UNITED STATES DEPARTMENT OF THE INTERIOR

Fred A. Seaton, *Secretary*

George W. Abbott, *Solicitor*

# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

Edited by
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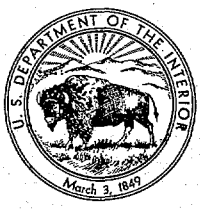


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## PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1959, to December 31, 1959. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Fred A. Seaton served as Secretary of the Interior during the period covered by this volume; Mr. Elmer F. Bennett served as Under Secretary; Messrs. Fred G. Aandahl, Roger C. Ernst, Royce A. Hardy, and Ross L. Leffler served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; and Mr. George W. Abbott served as Solicitor of the Department of the Interior.

This volume will be cited within the Department of the Interior as "66 I.D."

Fred A. Seaton

*Secretary of the Interior.*

*Errata*

Page 46—Footnote 8, last line, *ASBCO*A should read ASBCA.

Page 52—Last paragraph, line 8, sec. *251.14* should read sec. *257.14*.

Page 151—Fourth paragraph, line 12, *Columbia* Carbon Co., Liss, should read *Columbian* Carbon Co., Liss.

Page 260—Third paragraph, line 5, Henry *W*. Morgan, et al., should read Henry *S*. Morgan, et al.

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*[Should read *June 21*, Ed.]

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# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

## BERT AND PAUL SMITH

## ROGER SMITH

A–27769 *Decided January 16, 1959*

**Grazing Permits and Licenses: Cancellation and Reductions**

Where grazing privileges have been allowed for a long period of time upon the basis that a showing sufficient to satisfy the requirements of the Federal Range Code had been made, such grazing privileges will not be canceled unless there is convincing evidence that the base property upon which the privileges are predicated was not qualified and that the action in granting the privileges was clearly erroneous.

**Grazing Permits and Licenses: Base Property (Land): Dependency by Use**

In order to qualify as lands dependent by use within the meaning of the Federal Range Code, it is necessary that land offered as base property shall have been used in connection with the same part of the public domain only during a substantial part of the qualifying year of the priority period.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bert and Paul Smith have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated May 16, 1958, which affirmed the decision of the hearing examiner dated December 6, 1956, which dismissed their appeal from the range manager's determination of the class 1 demand of their base property in the Ruby Unit of Nevada Grazing District No. 1, and from the issuance of a license pursuant to that determination for the 1956 grazing season. Roger Smith is an intervenor in the proceeding.

The appellants are the present owners of base property known as the OX Ranch which, together with another ranch known as the North Ranch, was first offered in an application for grazing privileges in 1935 by the then owner Joseph W. Smith. The total dependency by use established by the two ranches during the priority period was 2,950 AUM's (590 AU's times 5 months). A dependent property survey of the operation made in 1936 determined that the OX Ranch produced 57 percent and the North Ranch 43 percent of the total forage production of the two ranches.

When the two ranches went into separate ownership, licenses were issued to the owner of each ranch.

In December 1955, the appellants filed an application for use of the Federal range between May 1 and October 1, 1956, by a varying number of their livestock for 550 AUM's and requested nonuse for the balance of their grazing privileges for range conservation purposes. By a decision dated April 2, 1956, the range manager informed the appellants that the class 1 demand of the OX Ranch was determined to be 57 percent of the former Joseph W. Smith operation less 6.67 percent land pattern reduction and a license would be issued to the extent of 600 AUM's and 969 AUM's nonuse, for a total of 1,569 AUM's. The division of the class 1 demand was based upon the proportionate share of the total forage production of the ranches. *Henry McCleary Timber Co. et al.*, A–27146 (November 7, 1955). On May 3, 1956, the appellants appealed from the Bureau's adjudication made with respect to the class 1 Federal range demand of the OX Ranch.

On August 14, 1956, a hearing was held at Elko, Nevada, before a hearing examiner of the Bureau of Land Management. At the hearing the appellants contended that the only property vested with dependency by use of the Joseph W. Smith operations during the priority period was the OX Ranch; that the North Ranch was not vested with any dependency by use; and that the full extent of the class 1 grazing privileges should be attributed to the OX Ranch.

In support of their contention the appellants state that Joseph W. Smith sold the North Ranch to the F. & N. Livestock Co. in 1929; that the F. & N. Livestock Co. held the land until December 23, 1932, when Joseph W. Smith repurchased the ranch at a sheriff's sale after foreclosure proceedings; that there is no proof that any use of the North Ranch was made by J. W. Smith in 1933 and 1934; and that the use of forage land of the North Ranch during the priority years (the 5 years preceding June 28, 1934) does not meet the 2-year minimum requirement of the Federal Range Code, 43 CFR, 1957 Supp., 161.2(k)(1).

The Federal Range Code, 43 CFR, 1957 Supp., 161.2(k), provides that:

> (1) "Land dependent by use" means forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the "priority period", was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the Federal range. * * *
>
> * * * * * * *
>
> (3) The extent to which grazing licenses or permits will be granted on the basis of dependency by use of land, shall be governed by the following:
>
> (i) It shall not exceed the average annual amount of forage customarily and properly utilized by the livestock operation computed on the basis of any two consecutive years or any three years in which use was actually made during the priority period, whichever is more favorable to the applicant, on that part of

the public land which, at the time of the issuance of the license or permit, is Federal range. * * *

The Director and the hearing examiner have concluded that Joseph W. Smith did make sufficient use of the Federal range in 1933 and 1934 to qualify the North Ranch as land dependent by use, and that there was no substantial evidence in the record to justify denial of the grazing privileges attached to the North Ranch.

In their appeal the appellants have attacked the Director's statement that:

> It seems reasonable to assume, in the absence of anything in the record to the contrary, that Joseph W. Smith turned his cattle out on the Federal range in 1934 at least by May 1 and, if that be true, he used the range for about two months during the five months of the 1934 season before the passage of the Taylor Grazing Act.
>
> There is no evidence that the Joseph W. Smith operation did not make use of the Federal range in the 1934 season and the record itself gives rise to the assumption that the range was in fact used in that season beginning at least as early as May 1. It is also not questioned that in the year 1934 Joseph W. Smith owned the North Ranch and used it as a part of his livestock operation. * * *

The appellants specifically deny that Joseph W. Smith made any use of the North Ranch in 1933 and contend that there is likewise no affirmative evidence in the record to show that Joseph W. Smith did use the North Ranch as a part of his livestock operation in 1934. In fact, the purport of their argument is that the North Ranch never did earn any dependency by use during the 5 priority-period years immediately preceding June 28, 1934.

The intervenor, or his predecessors in interest, have been allocated grazing privileges on the Federal range from the very beginning of the grazing program upon the basis that the use of the North Ranch in the priority period was sufficient to satisfy the requirements of the regulation. Privileges so long recognized will not be canceled unless there is convincing evidence that the base property upon which the privileges are dependent was not qualified and that the granting of the permit was clearly erroneous. *Earl C. Presley et al.*, 60 I.D. 290 (1949); *John D. Assuras et al.*, A–24268 (May 24, 1946).

With this criterion in mind, we now turn to an examination of the evidence relating to the use of the North Ranch in the priority years. Alfred Smith, a witness called by the appellants, testified that J. W. Smith moved 300 to 350 head of cattle to the North Ranch about April 1, 1933 (Tr. 38, 42, 44), that, prior to 1929, J. W. Smith had maintained cattle on both ranches (Tr. 41), and that after he reacquired the North Ranch, in 1933 and 1934, J. W. Smith operated both the North Ranch and the OX Ranch and the public domain, and the Forest Service lands as one unit (Tr. 46, 47). George Smith, a witness for the intervenor, stated that J. W. Smith ran the North

Ranch as though it adjoined the OX Ranch, as one unit (Tr. 82, 84), and that there were cattle on the North Ranch in 1934. Finally, when J. W. Smith first applied for grazing privileges in an application dated March 24, 1935, he listed both ranches as comprising his operation.

In their appeal the appellants have attempted to show by analysis that J. W. Smith could not logically have used the North Ranch in the spring of 1933. However, their own witness testified to the contrary and they offered no evidence on which to base any other finding. Therefore, I must conclude that the appellants have failed to establish that the North Ranch was not used in conjunction with the OX Ranch for at least part of one year and all of another.

The question remains whether the use to which the North Ranch was put is sufficient to qualify it under the pertinent regulations as land used as part of an established, permanent and continuing livestock operation for any 2 consecutive years of the priority period, in connection with the same part of the public domain. (43 CFR, 1957 Supp., 161.2(k)(1).)

As the Director pointed out, the Department has applied the rule that use during any season of the priority period must have been a substantial one, but not necessarily for the whole of a year. *John D. Assuras, supra; Auguste Nicolas*, 57 I.D. 110 (1940). At the very least, on the evidence in the record, the North Ranch was used in conjunction with the public domain from sometime in the first half of April 1933 through the end of the priority period on June 27, 1934. Such use constitutes, I believe, a substantial use and meets the requirement of the regulation.

The appellant also contends that the total demand of the OX Ranch and its forage production have been incorrectly computed, but he offered no evidence on these points at the hearing.

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.*

## CALAZONA FERTILIZER COMPANY

A–27710 *Decided January 19, 1959*

**Phosphate Leases and Permits: Generally**

The amendment of the phosphate regulations to omit the minimum expenditure requirement did not of itself amend the terms of pending offers of sale which included a minimum expenditure requirement as prescribed in the former regulations, nor does the amended regulation prevent the imposition of a minimum expenditure requirement in future offers of sale.

**Phosphate Leases and Permits: Leases—Contracts: Generally**

A decision declaring a high bid at a phosphate lease sale and stating that a lease will be offered to the high bidder but not until the lands are surveyed does not constitute an acceptance of the bid.

**Phosphate Leases and Permits: Leases—Contracts: Generally**

Where a phosphate lease sale is held with a minimum expenditure requirement as a condition of the sale and a bid is offered on that basis and the manager purports to accept the bid free from the minimum expenditure requirement, the purported acceptance is not an acceptance but a counter offer which does not result in a contract.

**Phosphate Leases and Permits: Leases**

Where a phosphate lease sale is advertised on terms which include a minimum expenditure requirement and a bid is submitted on that basis, but after the offer of sale is issued and before the date of the sale the phosphate regulations are amended to eliminate the minimum expenditure requirement, the bid will not be accepted but the sale will be readvertised.

**Contests and Protests**

One who does not bid at a lease offering can, as a protestant, call to the Department's attention any irregularities in the handling of the offering.

**Federal Employees and Officers: Authority to Bind Government**

The United States cannot be bound by the unauthorized acts of its agents.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Calazona Fertilizer Company has appealed to the Scretary of the Interior from a decision of the Director, Bureau of Land Management, dated April 10, 1958, which affirmed a decision of the manager of the Phoenix, Arizona, land office, dated August 8, 1957, holding in effect, that a proposed sale of a phosphate lease (for which the appellant had been declared the high bidder) was without authority and void.

On October 16, 1956, the manager, pursuant to the provisions of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 211), and the pertinent regulations (43 CFR, Part 196), authorized publication of a notice of an offer for sale by competitive bidding of a phosphate lease of certain lands located in T. 31 N., R. 14 W., G and SRM, Arizona.[1] The notice stated that the sale would be held on December 6, 1956, at 1 p.m. in the land office at Phoenix, and that a detailed statement of the terms and conditions of the lease offer could be obtained from the manager of the land office. One of the terms of the lease offer set out in that statement was that a minimum expenditure of $25,000 on or for the benefit of Unit 1 and of $75,000 for Unit 2 was required to be made during the first 3 years of the leases. This requirement was made pursuant to the pertinent regulation which pro-

[1] The advertisement of the proposed lease sale appeared in a Mohave County newspaper on November 1, 8, 15, and 22, 1956. Copies of the notice of sale were also mailed on October 16, 1956, to a list of prospective bidders, including Randall Mills Corporation.

vided that a bona fide expenditure for mine operations, development, or improvement purposes of the amount determined by the authorized officer would be a condition of each lease (43 CFR 196.4(a)). A few days later the Department on October 19, 1956, amended the regulation by omitting the minimum expenditure requirement. (Circular 1965, filed in the Division of the Federal Register on October 25, 1956, and published in 21 F.R. 8217 on October 26, 1956.)

On December 6, 1956, the sale was held as advertised. At the sale the sole bidder was the Calazona Fertilizer Company, whose total bid for the two units was $5,000.

On December 11, 1956, the manager issued a decision declaring the Calazona Fertilizer Company bid to be the high bid and stating that a lease would be offered to the high bidder at that price. The decision also stated that:

> The high bidder is also advised that under the amended phosphate lease regulations, Circular 1965, sec. 196.4, the minimum expenditure as noted under the terms of the sale and lease will not be required.

On January 23, 1957, Randall Mills Corporation filed a protest with the manager of the Phoenix land office against the manager's decision of December 11, 1956. The basis of the protest was that the amendment of the phosphate lease regulations on October 19, 1956, effected a material and substantial change in the published terms of the sale, and in view thereof the manager was required to issue and publish amended or corrected "Terms of Sale" and deliver copies thereof to the prospective bidders. The protest also alleged that Randall Mills Corporation would have made a monetary bid in excess of the Calazona bid had it been aware of the elimination of the $100,000 minimum expenditure requirement.

Following receipt of the protest and an answer thereto by the Calazona Fertilizer Company, the Administrative Assistant Secretary of the Department requested an opinion of the Comptroller General of the United States on the question presented.

By a decision dated May 3, 1957 (36 Comp. Gen. 759), the Comptroller General held that "since the award purportedly made on December 11, 1956, in favor of the Calazona Fertilizer Company, was not made in accordance with the stated terms of the offer, the said award should be canceled forthwith as unauthorized."

In accordance with the Comptroller General's opinion, on August 8, 1957, the manager canceled the award to the appellant and authorized a refund of the bonus bid of $5,000. A right of appeal to the Director was allowed. On September 3, 1957, the appellant filed a notice of appeal to the Director from the manager's decision.

The main thesis of the appeal to the Director was that the notice of the amended regulation when published in the Federal Register was notice to the entire public of the amendment of the regulation and

there was no necessity for personal notice being given to any person of the change in the regulation. The appellant contended that the pertinent statute is section 7 of the Federal Register Act, as amended (44 U.S.C., 1952 ed., sec. 307), which states in part:

> No document required under section 5(a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. * * *

Since the amendment of the Department's regulation was duly published in the Federal Register (*supra*), the appellant argued that the publication was notice of the change to Randall Mills Corporation and any interested bidder.

In his decision the Director conceded the point that publication of the amended regulation in the Federal Register may have constituted notice thereof to all prospective bidders, but he pointed out that since the revised regulation is silent as to its effect on outstanding offers of leases and does not appear necessarily to constitute a prohibition against inclusion of the previous requirements in leases thereafter to be awarded under outstanding offers, he was unable to agree that such publication of itself amended the provisions of the then outstanding terms of sale.

In its appeal to the Secretary the appellant contends that although the Director's decision admits the force and validity of section 7 of the Federal Register Act, it "reaches an inequitable conclusion by enlarging upon the meaning and the intent of the statute." The appellant makes no attempt to point out in what respect the Director's conclusion is inequitable, nor in what manner the meaning and intent of the statute have been enlarged.

In my opinion the Director correctly concluded that under the factual situation presented in this case, i.e., the lack of any statement in the revised regulation as to whether or not the amendment of the regulation constituted a prohibition against inclusion of the previous requirement in leases thereafter to be awarded under outstanding offers, the publication of itself did not amend the outstanding terms of sale. In his decision of May 3, 1957, *supra*, the Comptroller General also stated that:

> * * * since the revised regulation is silent as to its effect on outstanding offers of leases, and does not appear necessarily to constitute a prohibition against the inclusion of the previous requirements in leases thereafter to be awarded under outstanding offers, we do not feel that its publication constituted an automatic amendment of the terms of the offer of October 16. (36 Comp. Gen. 761.)

Furthermore, the removal of the compulsory minimum expenditure requirement from the regulation did not mean that such a requirement could not be imposed in a proper case. The authorized officer at all times had the authority to make the offer to lease subject to terms and conditions specified in the notice of lease offer. 43 CFR, 1957 Supp., 196.10.

In other words, Circular 1965 did not make it improper for lease offers to contain a minimum expenditure requirement; it only eliminated the requirement as an obligatory condition of a lease offer. Therefore, the publication of Circular 1965 could not of itself by any means be deemed to be an amendment of the terms of the sale.

The case then comes to this: On December 6, 1956, the date of the sale, the terms of the sale remained as originally published, including the requirement for a minimum expenditure. It was on those terms that bids were to be made and accepted. Indeed, inconsistently with its argument based on the Federal Register Act, the appellant states that it was unaware that no minimum expenditure requirement was to be made until after its bid had been accepted. The appellant's bid, therefore, must be presumed to have been made on the basis of the terms of the sale as published.

The question then is whether there was an acceptance of appellant's bid on that basis so that a binding contract ensued. Here the appellant shifts its position and demands that a contract be given to it "as originally awarded," in other words, without the minimum expenditure requirement.

The answer to this demand is twofold. First, the manager's decision of December 11, 1956, did not award a lease to the appellant. The decision stated that other than the appellant's bid of $5,000 no other bid had been received, that accordingly the $5,000 bid was declared the high bid, and that "the lease will be offered to the high bidder at that price." The decision also stated that:

> Inasmuch as the SE¼ sec. 16, T. 31 N., R. 14 W., G & SRM, is the only portion of the land that is surveyed, *no lease will be offered*, and compliance with 43 CFR 196.4 as to the bonds and the first year's rental under sec. 196.12(b) will not be required *until a survey is made* at the expense of the Government. A survey will be requested immediately. [Italics supplied.]

Secondly, even if the manager's decision is considered to have been intended to be an acceptance of the bid, it could not have had that effect because it stated that the minimum expenditure as noted in the terms of the sale would not be required. It is a fundamental principle of law that in order to create a contract an acceptance must be "unequivocal" (*Restatement*, Contracts, § 58 (1932)), "positive and unambiguous" (1 *Williston*, Contracts, § 72, Rev. ed. 1936), and "must comply exactly with the requirements of the offer" (*Restatement*, Contracts, § 59 (1932)). *Iselin* v. *United States*, 271 U.S. 136 (1926);

*United States* v. *Braunstein*, 75 Fed. Supp. 137 (D.C.N.Y. 1947); appeal dismissed 168 F. 2d 749 (2d Cir. 1948). Unless an acceptance is unconditional and without variance from the offer it is of no legal effect as an acceptance and operates as a rejection and a counter offer, and a qualified acceptance or a new proposal rejects the original offer. *Peerless Casualty Company* v. *Housing Authority of Hazelhurst*, 228 F. 2d 376 (5th Cir. 1955).

The decision of December 11, 1956, which the appellant contends was an acceptance of its offer, was not "positive and unambiguous" and did not comply exactly with the terms of the offer. Under the circumstances, it can only be considered a declaration of the fact that the appellant was the high bidder at the sale, or a counter offer; in either event no contract resulted therefrom.

The appellant next argues that it has suffered "severe damage in promoting the lease from December 11, 1956, to January 23, 1957." The appellant does not attempt to explain the exact nature of the "severe damage" alleged to have been suffered or to evaluate the damage in dollars and cents. It is contended that this severe damage was suffered when the appellant acted in good faith upon the decision of the manager dated December 11, 1956. As previously pointed out, the decision of December 11, 1956, stated that inasmuch as only one quarter section of the lands to be leased had been surveyed "no lease will be offered" and the high bidder was not required to post the bonds or pay the first year's rental until such time as a survey is made. No survey was made between December 11, 1956, and January 23, 1957, and, of course, no lease was offered during that time. Thus, all action on the lease was specifically declared to be held in suspense pending the required survey. Therefore, any expenditures made or damages suffered as a result of reliance on the manager's decision are difficult to comprehend, as well as being unjustified.

The appellant next complains that the protestant, Randall Mills, delayed a full 41 days before filing a protest, that had no protest been filed it is conceivable that the lease would have been granted, and that the question here for determination would never have been presented.

This contention is without merit. Randall Mills Corporation was not an appellant from the manager's decision of December 11, 1956. It appeared as a protestant, and in that capacity, it can call to the Department's attention any irregularities in its proceedings at any time. See *Floyd A. Wallis, The California Company*, 65 I.D. 417 (1958); *Lucille Mines, Inc.*, A–27558 (June 6, 1958); *United States Steel Corporation*, 63 I.D. 318 (1956). The Department can always consider the question of its lack of authority to act no matter how the matter is brought to its attention. *John J. Farrelly et al.*, 62 I.D.

1, 4 (1955), reversed on other grounds, *Farrelly* v. *McKay*, C.A. 3057–55, U.S.D.C. for the District of Columbia, October 11, 1955.

Finally, the appellant asserts that:

> It is axiomatic that the act of the agent while performing his principal's business is the act of the principal. The error of the agent here, and appellant denies that it was in error, cannot be placed as a burden on the appellant.

The simple answer to this contention is that the United States cannot be bound by the unauthorized acts of its agents. *Cf. Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383–384 (1947); *William H. Boyd, Clarence Virgil West*, A–27440 (June 3, 1957). As it has been determined that the manager did not accept appellant's offer and was without authority to accept a bid on terms materially changed from the terms of the sale, it is impossible to conclude that the United States is committed to issue a lease to the appellant omitting the minimum expenditure requirement.

Since the manager's declaration of the high bidder and award of the lease were invalid, the question remains as to whether Calazona's bid should be accepted as made. The regulation pursuant to which the sale was held reserves to the United States the right to reject all bids (43 CFR, 1957 Supp., 196.12(b)). It is now possible to offer the land for lease without a minimum expenditure requirement and an offer so made would doubtless draw a wider response from prospective bidders. Therefore I believe it is in the interest of the United States to cancel the sale [2] and to proceed anew to offer the lands for lease by competitive bidding under the current regulation.

In commenting on the purpose of the statutory requirement of advertising for bids, which in this case is required by section 9 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 211), the Comptroller General has said:

> * * * the purpose of the statutory requirement of advertising for bids in matters of this type is to secure free and open competition among bidders in order that the needs of the Government may be supplied upon the most advantageous terms available and to give all persons an equal right to compete for Government business. To insure to the Government the benefits of such competition it is essential that awards of contracts be fairly made upon the basis of the essential requirements of the specifications submitted for competition. While the Government reserved the right in the invitation for bids to waive any informality in bids received, the informalities which may be waived are those of form and not of substance, or some immaterial and inconsequential defect in or variation of a bid from the exact requirements of the advertised invitation and specifications. * * * 30 Comp. Gen. 179, 182 (1950).

In commenting on the facts in this case the Comptroller General stated:

> * * * Not only would the basic requirement in the invitation that a minimum expenditure of at least $100,000 be made in the first three years of the proposed

[2] *Cf. C. C. Thomas*, A–27380 (November 7, 1956).

phosphate lease tend to decrease the amount of any proposal submitted in response to the Government's original lease offer, but it also would tend to eliminate those bidders who might be unwilling to obligate themselves to invest the specified amount of capital for the development or improvement of the lands.

Therefore, considering the importance of Circular No. 1965, and its impact not only upon the number of bidders likely to be interested, but also upon the bid prices reasonably to be anticipated, it would seem that its immediate publication and release to the prospective bidders as an amended term or condition of the proposed lease was a prerequisite to any valid offering of Government-owned phosphate lands for lease under the terms of the revised regulations. (36 Comp. Gen. 756, 761 (1957).)

Accordingly, for the reasons stated herein, it is concluded that there was no error in the Director's decision and decisions below were correct.

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

EDMUND T. FRITZ,
*Deputy Solicitor.*

## MAX BARASH

## THE TEXAS COMPANY

A–27239 (Supp.) *Decided January 21, 1959*

**Oil and Gas Leases: Cancellation**

Where the District Court directs the Secretary to issue an oil and gas lease to an offeror for land covered by an outstanding oil and gas lease, the latter must be canceled so that the Secretary can comply with the order of the court.

### RECONSIDERATION OF DEPARTMENTAL DECISION

In a decision dated February 14, 1956 (63 I.D. 51), the Department held, in effect, that competitive oil and gas leases issued to The Texas Company (BLM–A 034714 and 034715) were properly issued and that it was necessary to reject a conflicting noncompetitive offer to lease for oil and gas (BLM–A 034282) filed by Max Barash. The facts are fully set out in that decision and need not be repeated here.

Thereupon Barash filed a suit against the Secretary, *Max Barash* v. *Douglas McKay, Secretary of the Interior*, Civil Action No. 939–56, United States District Court for the District of Columbia, in which he asked for a review of the defendant's action and that the Secretary be directed to cancel the leases issued to The Texas Company and to issue a lease to him. The Texas Company was not made and did not become a party to this suit.

On June 13, 1957, the District Court, upon cross motions for summary judgment, entered judgment for the Secretary and dismissed the suit. Upon appeal the Circuit Court reversed and remanded the case for further proceedings in accordance with its opinion (*Max Barash* v. *Fred A. Seaton, Secretary of the Interior*, United States Court of Appeals for the District of Columbia Circuit, No. 14069, April 25, 1958). The Circuit Court concluded its opinion thus:

> * * * In the absence of The Texas Company as a party in the present case we do not now order cancellation of any of the Secretary's leasing agreements with The Texas Company. We leave to the District Court, in further proceedings consistent with this opinion, the resolution of issues relating to those agreements.

Thereafter Barash filed a motion in the District Court for a judgment in accordance with the opinion and judgment of reversal rendered by the Circuit Court. In a judgment dated December 18, 1958, and entered January 5, 1959, *nunc pro tunc* as of December 18, 1958, the District Court vacated its judgment entered June 13, 1957, reinstated plaintiff's motion for summary judgment, overruled defendant's motion for summary judgment, granted plaintiff's motion for summary judgment, and directed the Secretary to reinstate plaintiff's application BLM–A 034282 and to issue a noncompetitive lease to the plaintiff as the first qualified applicant for the 954.51 acres of land covered by the application.

The District Court also filed a "Memorandum to the Clerk" in which it said—

> In the above entitled matter I have signed the plaintiff's order of judgment as filed August 15, 1958, as it appears I must.
>
> From the standpoint of the Court of Appeals, as indicated in its opinion (No. 14069, decided April 25, 1958), it was held that The Texas Company was not an indispensable party, and then the Court went on to say: ". . . we do not now order cancellation of any of the Secretary's leasing agreements with The Texas Company." (p. 7) Neither does this Court. Whether or not the order as signed will have that effect in the circumstances may well be so, but that result is not ordered for the very reason that the Court of Appeals, in the circumstances, refused to dispose of the matter.
>
> It is unfortunate that the Court left the case in this posture, and what the "further proceedings" consistent with this opinion is, is not clear either from the point of view of this Court or that of counsel. I leave it in the posture in which I find it.

On January 8, 1959, Barash filed a request with the Secretary that a lease be issued forthwith in accordance with the judgment of the court.

As the Department's decision of February 14, 1956, pointed out, the Department had issued three separate leases for the lands covered by Barash's application. Of these leases, one, BLM–A 034716, issued to Baker and Taylor Drilling Co., was canceled by the Director of the Bureau of Land Management and the cancellation became final

upon the failure of the lessee to appeal and one, BLM–A 034715, issued to The Texas Company, terminated by operation of law on August 31, 1958, upon the expiration of its 5-year term. The other Texas Company lease, BLM–A 034714, whose original 5-year term also would have terminated on August 31, 1958, has entered an extended term as the result of the payment on August 28, 1958, of compensatory royalty for the period September 1, 1953, to June 30, 1958. At the same time, The Texas Company paid the rental due for the lease year beginning September 1, 1958. The payment of compensatory royalty extends the lease for the period during which compensatory royalty is paid and for a minimum period of 1 year from the discontinuance of such payment. 30 U.S.C., 1952 ed., Supp. V, sec. 226; 43 CFR 192.8(b).

Therefore, the lands formerly covered by leases BLM–A 034715 and 034716 are now, so far as the record before me shows, available for leasing and, all else being regular, a lease can be issued to Barash for such lands.

However, the lands covered by lease BLM–A 034714 are in a different situation, since that lease is still in effect.

If the Department were to issue a lease to Barash now for this land, there would be two leases outstanding for the same land. It is well established that the Department will not knowingly allow conflicting rights to the same land to be created (see *Union Oil Company et al.*, 65 I.D. 245, 253 (1958)) and that where two leases have inadvertently been issued for the same land, one must be canceled. *Fred A. Seaton* v. *The Texas Company*, United States Court of Appeals for the District of Columbia Circuit, No. 13636 (May 8, 1958).

Furthermore, so long as an oil and gas lease is outstanding and of record, whether void or voidable, it segregates the land and the land is not available for further leasing until the existing lease is canceled and the cancellation noted on the tract books. *Joyce A. Cabot et al.*, 63 I.D. 122 (1956); *R. B. Whitaker et al.*, 63 I.D. 124 (1956); *Margaret A. Andrews et al.*, 64 I.D. 9 (1957).

Thus, it is evident that although neither the Circuit Court nor the District Court directed the Secretary to cancel lease BLM–A 034714, the District Court with full knowledge of the existence of lease BLM–A 034714 directed the Secretary to issue a lease to Barash for the same land.

The Circuit Court forbore to direct cancellation of this lease because The Texas Company was not before it.

However, The Texas Company is before the Secretary and its lease is subject to his jurisdiction. Since two oil and gas leases cannot be issued for the same land, and the Secretary has been directed to issue a lease to Barash, it follows that lease BLM–A

034714 must be canceled so that the Secretary may comply with the order of the District Court.

Accordingly, The Texas Company is given 30 days from receipt of this decision to show cause why lease BLM–A 034714 should not be canceled, failing which the lease will be canceled without further notice.

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 February 14, 1956, is vacated; as to the lands formerly covered by BLM–A 034715 and 034716, the case is remanded to the Bureau of Land Management for further proceedings consistent herewith; and The Texas Company is directed to show cause, in accordance herewith, why lease BLM–A 034714 should not be canceled.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## LYNN NELSON

## URANIUM KING CORPORATION

A–27795 *Decided January 21, 1959*

**Oil and Gas Leases: Cancellation—Oil and Gas Leases: Six-mile Square Rule**

A noncompetitive oil and gas lease covering land in excess of a 6-mile square issued without regard to the departmental regulation which so limits the area of such leases must be canceled when the violation of the regulation is disclosed and there is pending a qualified junior application for the same land.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lynn Nelson has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated June 11, 1958, which canceled his noncompetitive oil and gas lease dated December 1, 1957, issued under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

Several offers to lease were filed simultaneously and a drawing was held to determine the successful offeror. The lease was awarded to Nelson for certain lands in San Juan County, Utah, which comprise approximately all of section 31, T. 37 S., R. 22 E., S.L.M. (except the N½NE¼ and the NE¼NW¼), and the SE¼ of sections 5, 8, 20, and 29, T. 38 S., R. 21 E., S.L.M. Uranium King Corporation appealed from the rejection of its simultaneously filed offer, which covered only the last four quarter sections, alleging that the land included in the appellant's lease was not within a 6-mile square as required by departmental regulation 43 CFR 192.42(d).

The Director found by reference to the official plats of survey and field notes that the appellant's lease (Utah 025667) covers lands exceeding the 6-mile limitation by approximately 22.44 feet and, accordingly, canceled this lease.

On appeal to the Secretary, the appellant renews the arguments presented to the Director that the leased land is within a 6-mile square and that the Department lacks authority to cancel the lease for want of statutory authorization to cancel for violation of a regulation.

Whether the lands applied for by the appellant and included in his lease fall within a 6-mile square depends upon the length of the west boundary of sec. 31, T. 37 S., R. 22 E., S.L.M. The appellant apparently relied upon a dependent resurvey of the west boundary of the township, the plat of which was accepted on November 18, 1949, to ascertain the distance. The plat shows the south half of the west boundary of sec. 31 to be 39.37 chains in length and the north half to be 39.86 chains in length. Subsequently, a dependent resurvey was made of the east boundary of T. 37 S., R. 21 E., the adjoining township on the west. In surveying the east boundary of sec. 36 of that township, which is also the west boundary of sec. 31 in T. 37 S., R. 22 E., it was discovered that an error had been made in measuring the length of the south half of the common boundary and that the distance was actually 39.98 chains instead of 39.37 chains. The discrepancy of .61 chains comes to 40.26 feet. The plat of survey of T. 37 S., R. 21 E., which was accepted on May 11, 1953, shows the corrected distance of 39.98 chains.

On the basis of the correct distance of 39.98 chains, the lands included in appellant's lease extend beyond a 6-mile square by some 22.44 feet. If the incorrect distance of 39.37 chains is used, the lands would fall within a 6-mile square.

The pertinent portion of the applicable departmental regulation, 43 CFR 192.42(d), provides that:

> * * * Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed, * * * and must cover only lands entirely within a six-mile square.

Another regulation, 43 CFR 192.42(g), provides:

> (1) * * * An offer will be rejected and returned to the offeror and will afford the applicant no priority if: (i) * * * the lands are not entirely within a 6-mile square. * * *

The printed lease form (No. 4–1158, Fifth Edition (September 1954)), which also constitutes an offer to lease and was used by the parties here, states in item 2 of the Special Instruction on the back of such form that:

> "All of the land must be within a 6-mile square."

Paragraph 9 of the General Instructions provides in pertinent part:

> The offer will be rejected and returned to the offeror and will afford the applicant no priority if: (a) The land description is insufficient to identify the lands or the lands are not entirely within a 6-mile square. * * *

This Department has consistently held that an offer to lease lands not entirely within a 6-mile square is subject to rejection because of the violation of the regulation and instructions. *Adah G. Macauley*, A–26419 (September 3, 1952); *Earl W. Hamilton*, 61 I.D. 129 (1953). Accordingly, it appears that the manager ought to have rejected the appellant's lease offer in this instance.

But the question presented by this appeal is whether after a lease has been issued in violation of a departmental regulation it must be canceled because of such violation in the absence of any statutory cause for cancellation. In *Earl W. Hamilton*, *supra*, the Department observed that "As a matter of law, there is no requirement that a lease must be canceled if a departmental regulation or an 'instruction' of the character here involved is violated," and refrained from directing cancellation on the grounds that the issuance of the lease did not prejudice the rights of any other person and that the excess of the lands covered by the lease over the 6-mile square limit was small. Since that time, however, the question of the necessity for cancellation of a lease because of the violation of a departmental regulation in the issuance of such lease has been presented to a Federal court and answered in the affirmative. In *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C. 1955), the offeror to whom the lease was awarded filed an offer in competition with, and without revealing his connection with, a corporation of which he was president and owner of 23.7 percent of the capital stock, stating in his accompanying affidavit that he did so in good faith and on his own behalf and for his own use and benefit and not in behalf of any other person, association or corporation, either directly or indirectly. He did not list his interest in 20 oil and gas leases covering 9,436.84 acres of public land held by the corporation, although a departmental regulation, 43 CFR, 1946 Supp., 192.42(c), required all offerors to list their holdings or their proper proportion of group holdings in oil and gas leases of public lands. It was shown, however, that the stockholder's proportional share of the acreage of the leases held by the corporation did not exceed the maximum permissible acreage. Nevertheless, in the course of its opinion, the court said (at page 43):

> It is argued that, since the Secretary devised the regulation, he alone has the right to say what the consequences of violating it shall be. Whether that is so, we need not decide. The Secretary is bound by his own regulation so long as it remains in effect. He is also bound, we think, to treat alike all violators of his regulation. He may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulation.

The court ordered cancellation of the lease. Cf. *McKenna* v. *Seaton*, 259 F. 2d 780 (C.A.D.C. 1958).

It appears, therefore, that in this case, where the rights of a third party are involved, the Secretary is likewise bound to regard violation of a regulation which disqualifies an offer to lease as ground for mandatory cancellation of a lease which has been issued without regard to such violation.[1]

The appellant seeks to avoid the effect of his violation of the regulation by contending that, as he was applying for land (sec. 31) in T. 37 S., R. 22 E., he was entitled to rely upon the plats of survey relating to that township and should not have to refer to surveys of other townships, such as the adjoining T. 37 S., R. 21 E. This argument might have merit if the fact at issue concerned something completely within the exterior limits of the township. But here it does not. It relates to the length of a portion of a boundary which is common to two townships. As a matter of precaution, the appellant would have been well advised to check the surveys of both townships to see if discrepancies existed. Except for a minor saving in filing fees and number of offers that must be submitted, there is no advantage to be gained by cramming all the land that an applicant wants within the extreme limits of a 6-mile square. He can practically as easily include the land in two offers. *Adah G. Macauley*, *supra*. If he chooses to stretch his offer to the limit, he must abide the consequences of error on his part in determining the limits of the 6-mile square.

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.*

## UNITED STATES
v.
## KEITH V. O'LEARY ET AL.

A-27791 *Decided January 21, 1959*

**Mining Claims: Determination of Validity—Administrative Procedure Act: Decisions—Administrative Procedure Act: Hearings Examiners**

A decision declaring a mining claim null and void will be affirmed where the decision is based on substantial evidence submitted at a hearing held in accordance with the provisions of the Administrative Procedure Act and

[1] The affirmance of the Director's decision is predicated on the assumption that Uranium King Corporation is a qualified applicant for the lands involved. If it is not, the appellant's lease could be allowed to stand under the *Hamilton* decision, *supra*.

presided at by an examiner qualified under the act, and there was no error in the conduct of the proceeding or in the decision invalidating the claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Keith V. O'Leary and Donald K. Moore have appealed to the Secretary of the Interior from a decision of June 19, 1958, by the Director of the Bureau of Land Management affirming a decision by a hearing examiner declaring the Kay placer mining claim null and void. The Kay placer, which was located by the appellants, is situated in sec. 4, T. 8 N., R. 13 E., M.D.M., California.

The United States contested the validity of the appellants' claim, charging that the land covered thereby is nonmineral in character and that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.[1] On June 19, 1957, a hearing on the contest charges was held before an examiner at Sacramento, California. By decision of November 22, 1957, the examiner declared the Kay placer null and void.

On this appeal, objection is not made to the merits of the examiner's and the Director's decisions, but it is contended that the examiner who held the hearing on the contest charges was without authority or qualification to so act and that the requirements of the Administrative Procedure Act relating to hearings governed by the provisions of the act (5 U.S.C., 1952 ed., sec. 1001 *et seq.*) have not been complied with in this proceeding.

The Director's decision pointed out that the examiner who presided at the hearing in this case was appointed in accordance with the requirements of section 11 of the Administrative Procedure Act (*supra*, sec. 1010) which governs the appointment, classification, promotion, and tenure of examiners, and with the regulations issued pursuant thereto by the Civil Service Commission (5 CFR, 1957 Supp., Part 34; see *Ramspeck* v. *Trial Examiners Conf.*, 345 U.S. 128 (1953)). The assertions in support of this appeal consist of objections about the provisions of the Administrative Procedure Act, and there is nothing to substantiate the contention that the relevant statutory and regulatory provisions have not been complied with in the proceeding here under consideration. For example, the appeal asserts that the examiner is not independent of agency control because his decisions are subject to reversal by this office. However, section 8 of the Administrative Procedure Act (*supra*, sec. 1007) expressly permits agency review of examiners' decisions. Likewise, the assertions to the effect that the status of a hearing examiner is vaguely similar to that of certain other departmental employees provide no reason for questioning the qualifications of the examiner in view of the fact that

[1] The proceedings were initiated on August 7, 1952, and the course of the proceedings through September 28, 1956, is detailed in the Department's decision of that date (63 I.D. 341).

section 11 of the act (*supra*) expressly requires that the appointment of examiners shall be subject to the civil service and other laws to the extent not inconsistent with the act. All of the contentions advanced for the appellants amount essentially to complaints that the Administrative Procedure Act did not create a separate administrative tribunal consisting of examiners who are completely independent of the executive agencies of the Federal Government, but such objections to the provisions of an act of Congress are plainly not evidence of a failure by this Department to comply with those provisions in this proceeding.

A careful review of the entire record in this case indicates that the hearing under consideration was held in accordance with the requirements of the Administrative Procedure Act, that the examiner who presided at the hearing was qualified under the act, that the decision declaring the appellants' claim null and void was based on substantial evidence submitted at the hearing, and that there was no error in the conduct of the proceedings in this case or in the decisions declaring the mining claim null and void.

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.*

## R. S. PROWS

A–27726 *Decided January 26, 1959*

**Oil and Gas Leases: Applications**

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.

**Oil and Gas Leases: Applications**

Lands embraced within an oil and gas lease offer cease to be lands available for leasing within the meaning of 43 CFR 192.42(d) on the date the offer is signed by an authorized officer of the United States even though the lease does not become effective until the first of the following month.

**Oil and Gas Leases: Cancellation**

Where an oil and gas lease is issued pursuant to an application for less than 640 acres which did not include adjoining lands which were available for leasing at the time the application was filed, the lease must be canceled where a subsequent application for the same land is filed at a time when the adjoining lands were not available for leasing and is pending when the lease is issued.

**Oil and Gas Leases: Cancellation**

A noncompetitive oil and gas lease must be canceled where the lessee did not file the first proper application for the lands involved.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

On January 9, 1957, R. S. Prows filed an offer for a noncompetitive oil and gas lease, Utah 021062, for a tract of land described as:

SE¼ sec. 19
E½NE¼, NE¼SE¼ sec. 30

a total of 280 acres all in T. 40 S., R. 18 E., S.L.B. & M., Utah.

The lease offer was rejected by the manager of the Salt Lake City, Utah, land office, on February 1, 1957, for the reason that the land applied for was "embraced in prior oil and gas lease U–020574." This lease was issued on January 29, 1957, effective February 1, 1957.

Prows appealed to the Director, Bureau of Land Management, from the manager's decision. His appeal was based on the contention that his lease offer was a valid and acceptable application for less than 640 acres and that the 280 acres applied for were available for leasing; that Utah 020574 had been an unacceptable application for less than 640 acres because it did not include all lands available for leasing, and that lease Utah 020574 should be canceled and a lease issued to him.

In a decision dated March 25, 1958, the Director held that lease Utah 020574 appeared to have been issued in contravention of the Department's pertinent regulation, 43 CFR 192.42(d), because the land applied for (the same tract that Prows applied for) aggregated less than 640 acres and was not surrounded by lands not available for leasing.[1] However, the Director pointed out that even though the lease was issued in violation of the regulation, the land being otherwise available for leasing, the lease was not issued in contravention of an express provision of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 226), and that in such a circumstance the Department has held that a lease is not void and, in the absence of the intervening rights of third parties, will not be disturbed. *Arnold R. Gilbert*, 63 I.D. 328 (1956); *Earl W. Hamilton*, 61 I.D. 129 (1953). The Director concluded that since the rights of third parties were not present, lease Utah 020574 would not be disturbed.

As for the appellant's application, the Director stated that when the application was filed (January 9, 1957), contiguous lands, the SE¼ sec. 18 and the E½NE¼ sec. 19, were available for leasing, although then embraced in oil and gas lease offer Utah 020333; that since lands covered by an outstanding application for an oil and gas lease are

[1] 43 CFR 192.42(d) provides that an offer for a noncompetitive oil and gas lease must be for not more than 2,560 acres and not less than 640 acres, except where the rule of approximation applies, where the land applied for is in an approved unit plan, or where the land is surrounded by lands not available for leasing under the act.

not thereby rendered unavailable for leasing within the meaning of 43 CFR 192.42(d) (*Natalie Z. Shell*, 62 I.D. 417 (1955)), the appellant's offer did not comply with that regulation and should have been rejected for that reason. The Director, accordingly, modified the manager's decision to that extent.

In his appeal the appellant contends that the Director's decision is in error for the reason that when his application was filed oil and gas lease offer Utah 020333 had already become a lease and, therefore, the contiguous lands in the SE¼ sec. 18 and E½NE¼ sec. 19 were not available for leasing.

The records of the Department bear out the appellant's contention. The records show that oil and gas lease offer Utah 020333, on Form No. 4–1158, which is a combination offer to lease and lease form, was filed by Paul S. Callister on November 14, 1956. On January 2, 1957, the acting manager of the Salt Lake City land office executed the lease by signing the form in behalf of the United States under the statement on the form that—

> This lease for the lands described in item 3 above is hereby issued, subject to the provisions of the offer and on the reverse side hereof.

The lease form stated that the effective date of the lease was February 1, 1957. This was in accord with the regulation of the Department, 43 CFR 192.40a, which provides that all noncompetitive oil and gas leases, excepting renewal leases, will be dated as of the first day of the month following the date the lease is signed in behalf of the lessor. Thus, lease Utah 020333 actually became a binding instrument with respect to both parties on January 2, 1957, and the delayed effective date was adopted only as a matter of administrative convenience to facilitate accounting and record-keeping purposes. See *Charles D. Edmondson et al.*, 61 I.D. 355, 363 (1954). This is evidenced also by the fact that 43 CFR 192.40a provides that upon prior written request a lease may be dated the first of the month within which it is signed. Lease Utah 020333 therefore could have been dated as of January 1, 1957; but no one could contend that it became an executed contract prior to January 2, 1957, the date it was actually signed by the acting manager.

Therefore, the lands covered by lease Utah 020333 must be considered to be leased lands from January 2, 1957. Lands in an outstanding lease are not available for leasing and need not be included within a lease offer to comply with the terms of 43 CFR 192.42(d). It follows that the appellant's application was not subject to rejection for failure to meet the requirements of that regulation because, on the date his offer was filed, January 9, 1957, the lands included in lease Utah 020333 were no longer available for leasing.

On the other hand, when oil and gas lease Utah 020574 was filed on December 7, 1956, the lands in the SE¼ sec. 18 and E½NE¼ sec. 19, although embraced in oil and gas lease offer Utah 020333, were nevertheless available for leasing and should have been included in the lease offer. *Natalie Z. Shell* (*supra*). Clearly, then, as was stated in the Director's decision, oil and gas lease Utah 020574 was issued in violation of the Department's regulation, 43 CFR 192.42(d).

The question thus arises as to whether or not that lease should now be canceled in view of the circumstances. Section 17 of the Mineral Leasing Act, as amended, provides in part that:

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

The Department has interpreted the statutory preference right granted by section 17 of the act to be mandatory, and, therefore, that if a lease is to be issued to anyone it must be issued to the first qualified applicant therefor. Consequently, a lease issued in violation of this statutory preference right must be canceled. *Iola Morrow*, A–27177 (October 10, 1955); *Charles D. Edmondson et al., supra; Transco Gas and Oil Corporation*, 61 I.D. 85 (1952); *Russell Hunter Reay* v. *Gertrude H. Lackie*, 60 I.D. 29 (1947). See also: *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C. 1955), wherein the court held that the Secretary must cancel an oil and gas lease issued in violation of a regulation of the Department. *Cf. McKenna* v. *Seaton*, 259 F. 2d 780 (C.A.D.C. 1958).

The conclusion reached by the Director that the appellant's application was filed at a time when other lands were available for leasing has been shown to have been incorrect. The appellant's application was in fact the first qualified application for the land in question and this fact entitles his application to the preference right granted by section 17 of the act. Consequently, lease Utah 020574 was issued in violation of the appellant's statutory preference right, even though it was senior in point of time of the filing of the application, and the Department has no recourse but to cancel the lease and issue a lease to the appellant, in the absence of some disqualification not appearing on the face of the record.

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 reversed and the case is remanded for further action in accordance with this decision.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## RUTH B. LUCAS HUGLEY, EXECUTRIX OF THE ESTATE OF ROY O. LUCAS ET AL.

A-27809 *Decided February 2, 1959*

**Oil and Gas Leases: Rentals**

Where an oil and gas lease has been canceled, the lessee petitions for reinstatement and pays part of the rentals accruing prior to final action on the request for reinstatement, and the lease is subsequently reinstated on the ground that the cancellation was improper, the lessee is not entitled to a refund of the rentals covering the period between cancellation and reinstatement and is obligated to pay any rental accruing during that period.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ruth B. Lucas Hugley, executrix of the estate of Roy O. Lucas, deceased, together with A. K. Wilson, president of Zion Oil Company, has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated June 9, 1958, which affirmed a decision of the manager of the land office at Cheyenne, Wyoming, dated June 4, 1957, requiring payment of rent for the 10th year of a noncompetitive oil and gas lease, Evanston 022220, which was issued to Roy O. Lucas pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226), and refusing a demand for refund of rental payments for the 8th and 9th years of this lease.

The lease in question became effective July 1, 1947, and in 1952 was extended for an additional 5-year term. The manager's approval of an assignment of a portion of the lease, effective June 1, 1957, continues the term of the original lease and the assigned portion through May 31, 1959.

The controversy over rental payments arose in this manner: On February 8, 1954, the manager mailed a notice to the lessee, Roy O. Lucas, of rental payable for the 8th year of the lease ending "5/31/55" in the amount of $981. A second notice dated March 12, 1954, and received by the lessee on March 25, 1954, reminded him of the requirement for the filing of a bond or prepayment of the rent 90 days before the anniversary date of the lease and stated that there was then a default which, if continued for 30 days, would result in cancellation of the lease without further notice. This notice correctly named the end of the lease year as June 30, 1955. There was no response from the lessee and on June 1, 1954, the manager sent a further notice phrased in the same words. This notice did not reach the lessee who was ill in a hospital where he died on June 5, 1954. On June 10, 1954, according to the statement of the postmaster, the lessee's son signed a receipt and accepted the registered mail containing the notice. On July 13, 1954, the manager canceled the lease as of June 30, 1954,

because of the lessee's default in filing the bond or prepaying the annual rental.

On August 12, 1955, Ruth B. Lucas Hugley was appointed executrix of the estate of Roy O. Lucas and on September 9, 1955, she filed a request with the manager for reinstatement of the lease. The manager denied this request. He had previously issued a new lease effective December 1, 1954, in response to an application filed by Olin C. Brooks after the closing of the Lucas case. The executrix appealed to the Director of the Bureau of Land Management. In a decision dated April 9, 1957, the Director held that the Lucas lease was improperly canceled for want of the required 30-days' notice of default in performance of the terms of the lease since the lessee was not in default on March 25, 1954, and the subsequent notice dated June 1, 1954, was not served upon the lessee or his authorized representative, ordered the continuation of the lease in the name of the executrix, and canceled the Brooks lease.

Pursuant to the Director's decision, the manager issued a decision dated June 4, 1957, offering the executrix a 2-year extension of the lease, and so long thereafter as oil or gas is produced in paying quantities,[1] subject to acceptance and to payment of rental due for the 10th lease year from July 1, 1956, through June 30, 1957, and for the 11th year which would be due on or before July 1, 1957. The executrix appealed to the Director, contending that she owes rent only for the portion of the 10th lease year from April 9, 1957, through June 30, 1957, because the lessee in effect had been evicted from July 1, 1954, through April 8, 1957, and that payment has been made of the portion of the rent accruing from April 9th through June 30th which is applicable to the month of June by the submission of two checks totalling a year's rental for the portion of the original lease which she still holds and the assigned portion for the period beginning on June 1, 1957. The president of the Zion Oil Company, which was the unit operator (see fn. 1), has demanded a refund of the rent for the 8th and 9th years on the ground that the lessee was denied possession and the use of the premises during the period from July 1, 1954, to April 9, 1957, so that there was an eviction which relieves the lessee of the obligation to pay rent.

In his decision of June 9, 1958, the Director held that the lease had remained in effect throughout, that rentals had accrued each year, and there was no authority to waive such rentals.

The executrix and the president of Zion have renewed these contentions in their joint appeal to the Secretary. The question thus presented is whether a lessee is relieved under an oil and gas lease of his

[1] The 2-year extension referred to by the manager is the 2-year extension given a lease upon the termination of a unit agreement to which it has been committed (30 U.S.C., 1952 ed., sec. 226e). The Lucas lease had been committed to the Wyoming Anticline unit agreement which was terminated on October 1, 1956.

obligation to pay rent during a period of controversy over the propriety of a purported cancellation of the lease because of the lessee's default in performance of its terms.

The Director's decision of April 9, 1957, holding that the Lucas lease had been improperly canceled, was the result of a petition for reinstatement filed by the executrix. In *Thomas F. McKenna et al.*, 62 I.D. 376 (1955), the Department considered the nature of reinstatement and concluded:

> * * * the reinstatement of an oil and gas lease is the restoration of the lease to the status it occupied prior to its termination. It is not the issuance of a new lease * * *. In reinstating the canceled lease the Secretary, in effect, rescinds his own action and places the lease in the same status that it would have occupied had no cancellation been made. (Pp. 378–379.)

The effect of the Director's decision of April 9, 1957, was therefore to wipe out the erroneous cancellation and leave the lease as though it had never been canceled. It follows that the annual rentals became due and payable on the anniversary dates of the lease.

The appellants themselves recognized this when, in seeking reinstatement, they tendered rent for the 8th and 9th years of the lease. They obviously felt that tender of the rental payments was important to their contention that the lease should be reinstated and was necessary to preserve their rights while the legal controversy was pending. Thus their demands now for refund of the rental payments after the Director's decision reinstating the lease is completely inconsistent with their previous position.

In any event, the Mineral Leasing Act does not grant to the Secretary of the Interior any authority to excuse lessees from the obligation to pay rent in accordance with the terms of their leases. Accordingly, there is no legal basis for such action. *Robert E. O'Keefe*, 57 I.D. 216 (1940); *Stansbury, Inc.*, A–27396 (November 20, 1956); *Clyde B. Neill*, A–27650 (September 16, 1958); *cf. L. N. Hagood et al.*, 65 I.D. 405 (1958), reflecting the Comptroller General's decision denying the Secretary's authority to refund rental payments under a lease covering land for which patent was issued to a mining claimant during the term of the lease even though the lease was 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 decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Acting Solicitor.*

## CHAMPLIN OIL AND REFINING COMPANY
## JOE N. CHAMPLIN

A-27669 *Decided February 3, 1959*

**Oil and Gas Leases: Assignments or Transfers**

A partial assignment of an oil and gas lease, when approved, creates two separate leases and the existence of a producing well on one lease will not place the other in the status of a producing lease.

**Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination**

The assignor of an oil and gas lease may, after the filing of an assignment but prior to its approval, elect to bring the lease under the automatic termination provision of section 7 of the act of July 29, 1954, and the lease remains thereunder whether the assignment is approved prior to or after the anniversary date of the lease. The assignee's concurrence in the election is not essential.

**Oil and Gas Leases: Rentals**

There is no exemption from the provision of the act of July 29, 1954, automatically terminating leases for failure to pay rental timely of leases which contain valuable deposits of oil and gas but do not have a well capable of producing in paying quantities.

**Oil and Gas Leases: Termination**

Although a lessee of an oil and gas lease issued prior to July 29, 1954, may elect to bring his lease under the provisions of section 7 of the act of July 29, 1954, whether there is a producing well on it or not, the lease will not automatically terminate for failure to pay the rentals timely, if on the anniversary date of the lease there is on it a producing well.

**Oil and Gas Leases: Termination—Oil and Gas Leases: Rentals**

The fact that rental payments are offered and accepted on a lease that has terminated cannot continue or reinstate the lease.

**Oil and Gas Leases: Termination—Oil and Gas Leases: Cancellation**

The provisions of section 31 of the Mineral Leasing Act, as amended, relating to the cancellation of leases for lands known to contain valuable deposits of oil and gas do not apply to leases terminated under the provisions of section 7 of the act of July 29, 1954.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Champlin Oil & Refining Company (formerly Champlin Refining Company) and Joe N. Champlin have appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated January 28, 1958, holding that noncompetitive oil and gas lease New Mexico 06171 had terminated by operation of law on November 1, 1955, and reversing the decision of the manager of the land office at Santa Fe, New Mexico, which held that an election filed by the former subjecting lease New Mexico 06171 to the provisions of section 7 of the act of July 29, 1954 (30 U.S.C., 1952 ed., Supp. V, sec. 188), was not acceptable.

The records show that oil and gas lease New Mexico 06171, covering 320 acres in sec. 6, T. 14 S., R. 33 E., N.M.P.M., was issued as of November 1, 1952, to Margaret J. Spoden and transferred to Champlin Refining Company (hereinafter referred to as the Company) by mesne assignments. On February 25, 1955, the Company executed a partial assignment of a 40-acre tract of this lease, identified as the SE¼SE¼ sec. 6, to Joe N. Champlin, hereinafter referred to as Champlin. Evidence of this assignment was filed with the land office on March 16, 1955. Then on May 6, 1955, the company assigned to Champlin an undivided one-half interest in the remaining 280 acres in lease New Mexico 06171 and evidence of this act was filed on June 3, 1955. Finally, on May 6, 1955, Champlin assigned to the company an undivided one-half interest in the SE¼SE¼ sec. 6, and evidence of this act was filed on June 10, 1955. In a decision dated September 30, 1955, the manager approved (*1*) the partial assignment of the SE¼SE¼ to Champlin and designated it as New Mexico 06171–A, (*2*) the assignment of an undivided one-half interest in the remaining 280 acres to Champlin, and (*3*) the assignment of an undivided one-half interest in New Mexico 06171–A to the company. The net effect of the three assignments was to give the company and Champlin each an undivided one-half interest in both leases. On July 18, 1955, while the requests for approval of the assignments were pending, the company filed its election to subject lease New Mexico 06171 to section 7 of the act of July 29, 1954 (30 U.S.C., 1952 ed., Supp. V, sec. 188), providing for the automatic termination of leases upon the failure of the lessee to pay rental on or before the anniversary date of the lease. This fact was noted in the serial register on July 21, 1955.

A producing well was completed on the land now covered by the A-lease on May 6, 1955. On August 26, 1955, prior to the approval of the assignments, the rental account of the lease was transferred to the Geological Survey at its request.

On November 1, 1955, the rental for the fourth year of the parent lease became due and payable. It was not paid. On December 6, 1955, the petroleum accountant of the Geological Survey notified the company and Champlin of the overdue rental and requested that a check be mailed to the Geological Survey. On December 13, 1955, the Geological Survey acknowledged payment of the overdue rental on lease New Mexico 06171 and enclosed a receipt on the company's form.

On January 27, 1956, the account for the parent lease was returned to the land office as being for a nonproducing lease.

On February 21, 1956, W. M. Mueller filed his offer to lease the land included in lease New Mexico 06171 (excluding the 40 acres in the A–lease).

On April 20, 1956, the manager issued a decision holding that the election filed by the company was ineffective for want of the consent

of all the lessees. He indicated that Champlin might execute and return the election form furnished and, in that event, automatic termination for failure to pay rental would be effective the first lease year following the date of such filing and added:

> * * * According to a report of the Geological Survey, rental for the fourth lease year has been paid. Since the provisions of Public Law 555 were not applicable to that period the date the payment was made is immaterial to the status of the lease.

It also appears that on June 8, 1956, the company and Champlin commenced operations upon a test well in the SE¼NW¼ sec. 6 in the parent lease. This well was completed as a producing well on August 1, 1956, and is still producing.

On July 31, 1956, the manager issued a decision in which he rejected Mueller's lease offer on the ground that the land embraced therein was included in oil and gas lease New Mexico 06171 held of record by Champlin and the company.

Mueller appealed to the Director of the Bureau of Land Management, citing the statute which provides for automatic termination of an oil and gas lease for failure to pay rental and concluding that, if the election filed was effective, his offer to lease should have been accepted. The company answered, contending that it had no authority to bind Champlin by the filing of its election.

In his decision of January 28, 1958, the Acting Director held that Champlin had no interest in the lease until the company's assignment to him was approved by the management; that the Company was the sole record titleholder on July 18, 1955; and that its election was binding as to the entire lease without any subsequent action by the manager as to that document. Having thus found that the outstanding lease was terminated for failure to pay rental when due, the Acting Director, nevertheless, found that the rejection of Mueller's offer was proper, because the termination of the previous lease had not been noted on the tract book of the land office and that the land was therefore not available for leasing. (43 CFR, 1957 Supp., 192.161(a).)

From this decision the company and Champlin have taken this appeal. Mueller has neither filed a notice of appeal nor taken any part in the appeal.

Section 7 of the act of July 29, 1954 (*supra*), amended section 31 of the Mineral Leasing Act, as amended, by adding to it the following sentence: [1]

> * * * Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided*,

[1] Section 31 is concerned with the procedure to be followed by the Secretary in canceling leases for failure of the lessee to comply with the lease provisions. In general, it requires notice to the lessee and 30 days in which to cure the default.

*however*, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made. (30 U.S.C., 1952 ed., Supp. V, sec. 188.)

Thereafter the pertinent regulation was amended to make clear the circumstances under which the amendment would be applied to leases issued prior to its enactment. 43 CFR, 192.161. At the time the company filed its election the pertinent provision provided:

* * * Any lessee of a lease which issued prior to July 29, 1954, may, at any time prior to the anniversary date of such lease and the accrual of rental, elect to subject his lease to the automatic termination provisions of this section by notifying, in writing, the manager of the appropriate land office to that effect. (43 CFR, 1957 Supp., 192.161(b).)

On July 18, 1955, when the company filed the notice that it desired to subject lease New Mexico 06171 to the act of July 29, 1954, it was the lessee of that lease and the entity authorized by the regulation to submit the requisite notice. On November 1, 1955, its anniversary date, the lease did not have on it a well capable of producing oil and gas in paying quantities. Therefore, it would appear that upon the failure of the lessees to pay the rental on or before the anniversary date of the lease, the lease, being within the terms of the statute and regulation, was automatically terminated.

The manager held that the election was not binding because it was not signed by all the lessees, Champlin, in his view, being a co-lessee at that time. As the Acting Director pointed out, the Company, on July 18, 1955, was the sole record titleholder and Champlin, as an assignee whose assignment had not been approved, had no interest in the lease. See *Albert C. Massa et al.*, 62 I.D. 339 (1955); *Lester C. Hotchkiss et al.*, A–27342 (August 14, 1956).

The appellants raise other objections to the Acting Director's decision. First, they contend that on the date that the notice of election was filed lease New Mexico 06171 was still only one lease, none of the assignments having been approved, and as it was a producing lease the provisions of section 7 of the act of July 29, 1954, did not apply to it. This argument confuses two aspects of the statute and regulation—that is, first, whether a lease is subject to section 7 and, second, whether the provisions of section 7 act to terminate the lease. A lease, either by reason of its date of issuance, or date of extension, or by election may be subject to section 7. However, if on the anniversary date there is on it a well capable of producing oil and gas in paying quantities, it will not terminate even though the rental is not paid on or before the anniversary date. The fact that the termination provision of section 7 may not apply to a lease does not mean that the lease is not subject to that section. It merely means that the existence of a producing well on the crucial date prevents the lease from termi-

nating automatically. So here, lease New Mexico 06171 was capable of being subjected to the provisions of section 7, whether it was a producing lease or not.

The subjection having been made, only if on the anniversary date there was on it a well capable of producing oil and gas in paying quantities, would the automatic termination provision have failed to operate. By the approval of the assignments on September 30, 1955, the original lease was segregated into two separate leases. 30 U.S.C., 1952 ed., Supp. V, sec. 187(a). Thereafter the fact that there was a well on the first assigned portion (the A-lease), but not on the parent lease, would not continue the latter lease in the status of a producing lease. *Luna C. Wootton*, 60 I.D. 236 (1948). Thus, on the anniversary date of the lease, the parent lease was a nonproducing lease subject to the provisions of section 7.

The appellants also urge that the Geological Survey first treated the entire lease as a producing lease and then accepted the rental on the parent lease in December 1955. However, the Department has recently held that neither the payment of advance rentals nor their receipt by departmental officials upon a lease which had terminated can continue or reinstate the lease. *The Superior Oil Company and The British-American Oil Producing Company*, 64 I.D. 49 (1957).

The appellants next point out that to allow the assignor to file an election without the consent of the assignee would, in effect, place control of the lease within the power of the assignor even after the assignment had been filed for approval. While this contention may be true, it affords no basis for holding the election invalid because, pending approval of the assignment, the assignor has both obligations and rights under the lease. The statute provides:

> Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under authority of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary * * *, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof * * *. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. * * * 30 U.S.C., 1952 ed., Supp. V, sec. 187(a).

Prior to the amendment of the Mineral Leasing Act by the act of August 8, 1946 (60 Stat. 955), assignments were effective only from the date of their approval by the Secretary. The purpose of the 1946 amendment was to permit assignees to exercise rights of ownership over the lease prior to approval of the assignment and to eliminate much of the delay incident to assignments. It did not, however, sever the relationship between the United States and the assignor until the Secretary approved the assignment. The statute itself makes the assignor solely responsible for all obligations under the

lease until the assignment is approved. *Franco Western Oil Co. et al.*, 65 I.D. 316, 319 (1958). Thus he alone is bound to pay the rental on the anniversary date and the United States will look only to him for it prior to the approval of the assignment.

In other circumstances the assignor retains substantial control over certain aspects of the lease. For example, until the Mineral Leasing Act was further amended by section 2 of the act of July 29, 1954 (30 U.S.C., 1952 ed., Supp. V, sec. 226), the assignor-lessee, not the assignee, prior to approval of an assignment, alone could file a proper request for an extension of the lease. *John J. Farrelly et al.*, 62 I.D. 1 (1955); *E. P. Miremont et al.*, A–26253 (June 8, 1952). There is no indication that the assignor needed then, or needs now, the assent of the assignee to apply for an extension.

Similarly, a relinquishment can be filed only by the lessee to be effective. *Lester C. Hotchkiss* (*supra*). Again I can find no indication that the Department requires the assent of the assignee to a relinquishment. On the contrary, the *Hotchkiss* case clearly implies that action by the lessee alone is sufficient.[2]

In view of the fact that the assignor remains solely liable for the rent until assignment is approved, he ought to be able to protect himself against the accrual of the rental either by relinquishing his lease or by subjecting it to the provisions of section 7.[3] If the anniversary date were reached prior to approval, there is little doubt that an election filed by an assignor would be considered valid. Likewise, if the election were filed prior to the filing of an assignment, it would be effective and remain so. The obligation to pay the rental is the assignor's and he ought to be able to avail himself of the existing methods against having it accrue. In this case the assignments were approved prior to the anniversary date, but on the day the rentals fell due, the company, as a co-lessee, would still have incurred an obligation to pay the rentals.

It seems to me that the crucial date in determining the effectiveness of the election is the date on which the company filed its election. If the election was valid on that date, the lease became subject to section 7. In the absence of a provision for undoing an election, it remained valid. Elections which require no action by the Department are effective when made and cannot be undone either by the lessee or by the Department. See *Seaboard Oil Company of Delaware*, A–26246 (January 18, 1952); *cf. Thomas F. McKenna et al.*, 62 I.D. 376 (1955).

On the date that the company filed its election, it was still obligated to pay any rentals that might accrue. Therefore, I believe it had

[2] It is worth noting that although Congress amended the Mineral Leasing Act to permit assignees to file requests for extensions (*supra*), it did not amend the provisions of the act dealing with relinquishments.

[3] It seems that to some degree automatic termination was considered as a substitute for relinquishment. (Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, 83d Congress, 2d session, on S. 2380, 2381, 2382, May 12, 1954, page 36.)

the right to protect itself against this obligation by filing an election to come under section 7.

As far as the assignee is concerned, the filing of an election does not work to his prejudice because he can pay the rent prior to the approval of the assignment and after approval he is obligated to pay it. If he had met his obligations here, there would have been no difficulty. The assignments were approved on September 30, 1955, and the next rental did not become due until November 1, 1955, a month later.

Finally, the appellants argue that, in any event, the Acting Director erred in canceling the lease because it is a producing lease now (a well having been brought in on August 1, 1956), and section 31 of the Mineral Leasing Act (30 U.S.C., 1952 ed., Supp. V, sec. 188) provides that leases known to contain valuable deposits of oil and gas can be canceled only by judicial proceedings. This argument is not persuasive for several reasons: First, the Acting Director did not cancel the lease. He merely held that it terminated by operation of law. The statute leaves no discretion in the Secretary with respect to section 7. If a lease falls within its provisions, it terminates without any action by the Department, just as though it had reached the end of its term.

Next, as the Department recently stated, the language of section 7 removes from its effect only leases on which there is a producing well. It is not enough that a lease be known to contain valuable deposits of oil and gas. *United Manufacturing Co. et al.*, 65 I.D. 106, 115 (1958). Thus only a producing well on the parent lease on the anniversary date would have saved it.

Finally, the producing well which is now on the lease was brought in after the lease had terminated. Once having terminated it cannot be revived by the payment of the rentals, action of the Secretary (*United Manufacturing Co. et al.* (*supra*)), or by drilling to production.

It is undeniably harsh to hold a lease terminated in the circumstances presented by this case. However, the statute allows the Secretary no discretion. In somewhat similar circumstances, lessees obtained relief through legislation.[4] Until the appellants may determine within a reasonable time what course they wish to pursue, the Bureau of Land Management is instructed not to make the lands available for further leasing.

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.*

[4] Act of August 12, 1958 (72 Stat. 547), which relieved the lessees of the consequences of the *United Manufacturing Co.* decision.

U. S. GOVERNMENT PRINTING OFFICE: 1959

## MAUDE C. HARE

A-27825 *Decided February 2, 1959**

**Color or Claim of Title: Applications**

A class 2 application to acquire a patent to public land under the Color of Title Act is properly rejected where the application shows on its face that the title under which the claim is filed did not commence until after January 1, 1901, and that the State and local taxes on the land were not paid continuously up to the date of the application.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Maude C. Hare has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated July 21, 1958, which affirmed a decision of the acting manager of the Bureau's office in Russellville, Arkansas, dated December 28, 1956, rejecting her color of title application filed under the Color of Title Act (43 U.S.C., 1952 ed., Supp. V, sec. 1068).

The appellant's claim of title appears to be based upon the fact that her father allegedly purchased the land in 1904 and paid taxes on the land until 1931. She admits that in 1931 her father learned that the land was public domain and discontinued paying taxes thereon. She does not claim any adverse possession of the land since the death of her father in 1932 until her color of title application was filed on April 18, 1956. The appellant has presented no evidence of any conveyance of the land to her other than a claim of inheritance upon her father's death under the intestacy laws of Alabama.

The Color of Title Act, *supra*, and the regulations of the Department, 43 CFR 140.3, provide that the claims to be recognized are of two classes. A class 1 claim is a claim which 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 a period of more than 20 years, and upon which valuable improvements have been placed, or some part of which has been reduced to cultivation. A class 2 claim is one which has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors under a claim or color of title "for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by the State and local governmental units * * *" (43 U.S.C., 1952 ed., Supp. V, sec. 1068).

The application filed by the appellant states that it is a class 2 application; that F. E. Chesser (her father) paid taxes on the land claimed from 1904 until 1925; and that thereafter until 1931 the

*Out of chronological order.



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state or local taxes were paid by S. A. Chesser (her mother (?)). There are no payments of taxes listed as having been made before 1904 or after 1931. Thus, it is clear on the face of the record that the appellant's application does not meet the prerequisites of the Color of Title Act for a class 2 claim inasmuch as the claim is based upon a holding commencing later than January 1, 1901, and as taxes were not paid after 1931 until the date of application. For this reason alone the application must be 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.*

## APPEAL OF GEORGE A. LORD AND WILLIAM T. LORD, PARTNERS, d/b/a LORD BROS. CONTRACTORS

**IBCA–125** *Decided February 16, 1959*

**Contracts: Changed Conditions—Contracts: Additional Compensation—Contracts: Specifications**

A claim for additional compensation made by a tunneling contractor, who expected that the tunnel would be drilled entirely through andesite rock but who found that, except for short distances near the portals, the tunnel had to be drilled through volcanic tuff breccia, may not be allowed under the "changed conditions" clause of the standard form of Government construction contract when the evidence shows that the tunnel was drilled through a volcanic mountain area of rapidly changing formations, the geologic data set out in the contract drawings was insufficient to reflect the subsurface geology of the central reaches of the tunnel, the Government in the specifications explicitly and emphatically disclaimed knowledge of subsurface conditions in those reaches, and the surface geology was likewise insufficient to justify a conclusion that the tunnel would be driven through andesite rock for its entire length, and provision was also made in the specifications for contingencies that indicated that difficulties might be encountered in the excavation. In view of all these circumstances, the fact that the tunnel had to be more fully supported than the Government expected is not significant, especially since it appears that the amount of supports represented a compromise between the Government's engineers and the State safety inspectors in order to prevent the work from being shut down. Since the tuff breccia encountered by the contractor was not absolutely continuous; there were variations in the structure and other qualities of the material; and the record fails to show that the amount of tuff breccia exceeded the amount that could reasonably have been anticipated, there must also be rejected the contractor's contention that it could not reasonably have expected to encounter a continuous stretch of almost 3,000 feet of tuff or tuff breccia in variable volcanic material in a tunnel which was approximately 3,600 feet long.

**Contracts: Changed Conditions—Contracts: Additional Compensation—Contracts: Performance**

A claim for additional compensation made by a tunneling contractor, who encountered volcanic tuff breccia rather than andesite rock which it expected, must be rejected, even if it be assumed that the tuff breccia material constituted a "changed condition" within the meaning of that clause in the standard form of Government construction contract, when the contractor is unable to prove that such material actually increased the difficulties of excavation and its costs. Such a conclusion must be reached when the record shows that normally tuff breccia is as easy to work in as andesite rock, and that the contractor's difficulties may have been largely due to its lack of experienced employees with the requisite know-how for dealing with the problems encountered and its employment of experimental methods and equipment which may have impeded the work.

BOARD OF CONTRACT APPEALS

This is a timely appeal by George A. Lord and William T. Lord, partners, d/b/a Lord Bros. Contractors, from the findings of fact and decision of the contracting officer dated June 21, 1957, denying the appellant's claim in an unspecified amount,[1] under Contract No. 14–06–D–2026, for construction and completion of the Deadwood Tunnel under Specifications No. DC–4702, Talent Division, Rogue River Basin Project, Oregon, Bureau of Reclamation.

The contract, which was dated August 31, 1956, was on U.S. Standard Form 23 (revised March 1953), and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts.

The work required under the contract included the excavation of the Deadwood Tunnel, having a 6-foot diameter horseshoe section and a length of approximately 0.7 mile; concrete lining for the tunnel; earthwork for and construction of reinforced-concrete portal structures; and earthwork for approximately 2,200 feet of unlined inlet and outlet channels to the tunnel with bottom width of 10 feet. The total estimated contract price for all the work was $426,302.

At the request of both parties a hearing for the taking of testimony on the claim was held before the undersigned, at Camp White, Oregon, on October 7 and 8, 1957.

On October 6, 1957, the day prior to the beginning of the hearing, the undersigned, accompanied by the attorneys and other representatives of both parties, examined the site of the work, approximately 24 miles east of Medford, Oregon, in Jackson County. After traversing the ground above the tunnel from portal to portal, the group walked through the tunnel itself. During this walk, each party was afforded an opportunity to point out to the undersigned the

[1] As at the date of the findings excavation of the tunnel was still proceeding, the appellant could not make, of course, a claim for any definite amount.

rock or soil formations, the method of construction, or anything else deemed important. Then, at the request of the contractor, the Board member was driven to the site of another proposed tunnel in the area on which construction was about to begin.

Notice to proceed with the work was received by the contractor on September 18, 1956. As under paragraph 16 of the Special Conditions of the specifications the work was to be completed within 500 days of the receipt of such notice, January 31, 1958, was established as the completion date of all work under the contract. All work was not completed until March 8, 1958, but no liquidated damages were assessed, the delay of 36 days being excused by the contracting officer in findings of fact dated February 14, 1958.

The claim was first presented by the contractor in a letter to the contracting officer dated April 13, 1957. The contractor stated that it had encountered changed conditions, within the meaning of clause 4 of the General Provisions of the contract, and that it had discussed the situation with Mr. J. A. Callan, the project construction engineer. Additional details were given to that official by the contractor's letters of May 3 and May 25, 1957.

The contractor's claim is based on the contention that from the information furnished by the specifications and that available from site examination, it expected that the tunnel would be excavated through andesite rock but that instead, it encountered, for almost 80 percent of the excavation, volcanic material described as tuff breccia, which consisted of volcanic tuff intermingled with angular rock fragments of many sizes, was lighter and more variable than the andesite rock, was very porous, was much more difficult than the andesite to excavate, and caused considerable overbreak.

The issue as to what amount of additional costs, if any, were attributable to the conditions encountered, which the contractor maintains constituted changed conditions, was deferred until the Board should determine this appeal. Counsel have, however, joined issue not only with respect to the question whether the material encountered could reasonably have been anticipated but also with respect to the questions whether the excavation through the tuff breccia was more difficult and costlier than the excavation through the andesite rock, and whether the contractor's difficulties and increased costs were due to its methods of operation rather than to the nature of the material.

Two drawings incorporated in the specifications portray the information developed by the Government as a result of the exploration of the work site. The first drawing is No. 415–D–61 and is entitled "Location of Exploration and Surface Geology." It shows the surface geology in the immediate vicinity of the tunnel portals. Andesite outcroppings are shown near both the outlet and the inlet portals at locations on either side of the tunnel line and at elevations both

above and below its grade. The other surface material along the tunnel line near the portals is stated to consist, for the most part, of "silt, brown with angular rock fragments and small boulders" or "silt with a few small, angular rock fragments."

The second drawing is No. 415–D–62 and is entitled "Logs of Exploration." It shows the logs of two drill holes, drilled to or below the grade of the tunnel and along the line of the tunnel near the portals. Drill hole No. 1 is about 275 feet from the outlet portal and drill hole No. 2 is about 200 feet from the inlet portal. About 5 to 10 feet of the surface cover is shown as clay, silt, and sand, and the remainder of the holes is shown as drilled through andesite rock.

Five holes drilled with a hand auger are shown also on the drawing. Two of these holes, which are located immediately upstream from the inlet portals, indicate throughout their depths silt with rock fragments similar to the upper zone of the drill holes. Auger hole No. 5, which is 200 feet downstream from the outlet portal, shows silt with rock fragments in approximately 5 feet of the upper portion of the hole, while soft, weathered tuff breccia is depicted for the remaining 7 feet of the hole. The remaining two auger holes, Nos. 3 and 4, are located along the line of the tunnel. The surface cover material shown by these two holes is similar to that encountered in the other auger holes and in the upper zones of the drill holes. Below this material is indicated, however, a material, described as tuff breccia, extending downward approximately 3 feet.

Each of the auger holes shows rock fragments in the surface cover material and Nos. 3 and 4 also show rock fragments in the tuff breccia. Three of them, Nos. 2, 3, and 4, indicate the hole did not penetrate deeper because the material was getting too hard to auger. In connection with hole 1 it was stated "Unable to auger deeper" and in connection with hole 5 "Material caving and unable to recover samples due to the water." In connection with holes 3 and 4 it is also stated "Required a bar to break the material before it could be augered."

Two provisions of a general caveatory nature were included in the specifications. In paragraph 26 bidders were urged to visit the site, and were warned that they would be charged with knowledge of any conditions which might have been disclosed by a reasonable site investigation. Paragraph 32 was even more explicit with respect to subsurface conditions which might be encountered. Thus, it provided:

> The drawings included in these specifications show the available records of subsurface investigations for the work covered by these specifications. No investigation has been made to determine the existing conditions at the grade of the tunnel between drill holes DH1 and DH2 shown on Drawing No. 6 (415–D–60). 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. 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.

Paragraphs 36, 39, 41, 42, 43, 44 and 61 of the specifications made provision for a considerable number of contingencies which might arise by reason of the nature of the material found in the tunnel or by reason of other factors affecting the difficulty of the excavation. Thus, it was provided in paragraph 36 that materials would not be classified for payment, and that no additional allowance would be made "on account of any of the material being wet or frozen." In paragraph 39, which covered methods of tunnel excavation, bidders were expressly warned that the nature of the material being excavated might make it necessary for the contracting officer to increase the distance between the "A" line and the finished interior line of the tunnel lining, and provided for payment for the additional excavation at the unit price bid for tunnel excavation. In paragraph 41, it was provided that the contracting officer might order feeler or pilot holes to be drilled ahead of the tunnel excavation to determine in advance "the nature of the materials to be excavated or the existence of water-bearing seams or strata." In paragraph 42, which dealt with the installation of tunnel supports, the contracting officer was expressly authorized not only to require use of steel supports and tightly placed lagging, but also to modify the types of supports shown on the drawings. In paragraph 43, provision was made for moving the "A" line to coincide with the position of the "B" line across the bottom of the tunnel when the material in the bottom of the tunnel proved to be other than rock. Paragraphs 43 and 61 contained provisions for keeping concrete operations free from water, while in paragraph 44 a general obligation to drain water from the tunnel was included in the following terms:

> The contractor shall drain the tunnel where necessary to dispose of water. Pumping shall be done where gravity flow to an outlet cannot be secured.

The contractor received the award of the contract on August 31, 1956. After the clearing work had been done by a subcontractor, the contractor moved on to the site in the middle of September 1956. After performing the canal excavation leading to the outlet portal, drilling of this portal commenced about the middle of November 1956. Tunnel excavation commenced on December 3, 1956.

The drill pattern employed was the burn cut,[2] and 8-foot rounds

[2] In the burn or shatter cut, a number of closely-spaced holes are drilled straight into the face but only some of them are loaded, the objective being to cause the blasted material to break into the open space provided by the unloaded or "reliever" holes.

were shot. For hauling the excavated material the contractor employed scootcrete buggies known as "dumpies"—small rubber tired hauling units driven by diesel engines and using a rubber V-belt as a drive mechanism. For the first 320 feet from the outlet portal, namely from Station 38+32 to Station 35+12, the excavation was entirely through andesite rock, and no exceptional difficulties were experienced, except that the overbreak even during this period averaged more than 10 percent, and some spalling occurred. The contractor attributed this spalling to the drying out of clay seams in the rock but the bureau attributed the spalling to improper barring down after blasting, and at first it would permit the installation of steel supports in a few short reaches of the tunnel only. Ultimately, however, as a result of some insistence by the contractor, and demands of inspectors of the Oregon State Industrial Accident Commission, the contracting officer authorized steel supports throughout the entire length of the tunnel, and steel supports were actually installed throughout its entire length.

During this initial phase of the excavation of the tunnel from the outlet portal, the contractor worked only one shift, but on February 4, 1957, a second crew was put on. It was a few days after this that the tuff breccia material began to be encountered, and a few days later a third crew was added. Despite the fact that the contractor began working a six-day week the third week in February, the head was advanced only 150 feet during this month. During this month considerable quantities of water came in through the drill holes and along the sides of the tunnel and during most of March, considerable water was also encountered. The water combined with the soft clay binder of the material, created a muddy condition in the bottom of the tunnel, which impeded the cleanup work after blasting and which caused the equipment to get stuck. A great deal of trouble was experienced with the "dumpies." They would either get bogged down in the mud altogether, or lose power when their driving belts became wet. To drain the water, the contractor drilled a gutter along the side of the tunnel, but it soon became clogged with mud. While other methods were considered, the contractor decided to move right ahead in view of its inability to estimate the future quantity of water and the necessity of shutting down operations for 2 or 3 weeks if pipes were installed to pull off the water and keep the floor dry. However, for approximately 50 percent of the distance driven through the tuff breccia, the contractor attempted to improve the condition of the tunnel floor by overexcavating it and then backfilling it with rock materials previously excavated from the rock portions of the tunnel, and occasionally placing solid planking along the floor.

Moreover, from February to late July, the contractor experienced considerable difficulties in its blasting operations which it attributed to the extreme variability of the tuff breccia. The variability, according to the contractor, made it almost impossible to stabilize the drilling pattern and to predict the result of any particular round. These blasting difficulties included nondetonation,[3] shotgunning,[4] and bootlegging.[5] The contractor claimed that it also experienced propagation[6] but none of the Government witnesses observed this blasting difficulty. As a result of shotgunning and bootlegging, material was blown far down the tunnel and sometimes damaged equipment and knocked down steel supports as far back as 50 feet from the face.

After the contractor had driven about 1,400 feet from the outlet portal, the inlet portal was opened. This occurred at the beginning of the month of May. Because of the difficulties which the contractor had had in driving from the outlet portal, it substituted an excavator that ran on rails for the caterpillar-tread excavator that had theretofore been employed. The tunnel was advanced during May through andesite rock for about 200 feet. Then the advance was delayed for several days because of a bad seam of rotten rock, which necessitated the installation of steel supports on 2-foot centers. Before tuff breccia was encountered at the inlet portal, the excavation was through andesite for a distance of approximately 340 feet.

Early in June the crews at the outlet portal encountered some material which was too soft for drilling. Clay spades were used for this portion of the tunnel which extended for almost 200 feet, i.e., from Station 23+75 to Station 21+88. At the same time crews at the inlet portion ran into 30 feet of soft tuff breccia, i.e., from Station 6+30 to Station 6+78, for which clay spades had again to be used. In the middle of June a heavy flow of water was encountered at the inlet end.

On June 20, 1957, Grant Bloodgood, then associate but now chief engineer of the Bureau of Reclamation, visited the tunnel, and discussed with P. T. O'Callaghan, the contractor's construction superintendent, the problems being encountered, and suggested that an explosives expert be consulted. After some delay, A. W. Foster, a representative of the Atlas Powder Company, from which the contractor had purchased its powder, visited the site of the job, and discussed the blasting problems with O'Callaghan. Prior to these

[3] Nondetonation is a term applied to the failure of the powder in some of the holes in a round to explode with the result that the material is pulled from only one side of the face.

[4] In shotgunning the drill holes are enlarged by the blasting but the face is not blown out.

[5] In bootlegging the first four or five feet of material comes out from the face but about four feet of the material is left intact.

[6] Propagation is the simultaneous detonation of all the shots in a round. It occurs when the powder in one hole transmits its energy to an adjoining hole, and sets the latter off almost simultaneously.

events the contractor had begun to suspect that the powder it had been using was too fast and strong for the tuff breccia material, and had made some experiments that tended to confirm this suspicion. In June a small shipment of amodyne 30 percent—a slower acting and lower strength powder—was received and used with good success at the inlet end of the tunnel, and a much larger shipment of the amodyne was received on July 10. At about the same time the contractor received a shipment of caps of a different type from those previously used to set off the blasts. As a result of the change in caps and the new powder, the tunnel driving problems were finally solved and the tunnel was holed through at 8 p.m. on August 31, 1957.

To establish that it encountered "changed conditions" within the meaning of clause 4 of the General Provisions of the contract, the contractor must show that the conditions fall into either or both of the categories specified in that clause, namely (*1*) "subsurface or latent physical conditions at the site differing materially from those indicated" in the contract, or (*2*) "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for" in the contract.

Clearly the contractor did not encounter a changed condition in the first category. Not only did the contract contain the general warnings concerning geologic conditions at the job site set out in paragraph 32 of the specifications, but also it expressly cautioned the contractor that no investigation had been made "to determine the existing conditions at the grade of the tunnel between Drill holes DH1 and DH2 * * *." Counsel for the contractor concedes that the drill hole information could show—and did correctly show—only what material was encountered in the drill holes themselves. The drill holes, being far apart and only two in number, one at each portal, it was obvious, moreover, that they were wholly inadequate to reflect the subsurface geology for the long distance in between. Indeed, O'Callaghan, the contractor's construction superintendent, who with William T. Lord, one of the partners in the firm, examined the site prior to bidding, realized this, for he testified: "We felt it would be better if they had had more drill holes" (Tr., p. 105).

As for the auger holes, these too, were few in number and very shallow, and three of the holes showed, in addition, the presence of tuff breccia, the very material encountered by the contractor in actual excavation. O'Callaghan testified that he was not disturbed by these indications because of the notations in the logs of exploration that the material was getting too hard to auger, and that rock fragments were present. He deduced from these notations that bedrock lay underneath the depth to which the auger penetrated. This assump-

tion was, however, wholly unwarranted, for a hand auger can readily be stopped by rock fragments, and such fragments may themselves be a part of a tuff breccia formation, or may have come from sources other than underlying bedrock.

Nor is there adequate proof that the contractor encountered "changed conditions" in the second category. The conditions, although "unknown" were not "unusual" within the meaning of the "changed conditions" clause and, therefore, should have been anticipated. Apparently the contractor's conclusion that the tunnel would be driven through andesite rock was largely based on the facts that the two holes which were drilled to or below the grade of the tunnel near the portals showed andesite, that certain outcroppings of andesite rock were visible on the surface of the ground near each of the portals, at the crest of the ridge through which the tunnel passed, and on hills rising on either side of that crest, and the consideration already mentioned that the hardness which stopped the drilling of some of the auger holes was assumed to be indicative of the presence of andesite rock.

This conclusion was shown by expert witnesses of the Government to be unsound. The contractor's case rests primarily on the testimony of O'Callaghan, who was its principal witness, but his tunnel experience was limited and he was, of course, no geologist. While no geologist testified on behalf of the contractor, Clifford J. Okeson, a regional geologist of the Bureau of Reclamation, of long experience, testified on behalf of the Government, and his testimony that the contractor did not encounter unusual conditions not only remained unshaken by cross-examination but was reinforced by the testimony of the Government engineers who had observed the geological conditions in the area of the tunnel. Indeed, it was reinforced by the testimony of one of the contractor's own witnesses, Foster, who, when asked whether he considered the appearance of tuff or tuff breccia to be common in the area of the tunnel, replied: "Yes, it occurs more commonly here than it does in most of the rest of the state, I believe. It is encountered in highway work which is considerably more general than tunnel work, and *it's pretty widely scattered*" (Tr., p. 77, italics supplied).

It is deducible from the Government's testimony that the contractor by assuming that the tuff breccia disclosed by the auger holes was a shallow deposit and that the tunnel, therefore, would be driven through andesite rock, made only one of several possible deductions. While it was possible that the contractor could have encountered andesite in the excavation of the tunnel to an extent as great as the almost 3,000 feet of tuff breccia and volcanic tuff it actually encountered, the expert testimony shows that such an occurrence would have been extremely improbable. It was also erroneous for the

contractor's representatives who examined the site to assume that the visible outcroppings of rock indicated that andesite rock would be encountered in the central reaches of the tunnel. Among other possibilities, such outcroppings might have constituted merely the uneroded remnant of a shallow surface flow of hardened lava, or they might have been the exposed portions of embedded boulders that had broken off from the adjoining hills, or, as seems to have actually been the case, they might have been the upper portions of a dike that had been intruded into the tuff breccia from below by volcanic action.

It is quite common for tunnels to be driven through material which varies greatly. The Deadwood Tunnel was driven through a ridge in the Cascade Mountains, a range which consists principally of volcanic matter that changes rapidly from place to place. This area contains many kinds of sedimentary rock, volcanic flows and dikes, and explosive fragmental materials. Evidences of rapid geological variation are visible in traveling the highway from Medford, Oregon, to the tunnel site, for the numerous road cuts show a wide diversity of formations with many changes from place to place. Similar evidences are revealed by other excavations in the area. Tuff breccia and volcanic tuff are very common in a volcanic area, and such material is widely scattered in this area of the Cascade Mountains. It is very common also to find tuff breccia as the basic material in the middle of hills or mountains of volcanic origin. Intrusive andesite and basalt dikes are likewise common in the Cascade Mountains. It is also not unusual to encounter tuff breccia near a drill hole showing andesite rock.

The contractor seeks to avoid the force of this geological evidence by emphasizing the testimony of O'Callaghan that one of the major sources of the difficulties was not so much the tuff breccia itself as its extreme variability, which made it impossible to standardize any fixed pattern for the drilling and blasting operations. There is, however, no evidence that the subtle variations from point to point in the tuff breccia of which the contractor complains are not a typical feature of the tuff breccia deposits of the Cascade Mountains. Indeed, there is some evidence to indicate that such variations are not only of little significance from a tunneling standpoint but also quite common. When, during his visit to the site of the tunnel, Bloodgood was told by O'Callaghan that the material was changing constantly, he asked the latter to show him these changes in the course of his examination of the inside of the tunnel but, he testified, "I couldn't get it into my head where it was changing so abruptly, that it would make a difference from round to round * * *" (Tr., p. 155). Donald S. Walter, the regional engineer of the Bureau of Reclamation, who had done 2 years of post-graduate work in geology and who also

visited the tunnel, testified that while there were changes in the material, they were neither frequent nor unusual, and that he could not see in the material itself an explanation for the difficulties being encountered. Okeson also appears to have observed no abnormal characteristics in the tuff breccia.

The contractor also argues that the Government's estimate of steel supports—item 21 of the schedule made provision for 102,000 pounds of such supports—which was mistaken, since in the end the tunnel was fully supported, indicates that the Government itself assumed that the tunnel would be predominantly in andesite rock. O'Callaghan deduced from the Government's estimate of steel supports that it expected only one-third of the tunnel to be supported. Bloodgood testified, however, that the Government estimated that one-half of the tunnel might need to be supported with the steel supports installed on 4-foot centers. It is true that in some circumstances the Government's estimate of the amount of steel supports that will be required may be a significant indication of the geological conditions which its engineers expect to encounter.[7] However, it is, after all, only one indication, and in the present case, the information given on the drawings with respect to geological conditions was so scant, and the Government's disclaimer of knowledge of subsurface conditions was so explicit and emphatic, that the contractor could not reasonably have attached any importance to the estimates of steel supports. Moreover, there is substantial evidence to the effect that the installation of supports throughout the length of both the tuff breccia and the andesite reaches of the tunnel was an unnecessary precaution. The Bureau considered that only a few short areas of the tunnel actually required supports but the inspectors of the Oregon State Industrial Accident Commission insisted on full supports, and since they were in a position to shut down the contractor's operations, the Bureau's engineers were compelled to accept a compromise under which steel supports on 8-foot rather than 4-foot centers and skeleton rather than solid lagging were to be installed. Thus, although in a sense the tunnel was fully supported, the supports were not as frequent or extensive as would normally have been the case in a fully supported tunnel. As it turned out, the bureau's engineers were the better prophets, for only one set of the steel supports actually carried the weight of the tunnel. According to James Graham, an aide to the resident engineer on the Deadwood Tunnel, 99 percent of the steel supports were "decorative" (Tr., p. 242). That the value of many of the steel supports was doubtful from a safety standpoint is shown also by the fact that they were generally installed some 70 to 100 feet in back of the tunnel heading, sometimes as much as 150 feet

[7] Compare *J. A. Terteling & Sons, Inc.*, 64 I.D. 466, 484–85 (1957).

back. When supports are needed, they are installed generally one or two rounds back of the heading. The safety factor was, of course, important. But that the bureau's engineers erred in assessing this factor is not established by the record. To come to such a conclusion, it would be necessary to assume that the judgment of the inspectors of the commission was better than that of the bureau's engineers but the record furnishes no information concerning the experience and background of the former, while it shows affirmatively that the latter had extremely long and varied experience in tunnel construction, and that their judgment in the present case was borne out by the conditions actually encountered. Moreover, the inspectors of the commission were not produced as witnesses and, hence, there was no opportunity to test their recommendations by cross-examination.

Finally, the contractor seems to contend that, since in a volcanic area extreme variability in geological conditions is the rule, it could not reasonably have expected to encounter a continuous stretch of almost 3,000 feet of tuff or tuff breccia, and hence that such an encounter should be regarded as "unusual." There are, however, a number of difficulties in accepting this contention, although it is seemingly plausible. In the first place, the tuff breccia was not absolutely continuous, but was broken by a large dike of andesite near its midpoint extending for a distance of 58 feet and by two small cones or dikes of basalt near one end. In the second place, although the material was for the most part tuff breccia, some of it was tuff, and there were some variations in the structure and other qualities of both of these materials—indeed, the contractor contends that such variations occurred with no little frequency! But the basic difficulty is that there is no expert testimony in the record which can be taken to have established that the percentage of tuff and tuff breccia encountered in driving the tunnel substantially exceeded the percentage that would be found on average in excavations of like depth within the area where the tunnel was situated, or that the stretches of tuff and tuff breccia encountered were in some other particular beyond the range of what might be reasonably anticipated in that area. Rather, Okeson, who was the only geologist to testify, stated that it was a reasonable possibility to get tuff breccia "uniformly" for as much as 3,000 feet (Tr., p. 229).

However, even assuming for the sake of argument that there is some force in the contractor's contention, and that it encountered "changed conditions," it must also establish, before it can be said to be entitled to additional compensation, that the changed conditions increased its difficulties, and were responsible for its increased costs. The clear weight of the evidence is, however, that normally tuff breccia is a material in which it is as easy to work as in andesite.

Bloodgood, Walters and Graham, all of whom had had long experience with the construction of tunnels, so testified, and in the record as a whole the Board can find no good reason for rejecting their testimony. It must conclude that the contractor has not proved that the difficulties were caused by the nature of the material rather than by operative factors for which it was itself responsible.

The contractor's basic difficulty was, perhaps, that, having assumed that the tunnel would be drilled entirely through andesite rock, it organized its forces, supplies, and equipment solely with a view to excavating through such material, and thus when it encountered the tuff breccia it was wholly unprepared to deal with the situation. Counsel for the contractor argue its case as if it expected to drill the tunnel through material that would be "predominantly" andesite, and that it would not have complained if it had encountered tuff breccia for as much as 400, 600, or even 800 feet. But this argument is plainly contrary to the facts of record, and is a mere afterthought. In its letter of May 3 to the project construction engineer, which was written at a time when the contractor had already driven 800 feet through the tuff breccia, it stated that what its examination of the site and its study of the cores of the drill holes had disclosed was "that the work consisted of driving a rock tunnel through andesite rock approximately 3,600 feet," and it also stated: "We based our cost computations upon tunneling the 3,600 feet in andesite rock." Again, in its letter of May 25 to the project construction engineer, it stated: "It is unreasonable to presume from the available evidence that the tunnel was to be driven in other than andesite rock * * *." And, at the hearing, O'Callaghan testified that based on his examination of the specifications and the cores of the drill holes at the site, he had concluded that "we would have a rock tunnel from one end to the other" (Tr. p. 8). If it had not been for this conclusion, the contractor would have made preparations for excavating through tuff breccia at least to some extent. It is evident that if the contractor had been prepared to deal with as much as 800 feet of tuff breccia, the difficulties which it encountered would have been greatly reduced.

It is well settled that the contracting party in entering into a contract with the Government is presumed to possess the technical knowledge, the experienced and skilled workers and the equipment and facilities to complete the contract on time, subject only to relief for performance because of unforeseeable conditions not arising because of the contractor's fault.[3] The record shows, however, that the contractor lacked experienced employees with the requisite know-how for dealing with the problems which they encountered, and employed

[3] *Carnegie Steel Co.* v. *United States*, 240 U.S. 156, 164–165 (1916); *Krauss* v. *Greenberg*, 137 F. 2d 569–573 (3d Cir. 1943), *cert. denied* 320 U.S. 791; *Trand Plastics Co.*, ASBCOA No. 3708, 57–1 BCA par. 1186.

experimental methods and equipment which impeded the work. The contractor itself admits that it had difficulty in obtaining experienced and suitable employees, at least at the beginning of its operations. Its blasting problems were attributable to its use of a heavy-duty powder which would have worked well if only andesite rock had been encountered but which was not adapted to the softer tuff breccia material, and the situation was aggravated by its long delay in substituting a proper powder for the one which it had purchased. A large factor in accounting for the contractor's additional costs was the high percentage of overbreak which it experienced in drilling in the tuff breccia areas of the tunnel. But this overbreak was due to the contractor's drilling methods rather than to the character of the material. It resulted from its use for the most part of the burn-cut method, and its shooting of 8-foot rounds, the approximate dimension of the diameter of the tunnel. Both of these methods were unprecedented. In addition, the inexperience of its employees was responsible for faulty drilling, many of the drill holes being placed near or even outside excavation pay lines. The dumpies which broke down so frequently were in particular highly experimental. Indeed, the bureau's tunnel experts knew of no tunnel work in which they had ever before been employed. They might have proved satisfactory if the whole tunnel had been drilled through andesite but they were wholly unsuitable for the hauling job which had to be done when the tuff breccia was encountered. Insofar as the contractor's difficulties in the tuff breccia were aggravated by the water encountered in the tunnel, they were attributable entirely to its own decision virtually to ignore the dewatering problem. Allowing the water to flow freely on the tunnel floor was certainly a dewatering method that was as novel as it was ineffective.

The Government contends indeed that in many respects the contractor encountered the same type of difficulties in the andesite reaches of the tunnel, as it encountered in the tuff breccia, and that its progress and the results obtained in the tuff breccia were actually better than in the andesite. This the Government sought to illustrate by a chart containing three tables. Table I purports to show that the contractor made better progress in linear feet per shift in the tuff breccia than in the andesite; Table II, that longer rounds in linear feet per round were pulled in the tuff breccia than in the andesite; and, Table III, that less pounds of powder per linear foot were used in the tuff breccia than in the andesite. The contractor attacks Table I on the ground that the time devoted to portaling in at both the inlet and outlet portals was included in the figures stated for the work in andesite; while admitting that the figures in Table II are correct, the contractor contends that they fail to take into ac-

count the increased difficulties and costs in advancing the tunnel in the tuff breccia; and with respect to Table III it avers that the Government's figures on powder consumption are incorrect. It also takes the position that direct labor costs per linear foot are a better basis than the linear feet advanced per shift for comparing the progress in the andesite with that in the tuff breccia. Based on data of its own, the contractor has also offered counter tables which are difficult to reconcile with the Government's tables. As neither the Government nor the contractor has offered in evidence any of the payrolls, invoices or other data on which their respective conclusions are based, the Board is unable, of course, to arrive at any independent conclusions, and has attached no weight to the tables.

### Conclusion

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

Theodore H. Haas, *Chairman.*

We concur:

William Seagle, *Member.*

Herbert J. Slaughter, *Member.*

## A. V. TOOLSON ET AL.

A-27595 *Decided February 18, 1959*

**Mining Claims: Location—Mining Claims: Patent**

A mining claimant who has submitted an application for patent based upon claims located in 1947 may not change the date of the locations in his application to that of his alleged predecessors in interest at an earlier time, upon a determination by the Government that the 1947 locations were invalid as a matter of law because the lands were not open to mining location, but must resubmit his application on the basis of the prior locations.

**Mining Claims: Lands Subject to**

Mining claims located in 1947, at a time when the lands applied for were embraced in an outstanding oil and gas lease issued pursuant to the Mineral Leasing Act, are invalid in the absence of a showing of compliance with act of August 12, 1953, and it is immaterial that the lease may later be determined to have been improperly issued because at the time of issuance there were valid mining claims on the lands.

*February 18, 1959*

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

A. V. Toolson, A. J. Gibbons, Virginia Gibbons, Richard Reed, Minnie Ray Gibbons, and J. P. Gibbons have appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated August 7, 1957, which affirmed the decision of the manager of the Reno, Nevada, land office, dated July 28, 1955, rejecting their mineral patent application Nevada 039326 and declaring null and void their mining claims embraced therein.

The manager held that the two claims, called the Reed and Gibbons placers, were null and void for the reason that at the time the claims were located (March 18, 1947) the lands involved were embraced in a valid oil and gas lease (Carson City 021879)[1] and the lands were not open to mining location at that time. The Director affirmed the manager's conclusions.

In their brief on appeal to the Secretary the appellants contend that the oil and gas lease Carson City 021879 did not bar their mining locations for the reason that valid mining claims on the land antedated the oil and gas lease application and were, therefore, a bar to the valid issuance of any oil and gas lease on the land involved. They also state that they or their predecessors in interest were in fact the owners of these claims and that abstracts of title submitted by them establish their chain of title to these claims, which were superseded by the Reed and Gibbons claims.

It is not clear to what point the last-mentioned statement is directed. The appellants presumably are not basing their application for patent upon ownership of earlier claims. They must stand upon the statements made in connection with their application for patent submitted on June 17, 1955. The notices of application for patent stated that the original certificates of location of the Reed and Gibbons claims were recorded on April 16, 1947. Certified copies of the certificates of location submitted by the appellants show that the certificates of location were recorded on April 16, 1947, and the certificates state that the claims were located on March 18, 1947. If the appellants are now basing their claims upon locations made prior to March 18, 1947, they will have to file a new application for patent. Obviously they cannot file an application for patent based on 1947 locations and then switch to earlier locations when the 1947 locations are declared invalid because of a legal disability.

The Department has consistently held that mining claims could not be located on lands covered by an outstanding oil and gas lease or permit or allowable application for a noncompetitive lease. *Joseph*

[1] Oil and gas application Carson City 021879 was filed on January 26, 1944, and a 5-year noncompetitive lease was issued pursuant to the application effective as of October 1, 1944.

*E. McClory et al.*, 50 L.D. 623, 626 (1924); *Filtrol Co.* v. *Brittan and Echart*, 51 L.D. 649, 653 (1926); *H. Leslie Parker et al.*, 54 I.D. 165, 173 (1933). The act of August 12, 1953 (30 U.S.C., 1952 ed., Supp. V, secs. 501–505), provided that mining claims located subsequent to July 31, 1939, and prior to January 1, 1953, on public domain lands included in an oil and gas lease or application for lease could be validated, provided the owner of the claim filed an amended notice of location stating that the notice was filed pursuant to the provisions of the act and for the purpose of obtaining the benefits thereof within 120 days after August 12, 1953. Failure to file an amended notice under the act of August 12, 1953, has been held to result in a loss of the benefits of the validation afforded by the act. *Clear Gravel Enterprises, Inc.*, 64 I.D. 210 (1957). The record does not show any compliance with the act of August 12, 1953, nor is compliance alleged to have been made on behalf of the appellants.

Therefore, it must be held that inasmuch as their claims were located at a time when the land included in the claims was embraced in an existing oil and gas lease issued under the Mineral Leasing Act, the land was not open to mining location, and no attempt to comply with the act of August 12, 1953, having been made the application was properly rejected. *Edith F. Allen*, A–27455 (July 16, 1957); *Clear Gravel Enterprises, Inc., supra; Daniel H. and Eula Turnbaugh, Edith F. Allen*, A–27475 (September 23, 1957). A locator does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation. See *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250 (1914); *Brown* v. *Gurney*, 201 U.S. 184 (1906).

The appellants seek to avoid the effect of this ruling by asserting that the oil and gas lease itself was void because at the time it was issued there were in existence prior valid mining claims for the same land. They contend that these prior mining claims segregated the lands in issue from oil and gas leasing.

However, the Department has long held that the possible existence of a mining claim for which no patent application has been filed does not prevent it from issuing an oil and gas lease because:

> * * * The mining claimants had not applied for a patent to their claim, and at the time of the issuance of the lease, the tract books of the General Land Office [now Bureau of Land Management] showed the land to be free from adverse claims and to be subject to lease. The issuance of the lease was therefore regular and the lease is prima facie valid * * *. *Ohio Oil Company et al.* v. *W. F. Kissinger et al.*, 58 I.D. 753, 758 (1944).

*Union Oil Company of California et al.*, 65 I.D. 245, 252–253 (1958).

If the prior mining claim is later proved valid, then the oil and gas lease must be canceled. *Marion F. Jensen et al.*, 63 I.D. 71

(1956).[2] While the lease exists of record it segregates the land and prevents any other person from initiating any rights to it. *Joyce A. Cabot et al.*, 63 I.D. 122 (1956), and cases cited. Therefore, at the time the appellants made their location in 1947, the land was not open to mineral location and they gained no rights by their locations. The fact that the oil and gas lease later expires or is canceled does not validate a location made while the land was not open to mineral entry. *Alex and Jessie Boyle*, A–27518 (Jan. 17, 1958); *United States* v. *United States Borax Co.*, 58 I.D. 426, 443–444 (1943, 1944); *Filtrol Co.* v. *Brittan and Echart*, *supra*.

It therefore is apparent that the appellants must prove that valid locations were made on the lands applied for prior to the locations in 1947 and that they are the present owners of those locations. It should be noted that in the event the appellants desire to resubmit a patent application based on the earlier locations, the issuance of the oil and gas lease will be immaterial if the locations are proven to be valid.

The appellants should be given the opportunity to resubmit a patent application based upon the earlier entries discussed in their appeal to the Secretary. With their new patent application they should also submit whatever evidence they desire to prove the validity of those locations. Action upon such application will be taken in accordance with the regular procedure on applications for mineral patents.

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.*

## HOLBERT E. THOMPSON ET AL.

A–27827 *Decided February 19, 1959*

**Small Tract Act: Renewal of Lease**

An application for the renewal of a small tract lease is properly rejected where the application is not filed within the time limits imposed by the terms of the lease and the pertinent regulation of the Department in effect when the lease was issued or on the form required by the regulation in effect when the lease expired.

[2] The *Jensen* case dealt only with the consequences to the oil and gas lessee of the demonstration that a valid mining claim covered the land prior to the filing of the oil and gas lease offer. The procedure for resolving the conflict between a prior mining claim and an oil and gas lease is discussed in the *Union Oil Co.* case, *supra*, pp. 253–254.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Holbert E. Thompson and four other persons[1] have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated July 22, 1958, which affirmed decisions of the manager of the Los Angeles, California, land office, rejecting their applications for renewal of their small tract leases. The applications for renewal were rejected on the ground that they were not filed prior to the expiration of the leases.

All of the leases involved were issued for a 3-year period on September 8, 1953, and, therefore, expired on September 7, 1956. The leases provided that the lessee could apply for renewal of the lease, "not more than 6 months nor less than 60 days prior to the expiration thereof" and that if it was determined that a new lease should be granted, he would be accorded a preference right to a new lease.

On September 7, 1956, the day the leases were due to expire, a letter was received by the land office from appellant H. E. Thompson, enclosing a check for the sum of $60, pictures of concrete slabs located on the leased land, of himself and the other appellants, and a copy of the contract for pouring the slabs. The letter listed the names of the other appellants in this appeal and the serial numbers of their leases, and a legal description of the lands in their individual leases. The letter concluded with the statement: "We request permission to extend our time limit one year in order to erect our homes." The letter appears to have been returned to the sender and was again sent back to the land office where it was received on September 24, 1956.[2]

On September 24, 1956, each appellant filed an application for renewal of his lease on Form 4–775a. Thereafter, on September 26, 1956, the manager rejected the applications for renewal for the reason that they were not filed until after the leases had expired.

The pertinent regulation of the Department in effect at the time the appellants' leases were issued (43 CFR, 1953 Supp., 257.14(a)) and the terms of the leases provided that an application for renewal "must" be filed not more than 6 months or less than 60 days prior to the expiration of the lease. However, the regulation did not provide that any specific form of application for renewal must be utilized. On January 10, 1955, the small tract regulations were amended and sec. 251.14 of the old regulations became sec. 257.15 (43 CFR,

[1] The names of the other appellants and the serial numbers of their expired leases are as follows:

| | | | |
|---|---|---|---|
| Howard J. Thompson | Los | Angeles | 0101798 |
| Johnson G. Dunn | " | " | 0101801 |
| Sam B. Benson | " | " | 0103583 |
| Marshall R. Dunn | " | " | 0104373 |

[2] The record indicates that the land office returned the letter together with application forms (4–775a) for use in applying for renewal of the leases.

1954 Rev., 257.15 (Supp.); 20 F.R. 366). The amended regulation provides that:

> (a) An application for renewal of a lease must be filed on Form 4–775(a) * * * prior to the expiration of the lease.

In *Gilbert V. Levin*, 64 I.D. 1 (1957), the Department held that where a small tract lease provides that it is issued subject to regulations issued pursuant to a statute, in the absence of any other provision or indication to the contrary, the lease will be construed to incorporate only the regulations existing at the time the lease was issued and not any future amendments of the regulations which impose an additional obligation or burden upon the lessee. In *Henry Offe*, 64 I.D. 52 (1957), it was held that where changes in a regulation relieve a lessee of obligations or extend to him a benefit and are not detrimental to the United States, such a benefit may be extended to a lessee even though his lease did not incorporate future regulations.

Applying the principle announced in the *Levin* case, the Department held in the case of *Ralph Louis Walker*, A–27425 (May 7, 1957), that where, as in this case, the regulation in effect when the lease was issued did not provide that any specific form of application for renewal must be used, a simple letter from the lessee inquiring if he might be granted a renewal of his lease would be considered a sufficient application for renewal. In the *Walker* case, the application for renewal was filed within the time limits specified by the regulation in effect when the lease was issued, namely, not more than 6 months nor less than 60 days prior to expiration of the lease. Thus the case was not concerned with the question of compliance with the amended regulation in effect when the lease terminated.

In the *Offe* case, where the lessee failed to comply with the regulation in effect when his lease was issued by not applying for a renewal more than 60 days prior to the expiration date of his lease, the Department said that in order to take advantage of the amended regulation he must meet the requirements of that regulation.

On the basis of the Department's decisions in the *Levin* and the *Walker* cases it would appear that, from the standpoint of form alone, the appellants' request for renewal in the form of the letter received on September 7, 1956, would have been proper and the appellants would not have had to file an application on Form 4–775(a) inasmuch as the use of that form constituted an added requirement not imposed by the regulation in effect at the time the leases were issued. However, the letter sent by appellant Holbert E. Thompson was not received until September 7, 1956, the day the leases were due to expire, and was therefore not in compliance with the regulation in effect when the leases were issued and the terms of their leases

inasmuch as the application for extension was not filed 60 days or more prior to the expiration of the leases.

In order to make the letter timely, it would be necessary to consider it as an application for renewal under the amended regulation, which permits filing at any time prior to the expiration of the leases. But the letter was deficient under the amended regulation because that regulation requires renewal applications to be on a specified form. When the appellants submitted their applications on the proper form, their leases had already expired. Therefore, the appellants' applications for renewal were deficient under either the regulation in effect when their leases were issued or under the amended regulation in effect when their leases expired.

In view of the fact that the applications for renewal must be rejected for this reason, it is unnecessary to decide whether or not the request for renewal filed by H. E. Thompson should be considered as an application for the benefit of all the lessees named therein, or only for his own benefit.

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, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## THE CALIFORNIA COMPANY

A–27571 *Decided February 20, 1959*

**Oil and Gas Leases: Royalties**

In making settlement for the gas royalty due to the United States under an oil and gas lease, a lessee may not deduct from the price it receives for the gas sold in the field the cost of transporting the gas from one point in the field to the point of delivery under the sales contract nor may it deduct the cost of compressing and dehydrating the gas to meet the requirements of the sales contract.

### APPEAL FROM THE GEOLOGICAL SURVEY

This is an appeal to the Secretary of the Interior by The California Company from a decision of the Acting Director, Geological Survey, dated September 27, 1957, affirming the action of the Oil and Gas Supervisor, Gulf Coast Region, in calling upon the company to pay additional amounts for royalty due to the United States on gas produced and sold from four oil and gas leases, all of which are committed to the Romere Pass Unit Agreement.

The Acting Director held that since the beginning of gas sales from the unit the United States has received approximately $34,000 less in royalties under these leases than it would have received had the royalty computations been properly made; that the company should have made its payments on the basis of the price for which the gas was sold in the field; and that under the decision in *The Texas Company*, 64 I.D. 76 (1957), deductions in any amount for the gathering, compressing, and dehydration of the gas cannot be allowed.[1]

The company contends that neither the leases nor the regulations applicable thereto support the disallowance of these deductions. It contends that its obligation is to pay royalty to the United States on the net value of the gas and that the deductions made were for something other than production costs. Presumably, it feels that these deductions are in the nature of charges for either processing or marketing the gas, neither of which, it contends, it is required to bear.

The leases in question (BLM–FW 013006, 013045, 013046, and 013047) were issued as of March 1, 1949, under the authority of the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1952 ed., sec. 351 *et seq.*). They are subject to the oil and gas operating regulations set forth in 30 CFR, Part 221.

Each lease requires the payment of 12½ percent royalty on the production removed or sold from the leased lands and provides (Schedule "A"):

> In determining the amount or value of gas and liquid products produced, the amount or value shall be net after an allowance for the cost of manufacture. The allowance for cost of manufacture may exceed two-thirds of the amount or value of any product only on approval by the Secretary of the Interior.

The regulations require the payment of royalty on gas of all kinds (30 CFR 221.44, 221.50). In computing the royalty on liquid hydrocarbon substances extracted from the gas an allowance for the cost of extracting those substances, designated in the regulations (30 CFR 221.51) as an allowance for the cost of manufacture, is granted. In computing the royalty on the value of production, due consideration is to be given to certain factors but

> Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the *gross proceeds accruing to the lessee from the sale thereof* or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion

[1] For a breakdown of the charges which the company deducts before it computes the royalty due to the United States see page 4 of the Acting Director's decision.

of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value. (30 CFR 221.47; italics added.)

As we understand the present appeal, no contention is made that any of the gas is "manufactured" as that term is used in the regulations. The product involved is gas which is sold for 12 cents per 1,000 cubic feet, after it has been gathered to the point of delivery in the field designated in the sales contract and after so much thereof as requires it has been dehydrated and compressed to a condition suitable to enter the buyer's line. Whether these functions be called processing or marketing functions, they are certainly not "manufacturing" functions as that term is used in the leases and the oil and gas operating regulations. They are, in the opinion of the Department and under *The Texas Company* decision, functions necessary to place the product—gas—in a marketable condition. They are obligations of the lessee.

While the leases involved in this appeal differ in language in some respects from the lease involved in *The Texas Company* case,[2] the leases in each instance impose the requirement that royalty shall be paid on the amount or value of all production from the leased lands. The provision in the present leases that the amount or value of gas shall be "net" after an allowance for the cost of manufacture cannot be read, as the appellant contends, to provide for the deduction of costs other than those of manufacture. The appellant is attempting to read the provision as if, in the absence of any cost of manufacture, the cost of placing the production in a marketable condition for sale in the field is deductible. Such is not the meaning of the above-quoted provision of the leases involved in this appeal. The interpretation placed on the leases by the Acting Director, Geological Survey, is consistent with the established policy of the Department and nothing in the letter of Acting Secretary West, dated June 7, 1937, upon which the appellant places such reliance, is to the contrary.

In the circumstances, and after a full consideration of the appellant's brief on appeal, it must be concluded that the decision of the Acting Director, Geological Survey, is a correct decision and that the deductions which the appellant has made for the cost of gathering, compressing, and dehydrating gas sold from these leases have been improper.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised;

[2] The lease involved in that decision provides that royalty is to be paid on the amount of all production from the leased land at a designated percentage "of the amount or value of the gas and liquid products produced, said amount or value of such liquid products to be net after an allowance for the cost of manufacture * * *."

17 F.R. 6794), the decision of the Acting Director of the Geological Survey is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## AUTHORITY TO LEASE UNASSIGNED LANDS OF THE COLORADO RIVER INDIAN RESERVATION

**Indian Tribes: Reservations**

The statute setting apart the Colorado River Indian Reservation for "the Indians of said river and its tributaries" constitutes a continuing offer to the Indians of the class mentioned and may be accepted by them until withdrawn.

**Indian Lands: Leases and Permits: Generally**

The general long-term leasing act (25 U.S.C. sec. 415), which authorizes the leasing of tribal lands by the Indian owners, is inapplicable to the unassigned lands of the Colorado River Indian Reservation until the beneficial ownership in such lands has been determined.

**M-36557** FEBRUARY 24, 1959.

TO THE SECRETARY OF THE INTERIOR.

You have requested an opinion on the authority of the Secretary of the Interior to approve a proposed agricultural development lease executed by the chairman of the tribal council of the Colorado River Indian Tribes, as lessor, and Ucan Development Company, a Utah corporation, as lessee, for approximately 83,000 acres of unassigned lands of the Colorado River Indian Reservation. The approval is sought under the authority of the long-term leasing act of August 9, 1955, (69 Stat. 539; 25 U.S.C., 1952 ed., sec. 415).

The Colorado River Indian Reservation was established by the act of March 3, 1865 (13 Stat. 559), which act provided that the land thus reserved was set apart for "the Indians of said river and its tributaries." The Mohaves and Chimehuevis were the only tribes to take advantage of the reservation as permanent settlers, and these Indians, pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), organized as the Colorado River Indian Tribes and adopted a constitution and bylaws which was approved by the Department of the Interior on August 13, 1937.

The Colorado River Tribal Council on February 3, 1945, adopted Ordinance No. 5, which was approved by an Assistant Secretary of the Interior on March 9, 1945. By this ordinance the "Northern Reserve" of the reservation was reserved for the use of members of

the Colorado River Indian Tribes and the "Southern Reserve" was reserved "for the use of the Indians of the Colorado River tributaries for whom present tribal land and water resources are inadequate to support their present Indian population," and for returned soldiers of the tribes named. The ordinance provided for the adoption of Indian colonists into the Colorado River Indian Tribes. The ordinance further provided that in consideration of the setting aside of the Southern Reserve for settlement by other Indians, not less than 15,000 acres of the Northern Reserve would be subjugated and supplied with adequate irrigation and drainage facilities for use by members of the original Colorado River Tribes, the cost of such development to be borne by the United States. Subsequently, Ordinance No. 5 was referred to the tribal membership pursuant to article IX of the tribal constitution which provided that such a referendum vote could veto any ordinance passed by the tribal council. The ordinance was rejected by the tribal membership. However, the ordinance was construed to be contractual in nature, and hence not subject to the referendum provision of the tribal constitution.[1]

The Ucan Development Company, through its attorney Hugh B. Brown, has submitted a memorandum brief in support of the legality of the proposed lease. The memorandum brief recites an historical account of the Colorado River Indian Reservation and the Indians of the Colorado River. It is contended therein that any attempt to create a reservation for the benefit of all Indians of the Colorado River and its tributaries has been abandoned, and the offer to such Indians has been withdrawn by negative implication. It is further contended that the question of the beneficial ownership of the lands of the reservation has been resolved, and that the Indians upon the reservation (Colorado River Indian Tribes) are the beneficial owners, which views they contend, are supported by the opinions of former Solicitor Margold,[2] and by the approval of the tribal constitution without requiring a provision therein permitting other Indians to settle or colonize on the reservation. It is further contended that the offer to the Indians of the Colorado River and its tributaries to settle upon the reservation was to a certain group of specific and identifiable Indians which Congress had in mind, being only those Indians with whom Colonel Charles D. Poston held council at La Paz, Arizona, in 1864, and that those Indians were required to accept the offer within a reasonable time if they were to benefit thereby. It is also contended that the 1865 act did not create any vested rights

[1] Memorandum of Solicitor White to the Secretary, dated February 26, 1952.

[2] Solicitor Margold's memoranda for the Assistant Commissioner, dated September 15, 1936; to the Commissioner of Indian Affairs, dated November 24, 1936, and October 29, 1938.

in any Indians until they moved into the reservation with an intent to remain there, but that the act was merely an offer on the part of Congress to certain specific and ascertained Indians, which had to be accepted by them before they could establish any rights. It is further contended in the brief that Ordinance No. 5, adopted by the Colorado River Indian Tribes, is unconstitutional as it violates Article VI(c) of the tribal constitution. The brief points to the duty of the United States as trustee to keep the property in safe condition and protect it from loss or adverse claim and to make the property productive, suggesting in this connection that a portion of the receipts from a lease might be held in trust pending any determination of ownership rights adversely to the Colorado River Indian Tribes, and that part of the land developed under the lease could be held in trust for possible colonization by other Indians until it is determined whether or not such other Indians have any right to such land.

While the September 15, 1936, opinion of former Solicitor Margold holds that it has been determined to which Indians the reservation belongs, we must give consideration also to the opinion of former Solicitor Davis.[3] The Davis opinion expresses in substance that there was never a withdrawal of the offer expressed by the 1865 act creating the reservation; that where the offer has been kept open even after all tribes affected had obtained separate reservations in one form or another, there is serious doubt that Congress intended them to be foreclosed from ever occupying the Colorado River Reservation; and that the question of ownership of the unallotted lands of the Coloradio River Reservation is unsettled. The Davis opinion points out that Congress has by the Navajo-Hopi Rehabilitation Act of 1950 certainly indicated its intent to carry out a policy of relocation of Navajo and Hopi Indians upon the Colorado River Reservation. Solicitor Davis also pointed to the fact that the question of ownership by the Colorado River Indian Tribes is very definitely in litigation in Docket No. 283, in the Indian Claims Commission [vol. 6, pp. 86, 666], and Docket No. 424–52 in the Court of Claims [*Colorado River Indian Tribes et al.* v. *U.S.*] both involving claims filed by the Colorado River Indian Tribes arising out of the colonization of other Indians on the Colorado River Indian Reservation. In these cases the Department of Justice takes the position that the Colorado River Reservation was created for the benefit of a class of Indians, and that the purpose has never been abandoned.

The long-term leasing act of August 9, 1955, *supra*, specifically provides that long-term leases for certain purposes of any restricted

[3] Solicitor Davis' memorandum to the Assistant Secretary, M–36200, dated February 12, 1954.

Indian lands, whether tribally or individually owned, may be made by the Indian owners, with the approval of the Secretary of the Interior. Recognizing that the beneficial ownership of the lands of the Colorado River Reservation is uncertain, and that ownership was a requisite under the 1955 act, Congress passed the act of August 14, 1955 (69 Stat. 725), which authorized the Secretary of the Interior, for a period of 2 years, to lease the unassigned lands of the Colorado River Reservation under the same conditions as are provided in the act of August 9, 1955, except that specific provisions were made for the disposition of rental until such time as the beneficial ownership is determined. Further evidence of the recognition by Congress of the uncertainty of the beneficial ownership of the reservation is shown in section 2 of the act of August 14, 1955, which states that "Nothing contained in this Act shall be construed as recognizing any ownership in the Colorado River Indian Tribes or any other Indians or group of Indians * * *." It was clearly the intent of Congress to provide specific authority to lease the lands of this particular reservation which was not contained in the general act of August 9, 1955, *supra*. The fact that these acts were approved 5 days apart indicates that they were considered simultaneously by Congress, and it was not intended that the long-term leasing act should apply to the lands of the Colorado River Indian Reservation until the beneficial ownership becomes known. The Appropriation Act of August 28, 1957 (71 Stat. 433–434), provided for the expenditure of funds received from leases on lands on the Colorado River Reservation (southern and northern reserves) for the benefit of the Colorado River Indian Tribes and their members during the current fiscal year or until beneficial ownership of the lands has been determined, if such determination is made during the current fiscal year. Although the authority to lease provided in the act of August 14, 1955, expired on August 14, 1957, Congress, by the act of August 28, 1957, again recognized that the beneficial ownership of the lands remained undetermined.

We are in agreement with former Solicitor Davis that the offer to the Indians "of the river and its tributaries" to settle upon the reservation is a continuing offer which may be accepted at any time until it is withdrawn. Though we may consider, *arguendo*, that a long lapse of time or other implication would indicate that the offer has been abandoned, we need only to look to the Navajo-Hopi Rehabilitation Act of 1950 (64 Stat. 44–47), which indicates the intention of Congress to keep open the offer which has never been rescinded.

The contentions of the Ucan Development Company concerning the unconstitutionality of Ordinance No. 5 need but scant attention. Those contentions appear to rest upon the assumption that Ordinance

No. 5 itself constitutes the basis for uncertainty as to the beneficial ownership of the reservation. Without undertaking here to express an opinion on the question whether the ordinance violates the tribes' constitution it will suffice to observe that whatever uncertainty exists with respect to the identity of the beneficial owner of the reservation stems from matters other than Ordinance No. 5.

Treaties with the Indians, as well as acts of Congress, have specified how trust obligations to the Indians concerned are to be fulfilled. Being confronted with a specific leasing authorization enacted by the Congress shortly after general leasing provisions were approved by that body, it is incumbent upon the Secretary to look to the special leasing provisions when dealing with the particular lands embraced within that special statute. Until the provisions of the special leasing act, now expired, are in effect reinstated by further legislation, or the beneficial ownership of the reservation judicially determined, it is our opinion that no leasing authority exists concerning the unassigned lands on the Colorado River Indian Reservation. Moreover, the present suggestion that a lease nevertheless be executed and the proceeds held for such Indians as may be colonized upon the reservation cannot be followed, since basically a power to collect proceeds must be predicated upon a valid lease, which cannot be consummated at this time, and for the likewise impelling and practical reason that there is no way of determining what portion should be held in trust.

GEORGE W. ABBOTT,
*Solicitor.*

## SOUTHERN CALIFORNIA PETROLEUM CORPORATION

A–27851 *Decided February 25, 1959*

**Oil and Gas Leases: Lands Subject to—Private Exchanges: Generally**

Lands the title to which has been conveyed to the United States pursuant to a private exchange authorized by section 8 of the Taylor Grazing Act do not become available for offers to lease for oil and gas simply upon the acceptance of title on behalf of the United States, but only when an order is issued opening them to such disposition.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Southern California Petroleum Corporation has appealed to the Secretary of the Interior from a decision dated August 6, 1958, of the Director of the Bureau of Land Management which affirmed the rejection by the manager of the Salt Lake land office of two noncom-

petitive offers to lease for oil and gas filed by it pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

The offers, designated Utah 021502 and 021508, were filed on February 6, 1957, and covered three small tracts of land in San Juan County, Utah, which were reconveyed to the United States in private exchanges, Salt Lake 062962 and Salt Lake 065160, effected under section 8(b) of the Taylor Grazing Act, as amended (43 U.S.C., 1952 ed., sec. 315g (b), (d)). Title to the lands was accepted by the Director in decisions dated August 29, 1947, and October 25, 1949, each of which stated:

> The land acquired by the United States in this 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.

It appears that the land office records concerning these lands state—"Reconveyed to the U.S. under the provisions of Sec. 8 of the Act of July 28, 1934 (48 Stat., 1269) as amended * * * Not subject to appropriation until authorized by B.L.M."

The Director held the offers must be rejected because the lands, not having been restored to entry and disposition under the public land laws prior to the filing of the lease offers, are segregated from appropriation under the public land laws until a formal restoration order is published in the Federal Register. He also stated that, when restored, the lands would be subject to the preference rights accorded to veterans by the act of September 27, 1944, as amended (43 U.S.C., 1952 ed., Supp. V, sec. 282).

The appellant contends that the lands involved became subject to disposition for oil and gas purposes upon the acceptance of title by the United States; that publication in the Federal Register is not necessary to open lands conveyed to the United States in a private exchange to entry under nonpreference right filings; and that the preference provisions of the act of September 27, 1944 (*supra*), do not apply to offers to lease for oil and gas.

Section 8(d) of the Taylor Grazing Act (*supra*) provides—

> * * * lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located * * *.

This provision, however, does not make such lands immediately subject to disposition under the laws relating to public lands. In discussing a similar situation arising out of a release by a railroad of all

further claims to public lands under its grant, the Department stated:

The intention and the effect of the release were of course to free from any company claim all the United States lands that had been subject thereto. Upon the Secretary's approval of the instrument the two withdrawals mentioned above as made for the road were in effect lifted and the lands, released from all claims, immediately regained the status of vacant, unappropriated, public lands. But this restoration of the tracts to the public domain did not *eo instanti* make them subject to classification and disposal under section 7 of the Taylor Grazing Act as some might suppose.

The simple fact that lands belong to the United States and make part of the public domain does not of itself make them subject to disposal and private acquisition. Something more is required. It is true that according to the Supreme Court[3] the words "public lands" are habitually used in our legislation to describe such lands as are subject to sale or other disposal under general laws; and that ordinary thinking gives only this narrow, technical sense to the term. But it is not to be overlooked that the Supreme Court has also said that before lands federally owned become subject to private appropriation there must be an indication by the United States that the lands are held for such disposal.[4]

This latter statement, made in 1898, epitomized land department views and practice, in particular as to "restored" lands. Through the years, the Office and the Department have had frequent occasion to consider the status of restored lands,—lands once segregated by various kinds of adverse claims or appropriations, even those of patent, and restored to the United States by congressional act, by court decision, by individual relinquishment, by land office cancellation or by revocation of some withdrawal, Executive or departmental. In a long line of decisions in such cases, the Department has held that although restored lands become part of the public domain immediately, it remains for the Department and for it alone in the absence of congressional direction to give the "indication" spoken of by the court and to determine when and how such lands shall be opened for disposal.[5] (*Earl Crecelouis Hall*, 58 I.D. 557, 559–560 (1943).) [1]

[3] *Newhall* v. *Sanger*, 92 U.S. 761.
[4] *Oklahoma* v. *Texas*, 258 U.S. 574, 600.
[5] *Olson* v. *Traver*, 26 L.D. 350, 354, 355 (March 10, 1898); *Smith* v. *Malone*, 18 L.D. 482, 483, and the *Omaha Railway* cases therein cited; *Charles H. Moore*, 27 L.D. 481, 493; *State of Utah*, 53 I.D. 365, 367; *Asst. Attorney General's Opinion* of September 14, 1904, 33 L.D. 236.

In a recent case the Department has applied the same rule to lands conveyed to the United States in private exchanges under section 8(b) of the Taylor Grazing Act, holding—

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

[1] To the same effect: *California and Oregon Land Co.* v. *Hulen and Hunnicutt*, 46 L.D. 55 (1917); *Lewis G. Morton* (On Rehearing), 48 L.D. 507 (1921); *Ben McLendon*, 49 L.D. 548, 560 (1923).

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. (*Rachael S. Preston*, 63 I.D. 40, 43 (1956).)

Since there have been no orders opening the tracts for which the appellant has applied to other disposition, they are not open to leasing under the Mineral Leasing Act.

An offer filed for lands which are not available for leasing must be rejected. *Keil J. Scharf*, 60 I.D. 240 (1948); *Noel Teuscher et al.*, 62 I.D. 210, 214 (1955).

Therefore for this reason alone it was proper to reject the appellant's offers.

It follows that it is unnecessary to consider the appellant's arguments that the lands can be opened to oil and gas leasing without the publication of an order in the Federal Register pursuant to sections 5 and 7, Federal Register Act (44 U.S.C., 1952 ed., Supp. V, sec. 305; 44 U.S.C., 1952 ed., sec. 307). (But see *D. K. Edwards et al.* v. *Albert G. Brookbank et al.*, A–25960 (April 3, 1951).)

Similarly, the appellant's contentions concerning the inapplicability of the veterans' preference provisions of the act of September 27, 1944 (*supra*), are no longer material.

There remains its argument that the Director's decision opening the land only for grazing use is, in effect, a withdrawal of land from other disposition and that the Director has no authority to make such a withdrawal. As I have stated above, the lands applied for did not become available for disposition under the public land laws merely because the Director accepted title to them. A separate order, which has never been issued, is necessary to accomplish that end. Thus, the Director has not withdrawn the land applied for from leasing under the Mineral Leasing Act because it has never been opened to such disposition. Consequently, it is not necessary to consider whether the Director improperly withdrew 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.

EDMUND T. FRITZ,
*Deputy Solicitor.*

U. S. GOVERNMENT PRINTING OFFICE: 1959

## ARTHUR V. HELLER

A-27833 *Decided March 9, 1959*

**Grazing Permits and Licenses: Base Property (Land): Dependency by Use—Administrative Practice**

Where there has been no adjudication of commensurability of base property during the priority period and the earliest commensurability report in the official grazing files was not based on a dependent property survey, the commensurability rating of the base during the priority period will not be conclusively presumed to be that shown by the earliest commensurability report if there is other evidence in the record inconsistent with that report and the applicant whose grazing privileges are affected thereby requests an opportunity to submit evidence on the question.

**Words and Phrases**

*Commensurability.* "Commensurability," as used in connection with the Federal Range Code, refers to the number of livestock which can be properly supported for a designated period of time from the forage and feed produced on dependent base property.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Arthur V. Heller, successor in interest to Arthur V. Heller, deceased, has taken an appeal to the Secretary of the Interior from a decision of July 17, 1958, by the Acting Director of the Bureau of Land Management involving the appellant's grazing privileges on the range in Nevada Grazing District No. 3 (43 U.S.C., 1952 ed., sec. 315b).

In a decision of February 2, 1954, on an appeal from the district range manager's award of grazing privileges to the appellant in 1952 and 1953, the examiner found that the appellant owns or controls base property which in 1935 was impressed with a class 1 priority for 1,000 or more cattle and that the appellant's property would have a priority of 8,000 or more AUM's (that is, dependency by use for 1,000 cattle for the 8-month period of use of the Federal range in this grazing district) if no consideration were given to commensurability. However, as the Bureau had indicated that the commensurability of the appellant's base was not in issue in that proceeding, the examiner remanded the case for a determination of the present commensurability of the appellant's base property and the issuance of a license for grazing privileges not in excess of what that commensurability would support.

In a decision of March 15, 1955, the range manager allowed the appellant class 1 grazing privileges to the extent of 4,913 AUM's and an additional 3,549 AUM's which were classified as temporary. The decision stated that the unclassified use was temporarily granted for 1 year for the purpose of allowing an operational readjustment period



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in which to reduce the livestock numbers in accordance with the class 1 demand. For many years before 1955, the class 1 grazing privileges allowed to the appellant exceeded the amount permitted by the decision of March 15, 1955, and the appellant appealed from this decision. A hearing on the appeal was held before an examiner on February 26, 1957, at Carson City, Nevada.

The issue at the hearing was the present commensurability of the appellant's base.[1] Counsel for the Bureau contended that commensurability affecting the appellant's class 1 range privileges was properly determined by the Bureau on the basis of dependent property surveys made in 1952, 1953, and 1954 (Tr. 12–14). A dependent property summary dated January 19, 1939, was the first official report relating to the productivity of appellant's base and showed a commensurability rating of 3,248 class 1 qualified AUM's (Tr. 70–72, Bureau Ex. 5). This report was based on production figures contained in an application of April 18, 1935, filed by persons who then owned the property (Tr. 72). The first official field survey made of the Heller base property was prepared in 1952 and the commensurability of the base was rated at 2,150 AUM's (Tr. 72, Bureau Ex. 6). Additional surveys made in 1953 and 1954 showed total commensurability ratings of 2,607 and approximately 2,241 AUM's respectively (Tr. 73, 74, 81–83, Bureau Exs. 7, 8). At the time of the hearing, and on the basis of the 1953 and 1954 surveys, the Bureau rated the appellant's class 1 lands at 2,468 AUM's or 617 cattle for 4 months, with a class 1 Federal range demand of 4,936 AUM's (Tr. 83).

A number of persons who were closely connected with livestock operations on the base property, including the foreman of the ranch from 1938 to the time of the hearing and Heller's former partner who jointly owned and operated the base from 1937 to 1945, testified at the hearing for the appellant regarding the livestock supported on the base over a period of 20 years. According to these witnesses, approximately 1,200 head of cattle (with the exception of a short time after 1945) were cared for ordinarily from the forage and feed resources of the base during the period when they were not permitted to use the range (Tr. 24–34, 37, 39, 44–45, 61–63). No hay or other supplementary forage was purchased for feeding the livestock until 1952 when the appellant was forced to purchase supplementary feed because of a severe and lengthy winter and additional hay was purchased in

[1] Transcript of hearing on February 26, 1957, at Carson City, Nevada, on Arthur V. Heller's appeal from a decision of March 15, 1955, by the range manager, Nevada Grazing District No. 3, p. 12. Page numbers hereafter will refer to this transcript unless otherwise indicated.

1953 and 1954 as a result of the extreme drought in the area during those years (Tr. 21–67). The appellant's stock were always well fed from the feed available from the base property and authorized use on the range, the range which the appellant used was not overgrazed, and the appellant did not use the range for a longer period of time than was authorized (Tr. 38, 47–48, 54–56, 63).

There was testimony for the appellant that the base property was in good condition during the priority years and also during the years between 1937 and 1944, that during the war years, the condition of the property deteriorated and that productivity decreased greatly during the drought years (Tr. 50, 57). Witnesses for the appellant also testified that at the time of the hearing, the productivity of the base property had increased greatly since 1954, and that the property was in good condition as a result of a well having been drilled and sprinkling and irrigating systems installed (Tr. 49, 51–54, 58, 62, 64, 67).

By decision of August 14, 1957, the examiner held that the appellant was not entitled to an award of grazing privileges for more livestock than the forage production of his class 1 base property is able to support each year for 4 months, the minimum period of time when livestock must be supported on base property in Nevada Grazing District No. 3, and that the weight of the credible evidence at the hearing supported the finding that during 1954, the appellant's base property produced 2,241 animal-unit months of feed, sufficient to support 560 animal units during the 4-month period when they are required to be off the Federal range. As the appellant's total license for 1955 permitted greater use of the range than was authorized by the code, the examiner dismissed the appeal. The examiner also held that a reduction in the productive capacity of the base property below that required by the range code for 1 year does not result in a loss of the dependency by use or class 1 qualifications of the base property.

The Acting Director's decision affirmed the dismissal of the appeal as the 1955 grazing season had passed, and gave special instructions for future determinations of the appellant's grazing privileges. The instant proceeding is an appeal from portions of the special instructions. Several provisions of the range code require consideration in answering the question raised on this appeal.

The extent of class 1 grazing privileges on the Federal range to which applicants are entitled is limited by the priority or the dependency by use of base property and by the commensurability of the base property, and class 1 grazing privileges may not exceed the lesser

of these two factors (43 CFR, 1954 Rev., 161.2(k)(3) (Supp.)).[2] It has already been mentioned that the hearing examiner's decision of February 2, 1954, which established the priority of the appellant's base property, remanded the case to the manager for the determination of present commensurability. The decision suggested that the appellant's base probably lacked commensurability to support class 1 privileges to the extent of the priority of the base. To range manager's decision of March 15, 1955, which limited the class 1 privileges to which the appellant's base was entitled, was an adjudication of those privileges as limited by the commensurability ratings shown by the 1953 and 1954 dependent property surveys.

The term "commensurability," used in connection with the range code, refers to the number of livestock which can be properly supported for a designated period of time from the forage and feed produced on dependent base property. Livestock which are authorized to use the range must be supported for a period of time each year by forage and feed produced on the base property (43 CFR, 1954 Rev., 161.2 (k)(3)(ii), 161.4 (Supp.)), and base property is said to be commensurate for a license or permit for a certain number of livestock if the property provides a sufficient amount of forage to properly support that number of livestock during the minimum period when the public range may not be used for grazing the livestock. The commensurability of base property changes with variations in rainfall and other weather conditions, in the prevalence of plant disease, insects, pests, and in the numerous circumstances which influence plant growth. Because the commensurability of base property may limit the maximum amount of class 1 grazing privileges which the property will support and because the range code provides, in effect, that class 1 privileges may be lost if commensurability of the base property is not maintained

[2] When this appeal was taken, 43 CFR, 1954 Rev., 161.2(k)(3) (Supp.) provided in relevant part that:

"The extent to which grazing licenses or permits will be granted on the basis of dependency by use of land, shall be governed by the following:

"(i) It shall not exceed the average annual amount of forage customarily and properly utilized by the livestock operation computed on the basis of any two consecutive years or any three years in which use was actually made during the priority period, whichever is more favorable to the applicant, on that part of the public land which, at the time of the issuance of the license or permit, is Federal range.

"(ii) It shall not exceed the amount of forage needed for the proper support of the number of livestock creating such dependency by use which is available on the base property during the minimum period established under 161.4.

"The grazing privileges which may be granted hereunder shall not exceed the amounts determined under subdivision (i) or (ii) of this subparagraph, whichever is the lesser. Where the base property provides forage in excess of that necessary for the proper support of the number of livestock used in creating the dependency by use (Class I) the base property, to the extent of such excess forage capacity, may be treated as dependent by location (Class II) is so qualified."

A number of provisions in the Federal Range Code, including 161.2 (k)(1) and (k)(3)(ii), were amended on January 9, 1959 (24 F.R. 362, 363). The amended provisions may affect future determinations of the grazing privileges to which the appellant is entitled.

(43 CFR, 1954 Rev., 161.6(e)(1) and (12) (Supp.)), it is evident that an actual or implicit determination of commensurability during the priority period is contemplated by 161.2(k)(3)(ii) in the code (footnote 2). Otherwise there is no way of testing whether commensurability is being maintained over a period of time, as loss of commensurability may be measured only by comparison with a basic figure. Thus, although the range code has only recently expressly so provided, commensurability which may set a maximum limit on class 1 privileges is determined in the first instance on the basis of the priority period (see *Joseph F. Livingston et al.*, 56 I.D. 305 (1938); *William Sellas et al.*, A–25698 (June 15, 1950).)[3]

The examiner's decision of August 14, 1957, supported the Bureau's determination of the commensurability of the appellant's base during 1953 and 1954, but held that class 1 qualifications of the base were not affected by the loss of productivity for 1 year. The examiner made no ruling as to the commensurability of this base during the priority period or the maximum class 1 qualifications which this base would support.

The Acting Director's decision referred to the fact that commensurability of the base in 1939 was shown to be 3,248 AUM's which would support 812 cattle for 4 months. The decision then stated that if the base property was commensurate for no more than the equivalent of 812 cattle during the priority period, that rating limits the extent of the class 1 grazing privileges allowable to the property, for it is the lesser of the two factors which govern the extent of class 1 qualifications, and, in the absence of a showing that the property produced more forage during the priority period than was shown in the 1939 survey, the total class 1 grazing privileges allowable to the base property amount to 6,496 AUM's of Federal forage, or forage for 812 cattle for a period of 8 months. The decision also held, in effect, that since the lack of productivity of the appellant's base appears to have been due chiefly to adverse weather conditions which would have warranted granting a non-use license under the code (43 CFR, 1954 Rev., 161.6(e)(9)(i) (Supp.)), the appellant should be allowed two growing seasons to restore productivity, after which time licenses not to

[3] On January 9, 1959, 43 CFR 161.2(k)(3)(ii), *supra*, fn. 2, was amended to specifically provide that the productivity of base property which may limit the extent of class 1 privileges refers to "* * * the amount of forage needed for the number of livestock creating such dependency by use that *were customarily and properly sustained on the base property during the priority period and continue to use such property to the same extent* * * *." (Italics added.)

A memorandum of December 17, 1957, to the Secretary from the Director of the Bureau of Land Management recommending the adoption of this and other amendments to the range code states that the proposed rewording of 161.2(k)(3)(ii) is necessary to eliminate the conflict otherwise existing between this section and section 161.2(k)(3)(i) (see footnote 2).

exceed the present qualifications allowable to the property may be issued.

On appeal, exception is taken to the implication in the Acting Director's decision that commensurability of the appellant's base during the priority period is limited to 812 cattle for 8 months, shown by the 1939 survey, and the propriety of that limitation is the primary question which needs to be determined in this decision.

The appellant requests the right to present evidence on the commensurability of the base property during the priority period, points out that a permit and licenses authorized use of the range for many years by more than 1,000 head of livestock for 8 months each year, and that the permit and licenses were administrative determinations that commensurability during the priority period was sufficient to qualify the base property for more grazing privileges than the 1939 commensurability rating indicates.

There is some evidence in the appeal record which raises a question as to the correctness of a ruling that commensurability of the appellant's base during the priority period was that shown by the 1939 report which was apparently based solely on statements made in an application of April 18, 1935, and not on a dependent property survey (Tr. 70–72).[4] In any event, the commensurability of this base during the period 1952–1954, and not its commensurability during the priority period, was in issue at the hearing on February 26, 1957, and there has been no formal adjudication of the commensurability of the appellant's base during the priority period. Accordingly, a determination of the commensurability of this base during the priority period cannot be made on this appeal. In the circumstances, the statements in the Acting Director's decision implying that the 1939 report establishes the commensurability of this base during the priority period and limits the maximum class 1 qualifications thereof are set aside, as the record provides no basis for denying the appellant an opportunity to submit evidence on the question if the request is made at an appropriate time. The appellant may have the matter determined in accordance with the procedure provided in the range code (43 CFR, 1954 Rev., 161.9, 161.10) if, in the future, the productivity of the base increases above the 1939 rating and the manager rejects an application for class 1 grazing privileges on the ground that commensurability

[4] This evidence consists of testimony at the hearing about the condition of the property during the priority period as compared with its condition later. In addition, a 10-year permit, issued July 1, 1943, and canceled March 13, 1944, when the Heller-Parker partnership was dissolved, authorized use of the range in excess of the amount allowable if the commensurability of the base during the priority period was that shown by the commensurability rating of 1939. The permit presumably amounted to an administrative adjudication that the commensurability of the base during the priority period was sufficient to support the livestock permitted to use the range during the period 1943–1944 (*George Carson and Sons*, A–23584 (April 28, 1943)).

of this base as shown by the 1939 report limits the extent of the class 1 privileges which may be allowed.

It is also asserted on appeal that credible evidence at the hearing in this case indicated that the carrying capacity of the appellant's base has been sufficient at all relevant times to support 1,000 head of livestock for the required period. The issue is now moot because the 1955 grazing season has passed and future awards will presumably be determined by the commensurability rating of the base in future seasons as limited by the commensurability rating during the priority period (unless class 1 privileges are reduced by loss of base property qualifications).

As no questions were raised on appeal regarding the other rulings in the Acting Director's decision, that decision is affirmed except with respect to the implication that commensurability of the base during the priority period is conclusively presumed to be shown by the 1939 report.

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, Bureau of Land Management, is affirmed subject to the modification set forth herein.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEALS OF MORRISON-KNUDSEN COMPANY, INC.

**IBCA-36 and IBCA-50** *Decided March 23, 1959*

**Contracts: Appeals—Contracts: Changes and Extras—Contracts: Changed Conditions—Contracts: Specifications—Contracts: Modification**

A request of a roadway contractor for reconsideration of a borrow claim, which is based on the contention that the Board could not give effect to deviations from the "changes" and "changed conditions" clauses of the U.S. standard form of construction contract that limited the applicability of these clauses because deviations were prohibited by the regulations relative to public contracts, must be denied. Such regulations are simply for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of its contract. Moreover, although the courts have declared the standard "changes" and "changed conditions" clauses to be paramount as against caveatory or exculpatory provisions in the specifications of a general nature, this is not equivalent to a prohibition upon deliberate deviations. The standard provisions are paramount as against inconsistent specifications only in cases in which there is no other aid to interpretation than the provisions of the standard form itself.

**Contracts: Appeals — Contracts: Additional Compensation — Contracts: Specifications**

A motion for reconsideration of a claim of a roadway contractor based on the allegation that the Government by deleting a select borrow surface course, which the contractor had planned to use to correct deficiencies in the subgrade, and by failing to supply suitable topping material for finishing the subgrade both prior and subsequent to the deletion, had increased the contractor's costs in finishing the subgrade must be denied when it appears that (*1*) the contractor has not borne the burden of proving that it made every reasonable effort to conserve suitable topping material from excavation and borrow, as required by the specifications, and that the Government failed to designate borrow pits from which suitable topping material could be obtained; (*2*) the initial grading by the contractor had been very rough; (*3*) the gravamen of the contractor's complaint was really that too much of the borrow material had to be windrowed rather than that it was unsuitable; (*4*) the contractor's alleged plan to make good the deficiencies of the subgrade with select borrow was an afterthought and the alleged plan would in any event have been inconsistent with the requirements of the specifications relative to the laying down of the subgrade, and might have involved greater expense than the use of ordinary borrow; and, finally, (*5*) the contractor failed to give timely notice of and protest against the alleged denial of suitable topping material.

BOARD OF CONTRACT APPEALS

Under date of June 18, 1957, counsel for the appellant filed a motion for reconsideration by the Board of its decision of May 27, 1957, denying, subject to two exceptions, its claims for additional compensation, arising under its contract for the construction of section G of the Richardson Highway in Alaska.[1]

Briefly, the Board held in its decision that under the terms of the specifications, which included provisions, modifying the "changes" and "changed conditions" articles of the contract,[2] so as to reserve a right to the Government to make changes in the plans to meet unanticipated field conditions, and to limit the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities, the appellant was not entitled to additional compensation by reason of deficiencies or changes in the borrow pits, except to the extent that borrow and overhaul exceeded the stated limitation. The Board also held that the appellant was not entitled to additional compensation by reason of the deletion of item 100(1) of the contract, providing for a "Select Borrow Surface Course," except for preparatory work on plant before the deletion was made. The items of this claim that were rejected were

[1] 64 I.D. 185.

[2] These are, respectively, articles 3 and 4 of the contract. The provisions modifying these articles of the standard form are to be found in articles 4.2 and 4.3, respectively, of the standard specifications.

based on alleged difficulties in finishing the subgrade after the deletion of the item, and the prolongation of the work into another operating season, due to the same cause. The two basic claims of the appellant will hereinafter be referred to as the borrow claim, and the deletion claim, respectively.

Counsel for the appellant filed an extensive brief in support of its motion for reconsideration, and counsel for the Government [3] filed a reply brief. Upon the request of counsel for the appellant, the Board also heard oral argument on the motion for reconsideration in Washington, D.C., on April 15, 1958.

The only new ground for reconsideration of the borrow claim advanced by counsel for the appellant is that the Board, by giving effect to the modifications made by the specifications in this case in articles 3 and 4 of the U.S. standard form of construction contract, has disregarded or set aside a public policy of the United States which is designed to encourage lower bids by making it possible for contractors to eliminate certain contingencies which they would otherwise have to take into account in making their bids. This public policy is said to be established by numerous decisions of the Court of Claims and by sections 54.1 and 54.3 of the Federal rules and regulations relating to public contracts, which provide that "except as otherwise authorized" the standard forms of Government contracts, including the form of construction contract involved in this case, "shall be used without deviation by all executive agencies," except that additional stipulations or instructions "deemed necessary but not inconsistent with the provisions of the forms prescribed, may be incorporated in the Specifications, Schedules or other accompanying papers."

It is clear that the appellant, by presenting this argument, is attempting in effect to repudiate provisions of a contract into which it had freely entered, with at least constructive knowledge of the policy and the regulation. It is equally clear, moreover, that if this attempt were to succeed, another public policy, which is to maintain the system of public competitive bidding, would be undermined.

The Board does not deem it necessary to determine whether the particular alterations made in articles 3 and 4 of the standard form in this case were, or could have been, authorized, for it could not possibly make any difference in the result. The reason is that the appellant has no standing to raise the question whether the deviation was permissible. This has long been settled.

[3] Subsequent to the rendering of the Board's decision, jurisdiction over the contract was transferred to the Bureau of Public Roads in the Department of Commerce, and counsel who originally represented the Government has been replaced by counsel of that agency.

In *Hartford Accident & Indemnity Company* v. *United States*, 130 Ct. Cl. 490 (1955), the Government deviated from article 9 of the standard form by providing for the payment of liquidated damages by the surety as well as the contractor. The contractor eventually defaulted and the surety completed the work but not until after the completion date. When the Government assessed excess costs, as well as liquidated damages, against the contractor, one of the grounds on which the surety resisted the assessments was that the Government was without power to deviate from the standard form of contract, and it relied upon precisely the same provisions of the regulations relative to public contracts which are invoked by the appellant in this case. But the court held that "these regulations were for the benefit of the Government and that a third party cannot complain of any deviation therefrom" (p. 493). The reason for this rule is that the laws and regulations governing the making of Government contracts are simply for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of a contract. This principle was settled long ago by a series of decisions by the Supreme Court of the United States.[4]

In referring to the recent decisions of the Court of Claims in which the court has emphasized that the paramount importance of the "changed conditions" provision of the standard form of Government construction contract requires the subordination of caveatory or exculpatory provisions in Government specifications, the appellant seems to be arguing also that, even if articles 4.2 and 4.3 of the standard specifications, the special provisions of the specifications modifying the "changes" and "changed conditions" articles of the standard form, may not be disregarded, they should be "reconciled" by a process of interpretation with the provisions of the standard form. It is obvious, however, that provisions which are in direct and irreconcilable conflict cannot be reconciled by any legerdemain of which the Board would be capable. Actually, the Court of Claims has done no more in its decisions than to attempt to reconcile caveatory or exculpatory provisions of the specifications which are of a *general* nature with the provisions of the "changes" and "changed conditions" provisions of the standard form. The court has never held that these provisions are so paramount or absolute that they cannot be modified or set aside by appropriate provisions in the specifications which expressly so provide. On the contrary, the court has recognized that this can be done if the intention is expressed, and that the provisions of the standard form are paramount as against the specifications only in cases in which the

[4] Some of these cases are cited in 33 Comp. Gen. 180, 182 (1953).

court is without "any other aid than the standard contract form itself." [5]

The appellant also contends that the Board erred in rejecting its deletion claim, except for preparatory work on plant. As originally scheduled, the contract provided for a Select Borrow Surface Course, item 100(1), to be placed on the prepared subgrade but under date of April 23, 1954, the contracting officer eliminated this item, and the appellant's claim was based on its alleged added difficulties in finishing the subgrade after the elimination of the item, which it ascribed to the failure of the Government to provide suitable material for finishing the subgrade, and to the defeat of its plan to correct the roughness of the subgrade by the use of the select borrow without, however, charging the Government more than the price of ordinary borrow, or for overhaul in connection with supplying such borrow. The Board held, however, that there was no satisfactory evidence that the Government had imposed any greater requirements in finishing the subgrade than would have been imposed if item 100(1) had not been eliminated, and that the appellant's difficulties in finishing the subgrade were caused by its own haste in attempting to complete most, if not all, the subgrade in its first season of operation in 1953. The Board also held that it would not have been consistent with the requirements of the contract in any event to correct the roughness of the subgrade by the utilization of select borrow.

The appellant contends that the Board misconceived in its decision the basis for the rejected items of the deletion claim, and not only erred in its conclusion that the subgrade had to be constructed without regard to the use of select borrow but also failed "to either comprehend or mention the failure of the Government to furnish to Appellant specification material for the top 12" lift of the subgrade," as allegedly required by section 29–3.2(b) of the standard specifications, which reads as follows:

> Topping Material.—Suitable material shall be conserved for constructing the top portion of embankments and no rocks or hard lumps that cannot readily be broken up into pieces not over 6 inches in diameter shall be placed in the upper 12" layer.

It is not true that the Board misconceived the basis of the appellant's claim. It was aware that one of the bases of the claim was the alleged failure of the Government to furnish the contractor suitable material for the preparation of the subgrade for it stated that the appellant was complaining that "it was forced to use unsuitable and unspecified material because the Government neither permitted the overhaul of suit-

[5] See *Pfotzer* v. *United States*, 111 Ct. Cl. 184, 225, 226 (1948).

able material for the purpose of preparing the subgrade from available pits nor designated pits from which such suitable material could have been obtained without the objectionable overhaul." [6] This has now simply been made the very gravamen of the appellant's complaint in reiterating the deletion claim. Except for such changes of emphasis, the appellant is advancing the same claim which the Board has rejected and on the same basis. However, since this aspect of the deletion claim was only briefly discussed in the Board's decision, and section 29–3.2(b) of the standard specifications was not specifically mentioned or discussed therein, the purport and effect of this provision, as well as the claim as a whole, will now be examined in greater detail.

It is apparently the appellant's theory that section 29–3.2(b) of the standard specifications [7] imposed an absolute and unconditional duty upon the Government to select and furnish to the appellant, for the top 12 inches of the subgrade, material not over 6 inches in diameter, irrespective of whether such material was available within free haul distance, and that if such material was not available within free haul distance to allow overhaul from pits where such material could be obtained. However, the language of the provision, even when considered in isolation, does not support the appellant's theory, and it is rendered even more obviously untenable when considered in the context of the other provisions of the specifications.

It is apparent that actually the topping provision itself refers basically to "suitable material" rather than to material of any specified maximum size. Insofar as it contains any specific reference to size, it refers not to 6-inch minus material but to material that cannot readily be broken up into such material.[8] It is also apparent that it imposes a specific duty upon the contractor to conserve "suitable material" for topping. Indeed, the provision consists of two parts, in the first of which an affirmative duty of the nature just mentioned is imposed on the contractor, and in the second of which a prohibition is imposed upon the contractor against placing in the upper 12-inch layer of the embankment "rocks or hard lumps that cannot readily be broken up into pieces not over 6 inches in diameter * * *."

The duty of the contractor to conserve the suitable material is not mentioned, moreover, merely in the topping provision but in many other provisions of the standard specifications. Section 24–3.1 pro-

[6] 64 I.D. 185, 205.

[7] For the sake of brevity, this provision will hereinafter be referred to as "the topping provision."

[8] Indeed, in his opening statement at the hearing, counsel for the appellant recognized this, for, in speaking of the topping provision, he stated that the purport of the provision was to require that in the upper 12-inch layer of the subgrade "there should be used rocks or other suitable material not over six inches in diameter or *at least it had to be capable of being readily broken up into pieces not over 6 inches in diameter*" (Tr., p. 12).

vides: "All suitable material removed from the excavations shall be used as far as practicable in the formation of the embankment * * *;" section 24–3.4 provides for "saving" material obtained during excavation which was deemed suitable for topping; and sections 24–5.1(c), 25–5.1(c) and 26–5.1(c) all provide that payment for the respective items shall include the conserving of cushion and topping material.

In view of the existence of the duty on the part of the contractor to conserve suitable topping material, it is apparent, to say the least, that before it could justly complain of a lack of such material, it must show that it had made a reasonable effort, both in the course of excavation and in the obtaining of borrow, to conserve such material but that it was not available within free haul distance.

A more difficult question is the extent of the Government's obligation to supply the contractor with suitable material. Was the *prohibition* upon placing oversized material in the upper layer of the embankment also in effect a *requirement* that the Government supply the contractor with suitable material? The appellant seems at times to be almost arguing that the Government was bound to obtain and deliver to it enough truckloads of 6-inch minus material to enable it to construct the upper layer of the embankment. Actually, of course, the duty of the Government was merely to designate such suitable sources of borrow as would enable the contractor to construct the subgrade. As noted in the Board's original decision, in connection with the discussion of the borrow claim, the Government not only expressly repudiated any responsibility for the quantity of acceptable material in the borrow sources but also made the suitability of the material dependent upon the judgment of the project engineer,[9] and, in addition required any overhaul from sources of borrow to be authorized.[10] In view of these provisions, it may plausibly be argued that the purpose of the topping provision was merely to indicate the type of topping material which would be used unless the project engineer indicated that coarser material would be acceptable. It may be argued, in other words, that the provisions empowering the project engineer to determine the suitability of material were paramount. Such a construction would be strongly supported by the circumstances that the Government, having conducted no pre-bid explorations of the borrow pits, was in no better position than the contractor to determine in advance precisely the sort of material that would be yielded by them, and that it would have been rather ill-advised, therefore, for it to have undertaken an obligation to supply any particular grade of topping material for a subgrade extending 45 miles in length.

[9] See article 6.1(a) and sections 26–1.3, 26–2.1 and 41–3.1 of the standard specifications.
[10] See section 28–1.1 of the standard specifications.

In view of the actualities of the record there is really no need to decide this interesting question, as will be shown. However, it is important to indicate that in any event the contractor could not validly object to the presence of oversized rock in borrow material so long as sufficient quantities of material suitable for the construction of the upper layer of the embankment were available, nor could it object to having to separate, by blading or otherwise, the suitable from the unsuitable material even though this might involve the windrowing of the oversized material and might increase the labor costs of placement to some extent, although it is obvious that a part of the appellant's additional cost at least would be offset by the payment which it would receive for the additional borrow. That oversized rocks and boulders in the borrow were anticipated is made manifest by the provision added to section 41–3.1 of the standard specifications by the special provisions which reads as follows:

> Fill and ditch slopes shall be finished true to line and grade. Oversize rocks and boulders resulting from the placing and finishing of roadway borrow or other grading operations shall be aligned along the toe of the slope where the roadway is on fill and in such a manner that drainage will not be obstructed. Where the roadway is in cut, all oversized material from any source whatever shall be removed from the ditches, and disposed of as directed by the engineer.

Even more significant are some of the provisions of the unamended first paragraph of section 41–3.1 of the standard specifications. "All boulders or ledge appearing in the excavation," it is provided, "shall be removed or broken off to a depth of not less than 9 inches below the subgrade." This clearly indicates that boulders could extend even into the upper twelve inch layer of the embankment. "Selected material reserved under ROADWAY AND DRAINAGE EXCAVATION," it is also provided, "shall be used insofar as deemed suitable by the engineer, supplemented as necessary by additional material obtained under BORROW * * * ." In areas where satisfactory material is not available and the contract carries the item SPOT SUBGRADE REINFORCEMENT, material of the quality and characteristics necessary may be ordered in writing under such item." This would tend to support the view that even with respect to the material in the upper 12-inch layer of the embankment the judgment of the engineer was to be paramount.

The best guide to the meaning of a contract is the practical construction which the parties themselves have given to it. One will search in vain through the correspondence of either the period of construction or of the filing of claims for demands by the appellant that it be furnished with 6-inch minus material. During the construction season of 1953, 60 to 70 percent of the subgrade which the appellant constructed with its own forces was laid down by it but in the only letter which it wrote to the Alaska Road Commission during this

season, which was dated July 1, 1953, it made no mention of any such demand. It merely observed: "The specifications state that borrow sources shall be designated and that *suitable material* shall be conserved for construction of the top portion of embankment. However, no portion of the designated pits at Mile 79.9 is *suitable* for topping material and it is necessary to construct the entire embankment with the available material *containing* boulders up to two feet in diameter" (italics supplied). The appellant then continued, as follows: "During the construction of the embankment the Resident Inspector insisted that we construct the embankment to one (1) foot below subgrade. This requirement has made it necessary for us to dispose of a large quantity of large boulders by hauling than if we had been allowed to grade the fill to subgrade elevations and dispose of the large material into the fill ahead of the embankment." The appellant concluded the letter by stating: "We have been required to perform extra work with *this* requirement and request extra compensation" (italics supplied).

In his reply of the same date, the Resident Engineer pointed out that (*1*) under article 6.1(a) of the standard specifications the responsibility for the acceptability of material was entirely the engineer's; (*2*) the top 30 inches of the material in pit 79.9, which had a very minimum of large boulders, was acceptable for the upper 1-foot layer of the subgrade embankment, and if this material had been used there would have been a much smaller amount of boulders to be disposed of; (*3*) section 41–3.1 of the standard specifications included provisions for the disposal of boulders; and, finally, (*4*) section 29–3.2(b) was authority for the Resident Inspector's insistence "regarding construction to one (1) foot below grade." The Resident Engineer concluded by noting that at a conference in his office it had been agreed that, in view of the larger rock in pit 79.9, it would be permissible to bring the subgrade to its full elevation, so long as the material in the pit made it possible, and by ruling that no extra work had been performed that would require extra compensation.

It is apparent from this exchange of correspondence that what the appellant was really complaining about was the necessity of windrowing or hauling the oversized material rather than the absence of any suitable material; that both parties spoke in terms of the suitability of material; that the engineer was asserting the right to determine the suitability of the material, and also denying that there was any lack of suitable material. It should be noted also that the appellant did not at this point pursue the matter any further.

It was not until October 16, 1953, that the appellant's superintendent wrote to the Resident Engineer "to point out that in his opinion

material not suitable for construction of embankments has been and is being placed in roadway sections," referring especially to the borrow pits at miles 77.3, 77.9, 52.9, and to the pit at approximately mile 58.7. "In all these pits," the writer stated, "the material has been of very poor nature and the contractor cannot accept any responsibility for roadway contructed with this type of material." It is apparent that this was a disclaimer of responsibility for the roadway constructed with the allegedly poorer material rather than a demand for better material. It should be noted also that the respect in which the material was claimed to be not "suitable" was not indicated in the letter.[11] In his reply to this letter under date of October 19, 1953, the Resident Engineer merely stated that he wished to reiterate the statement in his letter of July 1, 1953, that the responsibility for the acceptability of material lay with the engineer,[12] and he pointed out also that the reference to the pit at mile 52.9 should have been to the pit at mile 57.9. Although article 5.1 of the standard specifications required the appellant to protest in writing against rulings of the engineer within 10 days from the date of the issuance of such rulings, it failed to protest within such period against the rulings contained either in the letter of July 1 or October 16, 1953.

In its first letter formulating the deletion claim, which was dated June 18, 1954, or almost 2 months after the deletion of the select borrow surface course, the appellant only succeeded in making it perfectly clear that if it had actually raised the question of the lack of 6″ minus material, or suitable material in general, the question had been purely academic. The appellant now supplied the first hint that it had harbored a plan to use select borrow to finish the subgrade, and asserted that, in view of the existence of this plan, it had made no particular effort to conserve suitable borrow material. Thus, the appellant declared:

> With this (plan) in mind, construction work during last season was directed toward completing as much subgrade as possible, preparatory to the surfacing operation. *Consistent with good construction practices, and the type of material available for the subgrade, no extensive effort was made, or suggested to be made by your inspectors, to select materials for the upper lift of the embankment* which would have provided a smooth and uniform surface to the subgrade (italics supplied).

Erickson himself cast doubt on the implication in the letter that "good construction practices" had been followed in laying down the

[11] A. W. Erickson, who was the appellant's Assistant District Manager for Alaska in 1953 and 1954 but who became its District Manager in 1955, testified at the hearing that he could not say that the letter referred solely to oversized material. He thought that with respect to two of the pits at miles 52.9 and 58.7 the question may have been "whether it was lag" (Tr., p. 109).

[12] Erickson testified that he had also been told verbally "on numerous occasions" that the determination of the acceptability of material was for the engineer (Tr., p. 108).

subgrade when he testified in effect that if the plan to use select borrow were to be disregarded it might be "proper" to say that the initial grading had been extremely rough, and that much of the work that had subsequently to be done should normally have been done as part of the initial grading (Tr., pp. 136–37). In this first claim letter, the appellant indicated that the gravamen of its complaint was that since the deletion of the select borrow surface course, it had been subjected to requirements "directed to requiring us to make a finish road surface out of what was originally designed and constructed to be a subgrade." But the only requirement which was specifically mentioned was again the windrowing of oversized material.

However, in three subsequent claim letters, dated February 27, April 6, and June 24, 1955, the deletion claim was subjected to a process of refinement. In the February 27 letter, the appellant still spoke in general terms of "the failure of the borrow pits and excavations as sources of material meeting the size requirements for the top twelve inches of embankment," and the failure of the Alaska Road Commission "to direct the Contractor into borrow pits from which suitably sized material could have been obtained for providing the demanded tolerances and surfaces at reasonable cost." To this the District Engineer replied in his letter of March 14, 1955, not only by denying in general terms the appellant's contentions but also by stating specifically: "In regard to the difficulty of handling the material in top course, it is felt that *the contractor should have followed good construction practice in original laydown of borrow material and been more diligent in selecting and conserving the better material for the top course*" (italics supplied). It was in the letter of April 6 that the appellant stated unequivocally *for the first time* its contention that the commission was bound to supply it with 6-inch minus material. "The subgrade specification provided," it stated, "for six-inch maximum size in the top twelve inches of the embankment subgrade * * *." No less interesting is the extremely long postponement in the correspondence of any expressed intention on the part of the appellant to dress the subgrade with select borrow *at no extra cost to the Government.* One will search in vain in the letters of June 18, 1954, February 27, 1955, or even April 6, 1955, for the expression of this intention. It appears indeed *for the first time* in the letter of June 24, 1955, in which the appellant stated:

> It had been the Contractor's intention to true the surface of the subgrade to as good a condition as possible considering the large rocks contained therein as part of the obligation, as required by the specifications, of Item 100(1), Selected Borrow Surface Course, using selected material *at no cost added, to the*

*Government for the selected material necessary* beyond the six-inch layer of the surface course.

And the letter in which this intention was expressed was not in a true sense a claim letter at all, for it was written as a commentary on the contracting officer's findings of May 3, 1955, and had, therefore, been written *after* the appellant's claim had already been filed and rejected. It was simply part of the basis of the appeal. It should also be emphasized that even the letter of April 6 was also written as part of an intermediate appeal by the appellant from the District Engineer's decision rejecting the claim.

Even assuming for the sake of argument that the Government was bound to furnish the appellant with 6-inch minus material, irrespective of whether the appellant had made any diligent effort to conserve such material for topping, is it "uncontroverted," as the appellant asserts that the Government did not discharge the obligation? The Government has always denied, and specifically denies in opposing the motion for reconsideration, that it had failed "to indicate suitable material for subgrade." In contending that the evidence is "uncontroverted" that the Government failed to discharge its obligations, the appellant relies heavily on the following bit of testimony by Ray Kuhns, who supervised construction contracts for the Alaska Road Commission in the Valdez district:

> Q. "You don't contend, do you Mr. Kuhns that the contractor was furnished with 6-inch minus material for the upper 12-inch layer?
> A. "No.
> Q. "You were on this job quite often and know that did not occur?
> A. "That is correct."

In the light of the realities of the record, and the actual requirements of the specifications, the questions put to Kuhns were simply trick questions, and elicited the expected answers, which must be regarded, however, as meaningless. Since the Government was under no obligation to "furnish" any material but only to designate borrow pits from which the contractor could obtain the material, whether "6-inch minus material" or "suitable material," the witness could only answer the questions in the negative, and the negative answer could not in any way illuminate the situation. Kuhns also testified that, in view of section 41-3.1 of the standard specifications, the appellant should have anticipated oversized rocks and boulders in the borrow material (Tr., pp. 333–34), and that so far as he knew "the same grade of subgrade finishing was required on this contract as on any other contract in the Valdez district" (Tr., p. 337). This testimony is hardly indicative of any consciousness on Kuhns' part that the Government had transgressed the appellant's rights.

It is manifest from the record as a whole, moreover, that it would be absurd to construe Kuhns' negative answers as categorical assertions that the Government had failed to furnish the appellant with suitable material. Such a construction would be wholly inconsistent with admissions of the appellant's own witnesses. Erickson first conceded that "down around 69 or 67 mile there were pits of an adequate fineness" (Tr., p. 100). A little later, he testified that although there was material that contained "cobbles up to two feet in diameter," there was "*a very considerable amount of material* which ran 6 inches and larger," (italics supplied), and also that "Section 29" material was made available when "immediately adjacent" to the borrow pits (Tr., p. 102). Even more significantly Erickson, speaking of the stretch of the roadway constructed by the appellant's own forces rather than by subcontractors, also testified that "we had some very bad pits, but *we had quite a few good pits* and the good pits tend to reduce on a straight average basis the bill per mile" (Tr., p. 142). Rutherford M. Haugan, the appellant's project superintendent at one time, in testifying that there were stretches of road where they had to "put 30 percent more material on to the road in order to comb out the large material and get our grade down to blue tops" (Tr., p. 252), necessarily admitted that this meant that "in fact 70 percent was necessarily less than 6″ in diameter" (Tr., p. 262). While Floyd W. McCullough, who was the appellant's project engineer from July 1953 to the end of the 1954 construction season, testified that the material was generally "quite coarse" and contained boulders "up to a foot or larger in diameter" he also testified that there were "some" borrow pits which contained material that could be classified "as 6 inches or under" and that *neither he nor anyone else to his knowledge made any request for such material from other pits* (Tr., pp. 268–69).

This testimony of McCullough is particularly interesting in connection with the contention of the appellant that while there was plenty of fine material in the pits, it was not allowed to obtain it if overhaul would be involved. Again, assuming for the sake of argument that the Government was obligated to furnish 6-inch minus material within free haul distance, and that if it was not available within such distance to allow overhaul, is it true, as the appellant seems to contend, that a reasonable amount of overhaul was not allowed? The record shows that at a conference with representatives of the appellant on July 15, 1954, the contracting officer recognized that in view of the elimination of the select borrow surface course the appellant should be authorized to obtain finer borrow material for several short sections of the roadway where cobblestones would not permit finishing without extra effort, and that subsequently over-

haul up to the amount of $15,000 was authorized. This authorization is evidenced by a telegram dated July 23, 1954, from the Alaska Road Commission to the District Engineer. There is also in evidence a letter, dated August 24, 1954, from the District Engineer to the appellant referring to the allowance of overhaul in the amount of $5,000 up to that time, and stating that the instructions of the contracting officer to allow additional overhaul in order to obtain finishing material would be followed. In his testimony Erickson attempted to dismiss the $5,000 allowance of overhaul on such grounds as that the material so obtained was only used to stabilize the subgrade, or that some of it ran 10 to 20 percent over 6 inches. It seems to the Board, however, that neither of these grounds is very persuasive. The fact that some of the material was used for stabilization purposes does not make the overhaul allowance irrelevant, nor does the fact that a small amount of the material exceeded 6 inches, especially since there is no indication of how much larger than 6 inches the material was. Surely, the Government was not bound to furnish material which never exceeded 6 inches in diameter even slightly. In any event, it is not denied that $15,000 of overhaul was allowed pursuant to the authorization. In paragraph 20 of its letter of June 24, 1955, the appellant admits the allowance of the $15,000 of overhaul but again attempts to dismiss it, this time on the ground that it came more than a year after the execution of the contract, and the acceptance of the northerly 10 miles of the roadway. But, of course, this overlooks the fact that there was no immediate need for topping material until after the work of clearing and excavating had been done, which would consume a considerable amount of time; that it was contemplated that the initial need for topping material would be met by the conservation of excavated material; and that the record does not show precisely when most of the topping material was actually needed. In any event, the appellant by its own confession had no need of topping material during the whole of the 1953 construction season. Again, it is raising an entirely academic question.

It is particularly necessary to emphasize that the problem of the topping material must be viewed in perspective and as a whole but the record leaves the precise extent and sequence of the appellant's operations in considerable obscurity, and is particularly unsatisfactory with respect to the precise quantities and the quality of excavation and borrow material that could be regarded as suitable for topping material. These shortcomings of the record, which must be held against the appellant, since it has the burden of proving any claim, are magnified by the fact already mentioned that the appellant did not construct the whole of the roadway with its own forces. It re-

lied rather on two subcontractors, McLaughlin Bros., Inc., which was to construct the roadway from mile 35.9 to 50.8, and Edwards-Nesmith Ryder, which was to construct the roadway from mile 50.8 to 57.4 and mile 58.4 to mile 60.6. These two stretches of the roadway total 23.7 miles, which was thus more than half of the roadway. However, while the McLaughlin firm completed its section of the roadway, the Edwards firm went bankrupt at some date not shown by the record,[13] and the work it was to have performed was taken over and completed by the appellant's forces.

Now, by the appellant's own admission, there was no deficiency of topping material in connection with the 14.9 miles, or approximately one-third of the subgrade, constructed by the McLaughlin firm. Erickson himself testified:

> The material in the lower 15 miles was on the average much finer and much more suitable for the construction of embankment than that found on the northerly 30 miles. I would like to go further and state that there were only 2 borrow pits on that end of the job, which were at the very southerly end that, exhibited the coarse material at all. The representatives of the Alaska Road Commission, during our particular inspection, acknowledged the fact that they had seen fit to authorize the haul of additional materials to help out with the situation in which these 2 pits contained coarse materials. The rest of the pits, without any difficulty, would meet every specification insofar as topping material and I can see no reason why the subcontractor would have reason to make claim. (Tr., pp. 134–135.)

It is true that the contracting officer declared in his findings of May 3, 1955 (paragraph 19), that the subgrade constructed by the McLaughlin firm "was in even more difficult terrain than the rest of the project, being largely rock cuts and *having no better borrow sources*" (italics supplied). But the very fact that the appellant speaks so highly of the quality of the topping material available for this section of the subgrade hardly strengthens its case. As for the section of the subgrade constructed by the Edwards firm, Erickson testified that "their material was even worse on the average than the material at the upper end of the job," which was constructed entirely by the appellant's own forces, but then he went on to add to the confusion by conceding, as already mentioned, that they had "quite a few good pits" on this upper end of the job. Yet the Edwards firm itself did not file any claim, based on deficiencies of material, either with the appellant or with the Government despite the fact that supposedly it had the worst material, and the appellant is pressing this part of the claim entirely on its own

[13] However, the record does show that the subcontract with this firm was made "at or about the time" of the deletion (Tr., p. 95). Erickson testified that the Edwards firm was also employed to haul borrow material for stretches of the road to be graded and finished by the appellant.

motion, and without any written authorization to it to present the claim. When it is considered that by the appellant's own admissions there were no difficulties in securing adequate topping material for approximately one-third of the subgrade, and that good material was available in other parts of the subgrade; that the worst that can be said of the material for the rest of the subgrade is merely that its quality is disputed; and, finally, that the Government made a special effort to come to the assistance of the appellant by authorizing no less than $15,000 of overhaul—the appellant can hardly be said to have established very convincingly that it suffered from a lack of proper topping material, quite apart from the fact that it has not shown that it made a diligent effort to conserve such material.

In the light of the evolution of the appellant's claim, as shown by the correspondence, the Board cannot regard the alleged plan of the appellant to make use of select borrow to make good the deficiencies of the subgrade ascribed by it to the lack of proper topping material as anything but an afterthought to excuse the exceedingly rough manner in which the subgrade had been laid down prior to the deletion. Moreover, the plan to use select borrow may be described as an early afterthought compared to the intention announced later to supply the select borrow at no extra cost and without charges for overhaul which would have been necessarily involved. Apart from the implications of the claims correspondence the record shows that the alleged plan was never reduced to any evidentiary form which would carry conviction. It is not recorded in any construction program, or any other relevant form of writing; it was never communicated to the contracting officer in any other way; and the appellant failed to produce any of its supervisory personnel who had immediate charge of constructing the subgrade and who had ever heard of the existence of the plan. Under these circumstances, it is appropriate to recall a warning issued by the land's highest tribunal:

> One's testimony with regard to intention is, of course, to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations or inconsistent acts.[14]

On the evidence as a whole, the Board cannot give credence to the existence of the alleged plan.

However, it does not really matter whether the intention to use the select borrow for finishing purposes on the same terms as ordinary borrow be conceded, and this is so for two reasons. The first is that, consistent with the requirements of the specifications, the deficiencies of the subgrade could not be corrected while placing the select borrow

[14] See *District of Columbia* v. *Murphy*, 314 U.S. 441, 456 (1941).

surface course, and, therefore, it is immaterial whether the appellant could have used select borrow in finishing the subgrade. The relevant provisions of the specifications are rather numerous and diverse but they may be epitomized by saying that, since a subgrade is itself intended to be a complete stage of construction, and may or may not itself be accepted and used as a roadway without a further finishing course,[15] the subgrade itself must be laid down true to line, grade and cross section *before* the surface course is placed.[16]

The second reason for the immateriality of the appellant's intention is closely connected with the first. It is that to establish its right to additional compensation the appellant must show that its claimed generosity would actually have cost it less than what was expended by it in finishing the roadway with the ordinary borrow and excavation. The select borrow, which had to be manufactured by a screening plant, was, of course, far more expensive to produce than ordinary pit-run borrow, and this was recognized in the contract by providing a payment of $1.20 a cubic yard for the select borrow, and only 73 cents a cubic yard for unclassified excavation for borrow. As the subgrade was subject to acceptance in segments, moreover, frequent movements of the screening plant, or considerable overhaul which would not be paid for would necessarily be involved. There is no evidence in the

[15] The appellant places undue emphasis on the statement of the contracting officer at the hearing that "We don't build subgrades as highways. They are built and then rebuilt for further development" (Tr., p. 306). Indeed, in his findings the contracting officer stated: "The subgrade is one type of construction and many contracts are designed to stop at that point." Moreover, Kuhns did not testify, as the appellant contends, that "it was customary to notify a contractor in advance of bid if a subgrade was to be used as a traveled road." On the contrary, Kuhns testified simply that contracts in the area were let for subgrade intended to be used as roadways but that this was never mentioned in the specifications. Before this, Kuhns had also plainly stated that subgrades are used as roadways (Tr., p. 337).

[16] Section 24–1.1 provided for excavating and grading the roadway and disposing of all excavated material "in conformity with the lines, grades and dimensions as shown on the plans or as staked by the engineer." Section 29–3.1 provided: "When embankment is to be placed upon an existing road, the existing surface shall be scarified to such degree as will provide ample bond between old and new material." Section 41–1.1 required the subgrade to be constructed "in conformity with the lines, grades, and cross section shown on the plans," and included the provision: "Where the plans indicate that a base course or surface course is to be placed, the contractor shall comply with any requirements as to subgrade contained in other such contract items," and item 100–1.1 made it plain that the surface course of select borrow was to be constructed on "the prepared subgrade." Section 41–3.3 included the provision: "Until the subgrade has been checked and approved, no base course, surface course, or pavement shall be laid thereon." Article 7.11 included the provision: "When any substantial portion or *feature* of the project is *completed*, it may be designated as "Accepted for Traffic" *previous* to the completion of the whole project, if and as deemed expedient by the engineer," and article 4.4 of part III of the special provisions included the provision: "When a continuous section at one end of the project, ten miles or more in length, is completed in conformity with the plans and specifications, such section shall be accepted for traffic in accordance with Art. 7.11 of FP–41. Additional sections, completed satisfactorily, shall be accepted provided they are five miles or more in length and connect with a section previously accepted." In view of these provisions, there is hardly any basis for the appellant's contention that the acceptance of segments of the subgrade was not contemplated.

record from which it can be determined whether the appellant would have effected any savings by its alleged plan. The claim based thereon would, therefore, have to be regarded as speculative.

To recapitulate: even assuming an interpretation of the requirements of the specifications most favorable to the appellant, it has failed to prove that, although it made every effort to conserve suitable material for topping from both excavation and borrow, the Government failed to designate sources of borrow from which deficiencies of suitable borrow material could be made up. The actual basis of the appellant's complaints, both prior and subsequent to the deletion of the select borrow surface course, was that the borrow material contained too much oversized material that had to be windrowed but the obligation to do this was consistent with the requirements of the specifications. The appellant's specific demands for 6-inch minus material were not made until after the work had been completed, and was then, like the supposed plan to use select borrow material to finish off the subgrade, a mere afterthought, conceived in its grand strategy to formulate an allowable claim. It is obvious, however, that for the items of the deletion claim involving the finishing of the subgrade to be allowable, a relationship of cause and effect between the deletion of the select borrow surface course and the consequences attached to it by the appellant must be shown. It hardly needs to be demonstrated that there can be no causal relationship between the deletion and the alleged failure to supply suitable topping material prior to the deletion. There was equally no causal relationship between the deletion and the alleged failure to supply topping material after the deletion, for this represented merely a continuation of a pre-existing controversy which involved other grounds. The appellant can only succeed in establishing the causal relationship by showing that the deletion itself prevented the consummation of a legitimate plan to use the select borrow material for finishing the subgrade, or that it was otherwise subjected to requirements that would not have been imposed except for the deletion. Having failed to make either showing, the items of the appellant's deletion claim involving the finishing of the subgrade must be rejected.

Apart from the merits, however, the deletion claim must be rejected also because of the failure of the appellant to comply with the procedural requirements of the contract. In paragraph 6 of his findings of May 3, 1955, the contracting officer expressly invoked against the allowance of the deletion claim the appellant's failure to comply with the procedural requirements of article 5.1 of the standard specifications, which in effect required not only written notice of claims within the 10 days prescribed by article 3 of the contract but also

written protest against any adverse ruling rejecting a claim. In these circumstances, the fact that the contracting officer also commented on some aspects of the merits of the deletion claim did not constitute a waiver of the notice and protest requirements. The appellant's contention that the contracting officer had already previously waived them in his letter of June 30, 1954, to the appellant is clearly untenable. In this letter the deletion claim was not even specifically mentioned; in it the contracting officer merely invited the appellant in *general terms* to submit "a number of claims" which appeared to be advanced in its prior correspondence, and stated that they would be considered when presented "formally with complete supporting data." This was, of course, merely provisional, and there was nothing to prevent the contracting officer from invoking the procedural requirements when upon examination of the submitted data he found it expedient to do so. The Board has recognized that in reaching such decisions contracting officers are commonly influenced by the circumstances of a particular claim, and it is obvious why the contracting officer in the present case would desire to invoke the procedural requirements, for the deletion claim, based as it was on the alleged difficulties on finishing the subgrade due to alleged deficiencies of material in prior years, would present enormous, if not insuperable problems of calculation, which would be involved enough even if they had to be solved contemporaneously.[17]

The appellant also advances a number of contentions with respect to the amount which should be allowed in payment for the item of the deletion claim which consisted of preparatory work on plant, and which the Board has allowed. Since the appellant's motion for reconsideration was made, however, the appellant and the Government have agreed on the amount of such payment, and there is no need, therefore, to consider these contentions of the appellant.

Finally, the appellant attacks the Board's rejection of its claim, based on alleged additional costs attributed to the slight prolongation of the work into the spring of 1955. The Board has considered the arguments advanced in support of this claim, which consist in the main of a reiteration of those previously advanced, but finds them to be without merit. Furthermore, insofar as the claim is based upon an alleged delay in inspection, it is one which the Board lacks jurisdiction to entertain or settle.

[17] The statement made in footnote 4 of the Board's original decision to the effect that the contracting officer had waived the appellant's failure to give timely notice by considering the deletion claim on its merits was in error and is withdrawn. The statement was based only on the apparent acquiescence of Department counsel in a claim of waiver made by appellant's counsel at the hearing (Tr., p. 83).

## 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 motion for reconsideration is denied.

Theodore H. Haas, *Chairman.*
William Seagle, *Member.*

Mr. Slaughter, dissenting in part:

It is necessary for me to dissent from the portion of the Board's decision which rejects in their entirety the two items of the deletion claim that have to do with topping material for the subgrade.

As for the question of timeliness, it seems to me that there can be little real doubt but that any failure by appellant to comply with the notice or protest provisions of the contract was waived by the contracting officer in his decision of May 3, 1955. In paragraphs 20 and 21 of that decision the topping items of the claim were considered in some detail and rejected on their merits. The question of timeliness was discussed only in paragraph 6 of the decision, the terms of which are quoted in the margin.[1] What the contracting officer says in that paragraph is merely that the claim was filed after the 10-day period allowed by the contract had expired; he does not say that it is being rejected, or is going to be rejected, because it was filed late. Each and all of the recitals of paragraph 6 would fit a decision in which the contracting officer intended to waive the lateness of the claim just as well as they would fit a decision in which he intended to do the contrary. They state circumstances that, if correctly stated, would give the contracting officer an election either to waive or not to waive; but they reveal nothing as to what choice he is making as between these two alternatives. The inference of an intent to waive which ordinarily arises when the contracting officer considers a belated claim on its merits[2] is hardly so ephemeral that

[1] "6. Under date of May 17, 1954, the contractor addressed a letter to our District Engineer at Valdez, advising of its intention to request re-negotiation of the contract because of this deletion. (See Exhibit 3.) It will be noted that the contractor bases his contention on the provisions of FP–41, Article 4.3, sub-paragraph (c)2. However, in relying on FP–41, the contractor should have taken cognizance of all of its pertinent provisions. Article 5.1 is quoted in part as follows: 'Claims for adjustment (Article 3 or 4 of Form 23) and disputes (Article 15 of Form 23) must be made and submitted in writing by the contractor within the prescribed time limit after the date of issue of the order dealing therewith.' Since this is actually a change in plans within the meaning of Article 3 of Form 23, the time limit of 10 days, as provided by that Article, would seem to apply. The contractor's first formal notice of claim was dated 24 days after the telegraphic order was issued and the first actual evaluation of the claim was not made until February 27, 1955."

[2] *Mere,* IBCA–64 (March 10, 1959), and authorities there cited.

it can be overcome by language which merely mentions that the claim is belated without in any way purporting to reject it for that reason. Thus in *Arundel Corp.* v. *United States*, 96 Ct. Cl. 77, 111 (1942) it was said, with respect to this inference, that "of course, 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" (italics supplied). And in *Grier-Lowrance Constr. Co.* v. *United States*, 98 Ct. Cl. 434, 461–62 (1943) it was held that a statement concerning the untimeliness of a claim, made by the contracting officer in communications transmitting his views on the merits of the claim to the Comptroller General, was insufficient to rebut the inference not only because these communications were not made known to the contractor, but also because the contracting officer, in mentioning that the matters at issue had not been protested at the time they arose, "was, apparently, only citing this fact as evidence of lack of merit in the claim, and not *as a bar to consideration of the claim*" (italics supplied).

As for the merits of the topping material items, the real crux of the controversy may be summed up in the question: Has appellant borne the burden of proving that for at least some stretches of the road the contracting officer failed to designate borrow pits or other sources of embankment material (to be paid for at overhaul rates if overhaul was actually involved) that contained material which, in the words of the topping provision of the standard specifications, could "readily be broken up into pieces not over 6 inches in diameter" in sufficient quantities, when reasonably conserved by appellant, to build the top 12 inches of the embankments in such stretches? It is difficult indeed for me to see how a completely negative answer can be given to this question in the face of the concession by the contracting officer in his decision of May 3 that "some of the designated borrow pits contained coarse material that was difficult to handle in the preparation of the subgrade." In any event the evidence adduced at the hearing calls, in my opinion, for the giving of an affirmative answer to this question in regard, at least, to those stretches of the road where the top 12 inches of the embankments were constructed with material from the borrow pits at miles 77.3, 77.9, and 80.9. This being so, I would hold that appellant is entitled to an equitable adjustment in the contract price on account of the increase in cost resulting from the directions of the contracting officer, or his authorized representatives, that material from the borrow pits at those miles be used in building the top 12 inches of the embankments, as compared with what the cost

would have been if such material had been material that could readily be broken up into pieces not over 6 inches in diameter.

With respect to the other items of the deletion claim, and with respect to the borrow claim, I concur in the opinion and decision of the Board.

HERBERT J. SLAUGHTER, *Member.*

## ELMER F. GARRETT

A-27819 *Decided March 24, 1959*

**Oil and Gas Leases: Applications—Oil and Gas Leases: Extensions—Oil and Gas Leases: Relinquishments**

Where lessees timely filed applications for extension of their leases and, thereafter, before the end of the primary lease terms, relinquished the leases, as a consequence of which no right to an extension of the leases survived, the lands nonetheless remained unavailable for further leasing until after the notation on the tract books showing the final action taken on the extension applications.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Elmer F. Garrett has appealed to the Secretary of the Interior from a decision of July 16, 1958, by the Acting Director of the Bureau of Land Management affirming the rejection of four oil and gas lease offers filed by the appellant for lands in Carbon County, Wyoming (30 U.S.C., 1952 ed., Supp. V, sec. 226). The Acting Director's decision rejected the applications on the ground that the lands applied for were not available for leasing when the appellant's offers were filed on October 1, 1957.

Effective October 1, 1952, the lands here applied for were included in four noncompetitive oil and gas leases (Wyoming 017875, 017876, 017877, and 017878), for a primary term of 5 years. On September 20, 1957, applications for a 5-year extension of each of these leases were filed.[1] On September 30, 1957, the final day of the primary term of

[1] These applications were filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226), which provides in pertinent part that:

"* * * Upon the expiration of the initial five-year term of any noncompetitive lease * * * the record title holder thereof shall be entitled to a single extension of the lease * * *. 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. * * * Any noncompetitive lease extended under this paragraph shall be subject to the rules and regulations in force at the expiration of the initial five-year term 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 or an assignee whose assignment has been filed for approval, or an operator whose operating agreement has been filed for approval. * * *"

the leases, a relinquishment of each of the leases was filed.[2] The filing of the relinquishments operated to withdraw any rights based on the applications for extension of the leases since the relinquishment of all rights under a lease includes the relinquishment of the right to an extension of the lease which is derived solely from the existence of the lease (see footnote 1). A relinquishment of an oil and gas lease effectively terminates the lease from the first moment of the day on which it is filed (*Humble Oil & Refining Company*, 64 I.D. 5 (1957)). In the instant case, the relinquishments terminated the leases (and the right to any extension thereof) from the first moment of September 30, 1957. In the absence of the relinquishments, the primary term of the leases would have expired at midnight of September 30, 1957. The applications for extension of the leases and the relinquishments of the leases were not noted on the tract books.[3]

The question which must be decided on this appeal is whether the lands for which the appellant applied were available for oil and gas lease offers on October 1, 1957. If the lands were not then available for new filings, the appellant's applications were properly rejected (*Edgar C. Hornik*, A–27340 (September 19, 1956)). For the purpose of determining the availability of lands for the filing of lease offers, departmental regulations distinguish between lands in several different categories, and the time when land is subject to new filings varies depending upon the status of the land. The availability for the filing of new offers on lands in canceled, relinquished, or terminated leases is governed by 43 CFR, 1954 Rev., 192.43 (Supp.) which provides that:

> 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. If prior to such notation, the lease term would have expired in the absence of the cancellation or relinquishment, the lands shall upon such expiration of the lease term, become subject to the filing of lease offers even though the notation of the cancellation or relinquishment has not been made on the records. See § 192.120 (f) and (g) for

[2] Section 30(b) of the Mineral Leasing Act (30 U.S.C., 1952 ed., sec 187b) provides that a lessee may at any time make and file in the appropriate land office a written relinquishment of all rights under any oil or gas lease issued under the act or of any legal subdivision of the area included within any such lease, and the relinquishment is effective as of the date of its filing, subject to specified obligations of the lessee and his surety which are not here material.

[3] The appeal states that the serial register pages on these leases showed that the extension applications had been withdrawn before the expiration date of the leases.

Notations on the serial register are not compliance with a requirement that information be noted on the tract books (*Willie M. Cortes, Carl Dry*, A–27438 (June 10, 1957)).

the availability for new filings of lands in a lease for which an application for extension has or has not been timely filed * * *.

The availability of lands in a lease or an expired lease for which an application for extension has or has not been filed is governed by the provisions of 43 CFR, 1954 Rev., 192.120 (f) and (g) (Supp.) as follows:

(f) The timely filing of an application for extension shall have the effect of segregating the leased lands until the final action taken on the application is noted on the tract book, or, for acquired lands, on the official records relating thereto, of the appropriate land office. Prior to such notation, the lands are not available to the filing of offers to lease. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

(g) Upon the failure of the lessee or the other persons enumerated in paragraph (a) of this section to file an application for extension within the specified period, the lease will expire at the expiration of its primary term without notice to the lessee. The lands will thereupon become subject to new filings of offers to lease.

Neither of the two regulations quoted above (192.43 and 192.120) provides specifically for the availability of lands for further leasing where, as here, extension applications are filed and, thereafter, before the expiration of the lease terms, relinquishments of the leases are filed. However, 192.43 expressly refers to 192.120(f) with the purpose of excepting from its terms lands for which extension applications have been filed.

The Acting Director's decision held that the determination as to whether the lands were available for new applications when the appellant's applications were filed was governed by 192.120(f), that since timely applications for extensions of the leases here involved were filed, the lands included therein were not subject to new lease offers until the final action taken on the applications for extension was noted on the tract books, that as no such notations had been made on October 1, 1957, the appellant's applications were properly rejected.

The appellant contends that the lands for which he applied were available for leasing on October 1, 1957, because the leases and all rights thereunder, including any right to an extension, terminated on September 30, 1957, and that thereafter the availability of the lands was governed by 192.43 which provides that lands in relinquished leases are subject to the filing of new lease offers after the time when the lease terms would have expired in the absence of the relinquishments even though the relinquishments have not been noted on the tract books. As the primary terms of the leases here involved would have expired at midnight September 30, 1957, in the absence of the relinquishments, the appellant argues that the lands were available for leasing on October 1, 1957, when his applications were filed. In sup-

port of this position it is contended that an application for extension cannot segregate leased land until the lease term has expired because the lease itself segregates the land until that time. Consequently, the appellant concludes, since the applications for extension had been withdrawn at the expiration of the lease terms, there was nothing to continue the segregation of the lands beyond the expiration of the lease terms.

The difficulty with the appellant's position is that it requires the assumption that the withdrawal of the applications for extension made the situation the same as though no applications had ever been filed. But the moment the applications were filed, they had a certain effect, and under the express language of 192.120(f) this effect was to endure until notation of the final action taken on the applications was made. Withdrawal of the applications could not terminate that effect. The appellant, presumably, would not question that if the applications had been withdrawn some time after the expiration date of the leases, the lands would not become available for filing upon such withdrawal but only after notation had been made on the tract book of such withdrawal. It is apparent then that in the interval between withdrawal and notation the continued segregation of the land results not from the existence of an application for extension but from the fact that an application for extension had been filed at an earlier date.[4] If this is true, and the appellant has shown nothing to contradict it, whether an application for extension is withdrawn before or after the expiration date of the lease is immaterial so far as its segregative effect is concerned.

This Department has pointed out in many decisions that in interpreting regulations affecting the availability of land for noncompetitive leasing, the principal objective of the provisions, to assure that all persons wishing to apply for noncompetitive leases may have an equal chance to do so, will be given great weight, and that this consideration is particularly emphasized because priority of filing determines who is entitled to a lease. See, e.g., *Max L. Krueger, Vaughan B. Connelly*, 65 I.D. 185, 191 (1958); *E. A. Vaughey*, 63 I.D. 85 (1956); *M. A. Machris, Melvin A. Brown*, 63 I.D. 161 (1956); *B. E. Van Arsdale*, 62 I.D. 475, 478 (1955).

In the instant case, the relevant regulations (192.120 (f) and (g) and the reference thereto in 192.43) indicated that the lands here involved were available for the filing of new lease offers upon the expiration of the primary terms of the prior leases only if applications

[4] 192.120(f) plainly states that the timely *filing* of an application for extension shall have a segregative effect until notation is made of the final action on the application.

for extension had not been filed or, if such applications had been filed, only if final action thereon had been noted on the tract books. The appellant presumably had constructive notice of these provisions. Others who may have wished to apply for this land may not have done so in reliance upon the provisions of 192.120(f) that the land was not subject to new filings until final action on the extension applications was noted on the tract books. In the circumstances, the appellant's contention to the effect that on October 1, 1957, when his offers were filed, the tract books showed that the lands were available for further leasing is not convincing in view of the provision in 192.120(f) that lands for which applications for extension are filed are not available to the filing of lease offers before the notation in the tract books of the final action taken on such applications. As final action on the extension applications was not noted on the tract books on October 1, 1957, the lands were not subject to leasing at that time and the offers were required to be rejected in accordance with 192.120(f).

It is true that as 192.120(f) expressly requires that the tract books be noted to show only the final action taken on an extension application and does not require the filing of the application to be noted,[5] applicants for lands in a lease which are subject to extension may be forced to inquire of Bureau employees as to whether an extension application has been filed in order to discover whether such land is available for new offers. It may be desirable, as the appellant urges, that the Bureau require that the filing of applications for extension be noted on the tract books in addition to the requirement that final action on such applications be so noted. If the filing of such applications were uniformly noted on the tract books, the practice would seemingly make easier an applicant's task of determining correctly whether lands are available for new filings. However, the fact that the regulatory provisions and practice regarding notations now in effect make difficult the task of determining correctly whether lands are available for new filings is not a valid reason for holding that the lands here involved were available for filing on October 1, 1957.

For the reasons discussed herein, the decision rejecting the appellant's lease offers in accordance with 192.120(f) was proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental

[5] The Bureau of Land Management Manual (Vol. VI, ch. 2.1.29A(4)) also requires notation on the tract books only of the final action taken on the application. According to informal information from the Bureau, the filing of extension applications is usually noted on the serial sheets and not on the tract books although at least one land office requires that the filing of an application for extension be noted on the tract books (see memorandum of February 1, 1956, from the Acting Manager, Eastern States Office, to the status and control units).

Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEAL OF COX AND HADDOX

**IBCA-155** *Decided March 26, 1959*

**Contracts: Delays of Contractor—Contracts: Unforeseeable Causes—Contracts: Specifications**

Bridge construction contractors, who were required to paint the steel work of the bridges constructed by them and who were delayed in the completion of the work due to their inability to identify the proper types of paint required by the specifications, are not entitled to an extension of time for performance when it appears that the paint types were sufficiently identifiable by reference to specifications of the American Association of State Highway Officials.

**Contracts: Specifications—Contracts: Changes and Extras—Contracts: Additional Compensation—Contracts: Delays of Contractor**

Bridge construction contractors who in pouring concrete for the decks of two bridges constructed by them were required to do so in a particular sequence or manner, which necessitated the installation of construction joints not contemplated by the specifications, were directed to perform extra work, and hence are entitled to additional compensation and extensions of time for the performance of the work.

**Contracts: Specifications—Contracts: Changes and Extras—Contracts: Additional Compensation**

Bridge construction contractors, who were instructed to cut and recess a few metal stirrups used to hold the reinforcing steel in place while the concrete for the bridges was being poured, were not directed to perform extra work, since the work was so inconsequential that it did not materially affect the whole operation of getting the concrete true, even and free of projections, as required by the specifications.

**Contracts: Appeals—Contracts: Additional Compensation—Contracts: Changes and Extras**

When it is apparent from the whole record that in taking their appeal the contractors are not only requesting extensions of time but also additional compensation for extra work, and that the contracting officer intended to deny such additional compensation, the Board will direct the contracting officer to determine the amount of such additional compensation, notwithstanding the defects of the formal claims of the contractors.

**Contracts: Notices—Contracts: Contracting Officer**

A contracting officer is entitled to have contractors give him reasonable notice of readiness of the work for final inspection.

**BOARD OF CONTRACT APPEALS**

Cox and Haddox, joint venturers, of Yuma, Arizona, have filed a timely appeal from findings of fact and decision by the contracting officer dated February 10, 1958, denying their claims for extensions of time and additional compensation under Contract No. 14–20–603–1556 with the Bureau of Indian Affairs.

The contract, which was dated July 2, 1956, was on U.S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953). It also incorporated the provisions of FP–41, "Specifications for Construction of Roads and Bridges in National Forests and National Parks, 1941" (hereinafter referred to as the standard specifications), except as modified by special provisions of the specifications.

The contract provided for the construction of the Ganado Wash Bridge at Ganado, Arizona, and for the widening and improvement of the Fish Wash Bridge, approximately 6 miles east of Ganado, Arizona.

Under the terms of the contract, work was to commence within 10 calendar days of receipt of notice to proceed and was to be completed within 365 calendar days thereof. Notice to proceed was received by the appellant on July 20, 1956. As under the terms of article 8.6 of the standard specifications the contract time was to begin to run on the calendar day immediately following the date of receipt of notice to proceed, the contract completion time expired on July 20, 1957. However, by Change Order No. 1, dated January 10, 1957, as amended May 13, 1957, the contract completion time was extended by 2 days, which made the date of completion of all work under the contract July 22, 1957. The appellant did not actually commence work on the Ganado Wash Bridge until December 11, 1956, and on the Fish Wash Bridge until January 11, 1957. The work was, however, completed and accepted as of August 14, 1957. For the 23 days' delay in the completion of the work, the appellant was assessed liquidated damages at the rate of $50 per day [1] or in the amount of $1,150.

On August 16, 1957, which was 2 days after the completion of the work, the contractor wrote a letter to the contracting officer, containing four requests for extensions of time, totaling 21 days. Although the 10-day notice requirement of clause 5 of the contract had not been complied with, they were considered on their merits by the contracting officer, and hence the failure to give such notice was waived. The requests will also be considered by the Board on their merits.

[1] This was in accordance with the provisions of article 8.7 of the standard specifications as modified by the special provisions under which the amount of the liquidated damages depended on the original contract price, which was $115,609.80.

The rights of the contractors to extensions of time, or to additional compensation depend in this case either on the provision of clause 3 of the General Provisions of the contract under which if a change is made in the requirements of the contract causing an increase in the amount due or in the time required for performance an equitable adjustment may be made which would increase the amount due or the period of time allowed for performance, or on the provision of clause 5(c) of the General Provisions under which delays are excusable if "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor."

*Claim 1: Delay in paint delivery*

The last paragraph of paragraph 301–3.1 of addendum No. 5, dated June 12, 1956, provides as follows:

> After construction of piers and abutments have been completed, exposed areas of steel pipe piles above the ground line and above the water line shall be cleaned and painted with one coat of red lead and linseed oil and two coats of aluminum paint as provided in FP–41.

The types of paint were prescribed by section 220–3.3 of the standard specifications as altered by the special provisions, which read as follows:

> Painting shall meet the requirements of AASHO[2] Standard Specifications for Highway Bridges (1953), Division II Section 14 except subsections 2.14.10 (c) and (d).

The appellants request an extension of time of 13 calendar days due to delay in securing delivery of the proper types of paint to meet the requirements of the specifications. In support of their request the appellants apparently filed with the contracting officer a letter addressed to them under date of August 23, 1957, by their paint supplier, W. P. Fuller & Co., which indicates that the paint was not actually ordered until July 6, 1957, and was not delivered to the appellants until July 29, 1957, although the order called for delivery on July 16, 1957, and which attributes the delay in supplying the paint to the fact that the supplier "could not recognize or find any one who could help us in finding Specification AASHO–M 72–51 Type 4 Red Lead Paint and AASHO–M 69–54 Aluminum Paint." The letter also indicates that this difficulty was solved by July 10 by contacting an inspector for the Bureau of Public Roads who in turn suggested that the paint supplier contact the Arizona Highway Department in order to obtain copies of the two specifications.

[2] These initials stand for American Association of State Highway officials.

The contracting officer denied any extension of time to compensate for the alleged delay in securing the proper types of paint on the ground that, although the work on the Fish Wash Bridge, which "had the greater area of the two bridges to be painted," was ready to be painted on May 25, 1957, the appellants' order called for delivery of the paint on July 16, which was only 6 days prior to the contract completion date. He concluded from this that a finding that the delay was due to unforeseeable causes beyond the control and without the fault or negligence of the contractor or supplier would not be justified.

In their objections to the findings of fact the appellants contend that the provisions of FP–41, the standard specifications, disclosed "no specification to the contractor's knowledge which provides for a paint type," and that the delay resulted from efforts to overcome this difficulty, which were initiated in "the early part of May 1957." These efforts, it is alleged, included contacting Indian Bureau personnel, various paint companies and the office of the Bureau of Public Roads, which finally provided the necessary specifications *before* the order was placed with W. P. Fuller & Company. It is apparent that this allegation is wholly inconsistent with the statements in the Fuller Company letter, which attributes the delay in filling the order to inability to identify the AASHO specifications. This serious inconsistency between the letter and the statements in the objections to the findings of fact must lead the Board to decline to accept also the allegation that the efforts to obtain the paint were launched early in May, even though the statement of objections is verified by affidavit of one of the partners. In any event, the request for the extension of time must be denied simply on the ground that the appellants overlooked the alteration of FP–41 by the special provision, which further identified the types of paint. There is nothing in the record which would justify any conclusion that the reference to the AASHO specifications in the special provision was not sufficiently clear and definite to enable the paints to be identified. It was the failure of the appellants to comprehend the specification which was the source of their difficulties.

*Claim 2: Fish Wash Bridge*

The appellants elected to pour first the concrete for the east one-third of the deck of the Fish Wash Bridge, and apparently planned to pour the center and west two-thirds of the bridge deck in a continuous operation. However, under date of May 9, 1957, they were instructed by letter that the west one-third of the bridge deck would have to be poured prior to pouring the center section of the deck, and that this would necessitate a keyed construction joint. The appellants

were also instructed that since a mixer truck would not be allowed on the bridge deck for a period of 21 days after being poured, the concrete for the center portion of the deck would have to be buggied over the east portion of the deck, which had been placed first. Under date of May 21, 1957, the appellants thereupon addressed a letter to the Bureau, claiming that the carrying out of the instructions would entail extra equipment, buggies, material and labor that "will amount to over $400.00 (estimate)" and subsequently in their letter of August 16, 1957, also requested an extension of time of 2 days.

The contracting officer denied the requested extension of time on the ground that proper pouring sequence would have required that the west one-third of the bridge deck be placed first, the east one-third second, and the center one-third last, and that good engineering practice had required the instructions which had been given. He also pointed out that the appellants, having failed to file a construction program, as required by article 8.2 of the standard specifications, which would have shown the sequence which they proposed to follow in pouring the bridge deck, and enable the contracting officer to approve or disapprove their plan, any additional work done by them must be regarded as their own responsibility. The appellants contend that the instructions given in connection with pouring the bridge deck amounted to a change in the specifications which should have been accomplished by the issuance of a change order.

The plans and specifications for the Fish Wash Bridge did not indicate that there were to be construction joints in the deck. Section 206–3.8 of the standard specifications provided as follows with respect to construction joints: "Construction joints shall be located where shown on the plans or *permitted* by the engineer." (Italics supplied.) This wording did not grant the engineer authority to *direct* the contractor to place construction joints in the bridge deck in case the contractor desired to pour the deck or certain portions thereof in a continuous operation as in the present case, but merely gave the engineer the authority to designate the location of construction joints in case the contractor wished to use them.

On the other hand, the Board finds nothing in the plans and specifications to indicate that the bridge deck must be poured monolithically or in one continuous operation as counsel for the appellants contends. Section 200–3.6 of the standard specifications cited in support of the above contention was not applicable in the present case since this section concerned only concrete girder and slab bridges, a type of structure not involved in the present contract. Therefore the plans and specifications must be interpreted as permitting the contractor the option of

placing the concrete deck or any portion thereof of the Fish Wash Bridge either by a continuous pouring operation, or in segments separated by construction joints, provided the location of such joints were satisfactory to the Government's engineer.

Since the plans and specifications did not require the placement of the Fish Wash Bridge deck in segments in a certain sequence, the Board is constrained to conclude that the Government's letter of May 9, 1957, directing the contractor to pour the west one-third of the deck prior to placement of the center portion, thereby requiring a construction joint, constituted a change in the plans and was in effect an order directing him to perform extra work, such extra work being the construction of a bulkhead and the forming of the construction joint between these two portions of the bridge deck. In addition to the labor and materials required to construct this construction joint, placement of the deck in the above sequence caused the contractor other labor costs and expenses due to his having to pour the center one-third of the deck by the use of rented buggies, which method and equipment he would not have had to employ had he been free to place these two-thirds of the deck in a continuous operation as he had planned to do.

The Board believes that having submitted a bid and received an award based on plans and specifications which did not require any particular sequence for placement of portions of the deck with the resulting construction joints, the contractor was entitled to proceed in accordance with such plans and specifications and that any directive by the Government that portions of the deck be poured in a certain sequence, thereby necessitating a construction joint, was an order for extra work, regardless of whether such directive was issued at the time the pouring was about to take place or soon after award of the contract when the contractor should have but did not file a construction program. Therefore, the fact that the contractor did not file a construction program as required does not affect the merits of his claim. Accordingly, the decision of the contracting officer in denying Claim No. 2 is reversed.

*Claim 3: Ganado Wash Bridge*

This claim, which involves an extension of time of 4 days, concerns the pouring of the concrete slab and pier caps for the 110-foot portion of the deck west of the expansion joint shown on the plans. The plans and specifications as in the case of the Fish Wash Bridge did not show or require construction joints, neither were such joints prohibited, it being left to the discretion of the contractor whether to place the entire bridge deck or any portion thereof by a continuous operation

or by two or more separate pours which would have necessitated a construction joint between the portions placed at different times.

The contractor's letter of July 1, 1957, asked permission to work in excess of 10 hours per day for the 2 days during which he expected to pour the deck slab. By letter of July 2, 1957, the contracting officer denied the above request due to the volume of concrete to be poured, the rate of curing caused by the intense midday heat, and the limitations of men and equipment and directed the contractor to pour at one time not more than one-half of the deck up to the expansion joint, thus requiring a bulkhead and construction joint along the longitudinal centerline of the western portion of the bridge, a distance of 110 feet. This letter of July 2, 1957, also stated that "No transverse joints will be permitted."

Since the intense midday heat in the vicinity of the work was a condition the contractor could foresee and the limitation on his men and equipment a condition within his control, the Board must conclude that the contractor could and should have foreseen that in such circumstances good engineering practice would have required him to divide in some manner the west 110 feet of the deck into two pours with the resultant construction joint, and to the extent that the contracting officer required such two pours, he was not exceeding his prerogatives.

The second sentence of section 206–3.8 of the standard specifications provided, however, as follows: "Construction joints shall be perpendicular to the principal lines of stress and in general shall be located at the points of minimum shear." In a concrete slab bridge, such as the Ganado Wash Bridge, the principal lines of stress are parallel to the length of the bridge. Consequently any construction joint in such a structure must, according to the above specification provision, be placed in a crosswise or transverse direction, which would make it parallel to the expansion joint shown on the plans near Bent No. 4. The points of minimum shear in this type of structure are near the middle of the various spans. Thus the above provision when applied to the Ganado Wash Bridge must be interpreted to mean that any construction joint must be a transverse joint located near the middle of a span. A joint at such a location would have been 30 feet in length and very simple to construct compared to a longitudinal joint which in addition to being 110 feet in length was more difficult to construct due to the extra forming for the pier caps and the adjacent haunches on the underside of the slab.

The Board must conclude that the contracting officer, in directing the contractor in his letter of July 2, 1957, to make a construction

joint longitudinally along the centerline of the deck and prohibiting transverse joints, introduced a change in the plans, such change being the elimination of transverse joints as required by the above specifications provision and the substitution therefor of a longitudinal joint. This change required the contractor to furnish the extra material and labor required to construct the 110-foot longitudinal joint over the material and labor which would have been required to construct the more simple 30-foot transverse joint required by the specifications. Accordingly, the contracting officer's decision in rejecting Claim No. 3 is reversed.

*Claim 4: Metal stirrups claim*

The appellants request an extension of time of 2 days because they were required by an inspector to cut and recess metal stirrups used to hold the reinforcing steel in place while the concrete was being poured. Section 206–3.12 of the standard specifications included the provision:

> As soon as the forms are removed, all projecting wire or metal devices which have been used for holding the forms in place, and which pass through the body of the concrete, shall be removed or cut back at least one-fourth inch beneath the surface of the concrete.

In explanation of their request, in a letter to the contracting officer dated September 27, 1957, the appellants stated that they considered this provision inapplicable because none of the stirrups projected through the body of the concrete, and they were not used to hold the forms in place, although they conceded that they penetrated soft spots in the forms by as much as one-half an inch.

In rejecting the requested extension of time, the contracting officer found that the cutting back of the stirrups was a minor consideration, since there were only two or three stirrups which required such attention, and that the "major work involved was the cutting back of nails which were used to hold the forms in place," such work being also required by section 206–3.13(c), which provided that the concrete was to be true, even, and free of projections. The Board construes this finding to mean that, even assuming that section 206–3.12 of the standard specifications to be inapplicable, the cutting back of the few metal stirrups was so inconsequential that it did not materially affect the whole operation of getting the concrete true, even, and free of projections. Consequently, this request, too, must be denied.

In their objections to the findings of fact, the appellants also contend that the work was actually completed on August 11 rather than August 14, 1957, and that they made a request for final inspection on

August 12, which was the following Monday, but that the inspecting officer, who was in Phoenix, Arizona, was unable to arrive on the job site until August 14. As this contention was not submitted to the contracting officer prior to the taking of the appeal, the Board cannot give it consideration. It is apparent, moreover, that the appellants could hardly expect that a request for inspection made on a Sunday would be honored the following day. The Government was clearly entitled to reasonable notice of readiness for final inspection.

A rather confusing aspect of the present record with respect to Claims 2, 3, and 4 is whether the appellants requested not only extensions of time but also additional compensation. Only in case of Claim 2 did the appellants, prior to the taking of the appeal, assign an even approximate amount of expense to the allegedly additional work. In their objections to the findings they seem to claim additional compensation, however, in connection with Claims 2, 3 and 4, although in unspecified amounts. The contracting officer seems to have considered the claims only under clause 5(c) of the General Provisions of the contract, except that in connection with Claim 2, he remarked that "time extension and monetary compensation are to us one and the same." This is, indeed, the case normally, since a contractor who has had to spend additional time on the performance of work will also make claim for additional compensation. The Board will assume that the appellants are doing so in the present instance, and that it was the intention of the contracting officer also to deny any additional compensation. Under such circumstances, no purpose would be served by insisting that the appellants file formal claims for the contracting officer to consider. He is directed, therefore, to consider what extensions of time and additional compensation the appellants are entitled to in the case of Claims 2 and 3, as equitable adjustments, and to enter appropriate change orders in accordance with his findings. If dissatisfied with such findings the appellants may file a further appeal with the Board pursuant to the disputes clause of the contract.

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F.R. 9428), the findings of fact and decision of the contracting officer, dated February 10, 1958, are affirmed in part and reversed in part, and he is directed to proceed as specified herein.

Theodore H. Haas, *Chairman.*
William Seagle, *Member.*
K. K. Young, *Alternate Member.*

## RICHFIELD OIL COMPANY ET AL.

A-27550
A-27601
A-27619

*Decided March 30, 1959*

**Oil and Gas Leases: Consent of Agency**

Oil and gas lease applications are properly rejected where the lands applied for are in a national forest administered by the Department of Agriculture and that agency objects to the issuance of leases.

### APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Richfield Oil Company, Eric A. S. Borklund, and Charles A. Beguhl have appealed to the Secretary of the Interior from decisions of the Director and Acting Director, Bureau of Land Management, affirming the rejection of their various noncompetitive oil and gas offers.[1]

The lands applied for form a compact block which lies within the Shoshone National Forest and partly within the North Absaroka Wilderness Area, and along the east approach to Yellowstone National Park. The lands are being administered by the Forest Service, U.S. Department of Agriculture. The Forest Service has objected to issuance of oil and gas leases in the area on the ground that oil and gas operations would interfere with the uses for which the lands are being administered. On the basis of these objections the Director and Acting Director of the Bureau rejected the lease offers.

The leasing of public lands for oil and gas development purposes is discretionary with the Department. *United States ex rel. Roughton* v. *Ickes*, 101 F. 2d 248 (C.C.D.C. 1938); *Dunn* v. *Ickes*, 115 F. 2d 36 (C.C.D.C. 1940), *cert. denied* 311 U.S. 698; *United States ex rel. Jordan* v. *Ickes*, 143 F. 2d 152 (C.C.D.C. 1944), *cert. denied* 323 U.S. 759. The Department has long held to the policy that if the leasing of land for oil and gas purposes would interfere with the use for which the land is reserved, it is proper to reject lease applications for such land. *George E. Kohler, Sr., et al.*, A-26412 (January 9, 1953); *Gerald W. Anderson*, A-26297 (February 13, 1952); *Vilas P. Sheldon*, A-25927 (January 16, 1951). Thus, where the lands applied for are being administered by another agency and that agency objects to issuance of oil and gas leases on the ground that issuance of such leases would interfere with the purposes for which the lands are being administered, the Department has refused to issue such leases. *John C. de Armas, Jr.*, A-27105 (May 16, 1955); *Jack Weldon Wood*, A-27240 (December 23, 1955); *Clark H. Boyles*, A-27538 (January 23, 1958). This has

[1] The serial numbers of the appellants' offers are contained in the appendix on p. 107. The Richfield Oil Company holds options on all the offers involved.

been true with respect to lands administered by the Forest Service. *George E. Kohler, Sr., et al., supra; Harry O. Morris*, A–26390 (January 9, 1953).

On the basis of the information in the record, most recently a letter dated July 11, 1958, from Assistant Secretary Peterson of the Department of Agriculture to this Department, it appears that the lands applied for are located in an area of important national forest recreation and wildlife resources. The area is very important from a wildlife management standpoint in that it is the winter range for a large elk herd. The Department of Agriculture is of the opinion that oil and gas development, no matter how carefully done, could not be undertaken without seriously impairing the outstanding recreation and scenic values of the area. Moreover, it does not appear that the national need for additional oil and gas is of such a pressing nature as to justify exploration and development in this area at this time.

The Supreme Court of the United States in *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.*, 338 U.S. 621, 627–628 (1950), said:

> The Mineral Lands Leasing Acts confer broad powers on the Secretary as leasing agent for the Government. We find nothing that expressly prevents him from taking into consideration whether a public interest will be served or injured by opening a particular mine. But we find no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.

After careful consideration of the record it is my conclusion that the public interest will best be served by rejecting the oil and gas lease offers involved.

Therefore, the decisions of the Director and Acting Director, Bureau of Land Management, are affirmed.

ROGER ERNST,
*Assistant Secretary.*

APPENDIX

| *Appeal No.* | *Name of Applicant* | *Serial No. of Application* | |
|---|---|---|---|
| A–27550 | Richfield Oil Company | Wyoming | 026016 |
| | | Wyoming | 026017 |
| | | Wyoming | 026018 |
| | | Wyoming | 026019 |
| | | Wyoming | 026020 |
| | Eric A. S. Borklund | Wyoming | 027185 |
| A–27601 | Charles A. Beguhl | Wyoming | 039175 |
| | | Wyoming | 039176 |
| | | Wyoming | 039177 |
| A–27619 | Charles A. Beguhl | Wyoming | 040072 |
| | | Wyoming | 040086 |

## OLLIE W. BROOKS

A-27856 *Decided March 30, 1959*

**Rules of Practice: Appeals: Extensions of Time**

The rules of practice do not authorize officials of the Bureau of Land Management to grant extensions of time for the filing of notices of appeal to the Secretary of the Interior or paying the filing fee.

**Rules of Practice: Appeals: Timely Filing**

An appeal to the Secretary of the Interior will be dismissed if the notice of appeal is not filed or the filing fee paid within the period prescribed by the Department's rules of practice.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ollie W. Brooks has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated July 21, 1958, which dismissed his appeal from a decision of the manager of the land office at Reno, Nevada, dated March 3, 1958, rejecting his desert land application. The Acting Director's dismissal was based upon the appellant's failure to file his statement of reasons for the appeal within the period allowed for filing by departmental regulation, 43 CFR 221.3, as amended (23 F.R. 1930).

The Director's decision was received by Brooks on July 28, 1958. The last paragraph of the decision told Brooks:

> You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365.
> * * *

On August 9, 1958, Brooks wrote the Director's office as follows:

> Please refer to your recent communication which appears to be undated. You state "You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365." You are advised that there was no Form 4-1365 enclosed. Expecting it to follow I have waited until today and you are advised that it was, and is my intention to appeal to the Secretary of the Interior.
>
> Will you, on receipt of this communication, send Form 4-1365 as you mentioned in your communication.
>
> This is to advise you further that if a time limit is set forth in the foregoing regulation, it would appear that that time limit should start at the time that you reply to this letter and not at the undetermined time of your decision.

This letter was received in the Director's office on August 12, 1958.

On August 20, 1958, the Director answered, transmitting the form with this statement:

> Since, through inadvertence, we failed to enclose Form 4-1365 containing the regulations for filing an appeal to the Secretary, you are allowed 30 days from receipt of this letter within which to file a notice of appeal.

Brooks received this letter on August 26, 1958. On the same day, he wrote the Director's office stating that the form was not enclosed. This letter was received in the Director's office on August 28, 1958. On September 2, 1958, the Director wrote:

> The printed sheet attached to that letter is Form 4–1365. You will note the form number in the upper left-hand corner. Since you received this form with the letter of August 20, the 30 days allowed for filing a notice of appeal commenced the date you received that letter.

On September 11, 1958, Brooks filed in the Director's office a document dated September 10, 1958, labelled "Statement of Reasons for Appeal under Application Nevada 046698." The document referred to the manager's rejection of March 3, 1958, and set forth three arguments directed to the merits of the manager's decision. Nothing was said as to the correctness of the Acting Director's decision in dismissing the appeal to the Director on procedural grounds.

On September 16, 1958, the Director wrote to Brooks, referring to Brooks' communication of September 10 and stating:

> If you wish to have your letter of September 10 considered as an appeal, you are required to pay a $5.00 filing fee. This should be filed in this office no later than September 25. * * *

Brooks' letter dated September 19, 1958, enclosing the filing fee, was received in the Director's office on September 22, 1958. The last paragraph of this letter stated:

> Please attach this letter to My previous letter of Sept. 10th and call it My appeal if it will suffice.

On September 25, 1958, the Acting Director transmitted the case record to the Secretary as an appeal from the decision of July 21, 1958.

The Department's rules of practice provide:

> § 221.32 *Appeal; how taken, filing fee, mandatory time limit.* (a) A person who wishes to appeal to the Secretary must file in the office of the Director * * * a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the Director's office within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.
>
> (b) * * * a filing fee of $5 must be paid for each separate application * * * on which the appellant is seeking favorable action. * * * The filing fee should accompany the notice of appeal but in any event must be received in the Director's office within the time allowed for filing the notice of appeal.
>
> (c) No extension of time will be granted for filing the notice of appeal or paying the filing fee. If a notice of appeal is filed or the filing fee is paid after the grace period provided in § 221.92, the notice of appeal will not be considered

and the case will be closed by the Director. If the notice of appeal is filed or the filing fee is paid during the grace period provided in § 221.92 and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the case will be closed by the Secretary. (43 CFR 221.32, as amended 23 F.R. 1930.)

§ 221.92 * * * (b) Whenever a document is required under this part to be filed within a certain time and it is not received in the proper office, as provided in paragraph (a) of this section, during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. * * * (43 CFR 221.92, as amended, 23 F.R. 1930.)

As Brooks received the Acting Director's decision on July 28, 1958, he had 30 days after that date for filing his appeal, but, since the 30th day, August 27, 1958, was Sunday, he had until the close of business on August 28, 1958, to do so. 43 CFR, 1954 Rev., 221.96 (Supp.).

Brooks' letter of August 9, 1958, notifying the Bureau of Land Management that "it was, and is my intention to appeal to the Secretary of the Interior" was filed on August 12, 1958, within the period allowed for filing an appeal, but although it indicated that Brooks intended to appeal, it seems clear that the letter itself was not considered to be an appeal. It is apparent that Brooks did not regard this letter as an appeal inasmuch as he stated in the letter that if a time limit was set forth in form 4–1365 he thought it should not apply to him until he had received the form. The document received on September 11 was the first that clearly constituted an appeal, stating that "This appeal presents certain reasons for the appeal. But this document was filed long past the deadline of August 28, and the record shows clearly that it cannot be saved from delinquency by the provisions of the grace rule, 43 CFR 221.92(b), *supra*, since it was definitely transmitted after the end of the period for filing an appeal and it was filed considerably later than 10 days after the end of the period for filing an appeal.

Even if the statement in the letter of August 9 disclosing an intent to appeal could be regarded as a notice of appeal, the problem of the filing fee remains. The applicable regulation, 43 CFR 221.32(b), *supra*, requires that it be filed in the Director's office within the time allowed for filing the notice of appeal. Brooks did not present the filing fee until September 22, 1958.

The Director's letter of August 20 specifically allowed Brooks 30 days from receipt of that letter, which took place on August 26, to perfect his appeal. Thus Brooks may be presumed to have supposed

that he actually had until the close of business in the Bureau of Land Management on September 25 to file the necessary documents and to pay the filing fee, even though the regulations set out in the form furnished to him state explicitly that notice of appeal must be filed and the filing fee paid in the Director's office within 30 days after service of the decision appealed from. This raises the question whether the Director had authority to extend the period prescribed in the departmental rules approved by the Secretary of the Interior for the filing of an appeal from a decision of the Director of the Bureau of Land Management.

43 CFR 221.32(c), quoted above, states flatly and without equivocation that "No extension of time will be granted for filing the notice of appeal or paying the filing fee." This sentence was italicized for emphasis in form 4–1365 which was sent to the appellant. The language on its face denies authority to the Director to extend the time for filing a notice of appeal or paying the filing fee.[1]

The history of this provision demonstrates beyond doubt that no extensions of time were intended to be authorized. Prior to the complete revision of the rules of practice effective as of May 1, 1956, the provisions of the former rules pertaining to appeals to the Secretary were amended on May 16, 1952, effective as of June 23, 1952 (43 CFR, 1953 Supp., 221.75, 221.76). Sec. 221.75(a) made it mandatory that an appeal to the Secretary be filed within 30 days from service upon the applicant of the Director's decision. The regulation said nothing about extensions of time. But in decision after decision, the Department held without exception that no officer of the Bureau of Land Management had authority to grant extensions of time for filing a notice of appeal.[2]

When the current complete revision of the rules of practice was adopted in 1956, it specifically incorporated the previous rulings of the Department (43 CFR 221.32, 21 F.R. 1862). Before the revision was adopted, it was published as proposed rules in the Federal Register on March 3, 1955 (20 F.R. 1313). Among suggestions received from the public on the proposed rules was one that provision be made

[1] 43 CFR, 1954 Rev., 221.97(a) (Supp.), also states: "*with the exception of the time fixed for filing a notice of appeal,* the time for filing or serving any document in connection with an appeal may be extended by the officer to whom the appeal is taken." (Italics added.)

[2] *C. B. Eaton et al.,* A–26762 (August 11, 1953); *Willis H. Morris,* A–26783 (November 12, 1953); *Fischer Lumber Company,* A–26963 (March 8, 1954); *Alma M. Argyle, Jr.,* A–26999 (May 26, 1954); *Mabel Hale et al.,* A–26860 (June 23, 1954); *State of California,* A–26899 (July 21, 1954); *R. L. Grady,* A–26903 (August 31, 1954); *Ellis Kelly,* A–26943 (September 15, 1954).

for granting extensions of time for filing notices of appeal. With letters sent by the Department to a number of persons located in different parts of the country a summary of reasons for not adopting suggestions submitted by them for changes in the proposed rules of practice was attached. With respect to the suggestion for extensions of time for filing notice of appeal to the Secretary, the Department said:

> We see no reason for making provision for granting an extension of time to file an appeal. The requirements for a notice of appeal are extremely simple and can easily be complied with during the 30-day period.

Later, the rule was relaxed by the adoption on March 22, 1958, of the grace rule quoted above (43 CFR 221.92). Thus a person who wishes to appeal from a decision of the Director of the Bureau of Land Management may appeal by notifying the Director in writing that he wishes to appeal from a designated decision and (*1*) filing such written notice and paying the filing fee, in the Director's office, within 30 days after receipt of the decision appealed from or (*2*) mailing such notice and filing fee within the 30 days allowed so that they are received in the Director's office within business hours within 10 days following the 30 days allowed for filing an appeal.

There has been no other relaxation of the rule and the Director has not been given authority to waive any requirement of the rule.

In the absence of any authorization for the extension of time which the Director's office purported to grant, the filing fee was paid and the notice of appeal was filed too late. Accordingly, the appeal must be dismissed. (43 CFR 221.32(c), *supra.*)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the appeal is dismissed.

EDMUND T. FRITZ,
*Acting Solicitor.*

U. S. GOVERNMENT PRINTING OFFICE: 1959

## WILLIAM S. YOUNG ET AL.

A-27894 *Decided March 13, 1959**

**Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses: Federal Range Code—Rules of Practice: Appeals: Dismissal**

As the Federal Range Code for Grazing Districts requires that notice of intention to appeal to the Director of the Bureau of Land Management from a decision of a hearing examiner must be filed within 10 days after the receipt of the hearing examiner's decision by the appellant, it is proper for the Director to dismiss an appeal to him where it is shown that the notice of intention to appeal was filed after the 10-day period had elapsed.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William S. Young and others, through their attorney, have appealed to the Secretary of the Interior from a decision by the Director, Bureau of Land Management, dated October 2, 1958, which dismissed their appeal from a decision dated July 28, 1958, by the hearing examiner at Salt Lake City, Utah. That decision held that, from a review of the evidence presented at a hearing on their appeals from decisions of the district range manager, the condition of the range in the North Dugway Unit, Utah Grazing District No. 2, is such that the reduction of 30 percent in the amount of grazing privileges previously enjoyed by the appellants made by the district range manager is necessary to keep the class 1 demand within the carrying capacity of the range. The Director dismissed the appeal to him for the reason that a notice of intention to appeal from the examiner's decision was not filed within 10 days after the receipt by the appellants of the examiner's decision, as required by a regulation of the Department (43 CFR, 1954 Rev., 161.10(f) (Supp.)).

The appellants have pointed to no error in the Director's decision and none has been found.

Section 161.10 of the Federal Range Code for Grazing Districts (43 CFR, 1954 Rev., 161.10 (Supp.)) sets forth in great detail the procedure to be followed by applicants for grazing privileges under the Taylor Grazing Act (43 U.S.C., 1952 ed., sec. 315 *et seq.*) who desire to appeal from adverse decisions of range managers and examiners. Subsection (f) of that section provides:

> Within ten days after the receipt of the decision of the examiner any party, including state supervisor or his representative, desiring to appeal to the Direc-

*Not in chronological order.



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tor shall file a written notice of his intention to appeal and may request a copy of the transcript of testimony. * * * Notice of appeal and request for a copy of the transcript shall be filed through the office of the Hearing Examiner.

As stated above, the hearing examiner's decision was rendered on July 28, 1958. The decision contained, as an attachment thereto, a statement of appeal procedure, setting forth the requirements of the regulation quoted above. It was received by the appellants on July 29, 1958. Therefore, under the subsection quoted above the notice of intention to appeal to the Director must have been filed at the latest by August 8, 1958. The notice of intention to appeal itself recites that it was filed with the hearing examiner on August 13, 1958. The notice of intention to appeal was obviously filed late.

As the Department had occasion to note recently in affirming the action of the Director in dismissing an appeal to him under the general rules of practice (43 CFR, 1954 Rev., Part 221 (Supp.)) where the statement of reasons supporting an appeal was not filed within the time required:

> The rules of the Department are not strict in their requirements. They afford an appellant ample time to file the few documents that are necessary. Only by rigid enforcement of the rules can the Department insure orderly procedure and fairness to all litigants before it. Otherwise the rules become only the whim of the person who is administering them for the nonce. *United States* v. *E. V. Pressentin et al.*, A–27495 (April 2, 1958).

Accordingly, it must be held that the Director's action in dismissing the appeal of William S. Young and others from the hearing examiner's decision was proper.

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

EDMUND T. FRITZ,
*Deputy Solicitor.*

## MAX BARASH
## THE TEXAS COMPANY

**A–27239 (Supp. II)** *Decided March 18, 1959**

**Secretary of the Interior—Oil and Gas Leases: Cancellation—Accounts: Refunds**

The authority of the Secretary to cancel an oil and gas lease is independent of the right of the lessee to a refund and the Secretary need not determine

*Not in chronological order.

prior to or simultaneously with cancellation whether the lessee is entitled to a refund of moneys paid to the United States in connection with the lease.

**Oil and Gas Leases: Cancellation—Accounts: Refunds**

A decision that a lease is to be canceled, standing by itself, is not a determination one way or the other that repayment of moneys paid in connection with the canceled lease is or is not to be made.

**Oil and Gas Leases: Cancellation—Accounts: Refunds**

The Secretary of the Interior need not return moneys paid in connection with an oil and gas lease as a condition to cancellation of the lease.

**RESPONSE TO ORDER TO SHOW CAUSE**

In a decision dated January 21, 1959 (66 I.D. 11), the Department vacated its prior decision of February 14, 1956 (63 I.D. 51), in this matter, and remanded the case to the Bureau of Land Management for the issuance of a lease to Max Barash for the lands formerly included within oil and gas leases BLM–A 034715 and 034716, and directed The Texas Company to show cause why lease BLM–A 034714 should not be canceled.

On March 4, 1959, The Texas Company filed a document entitled "Opposition By The Texas Company To Reconsideration Of Departmental Decision," in which it does not object to the cancellation of BLM–A 034714, but contends that the Department's decision on reconsideration must be amended to provide for the repayment to it of bonuses, rentals and compensatory royalty paid by it on leases BLM–A 034714 and 034715.[1]

In a letter dated March 5, 1959, Max Barash, through his attorney, stated that Barash's right to a lease is not contingent on the repayment of moneys to The Texas Company from the United States and renewed his request that a lease issue to him forthwith in accordance with the judgment of the court.

After careful consideration of the matters presented by The Texas Company, I can only conclude that its opposition to the decision of January 21, 1959, does not present any substantial reason why lease BLM–A 034714 should not be canceled. That decision was based upon the propositions that the District Court had ordered the Secretary to issue a lease to Barash, that lease 034714 was an outstanding lease covering part of the land the court had ordered the Secretary to lease to Barash, that two leases cannot subsist for the same land, and that therefore The Texas Company lease must be canceled.

[1] 43 U.S.C., 1952 ed., secs. 95–98a.

The document filed by Texas deals only with its right to a repayment of the moneys it has paid to the United States under leases BLM–A 034714 and 034715.

The decision of January 21, 1959, was concerned solely with the issue of complying with the court's order that the Secretary issue a lease to Barash. It did not deem it necessary to consider Texas' right to a refund and its silence on this point can in no way be construed as an expression that Texas can or cannot obtain the refund it desires.

Before considering other matters, I would first like to point out that lease BLM–A 034715 terminated by operation of law, at the expiration of its 5-year term, on August 31, 1958, and that there is no connection between this lease and BLM–A 034714. Therefore, I fail to see how the propriety of canceling the latter lease can in any way be related to paying a refund on the former.

Accordingly, we need only consider whether the Secretary must determine whether a refund must be paid on BLM–A 034714 prior to or simultaneously with its cancellation.

The authority and obligation of the Secretary to cancel entries for public land erroneously allowed are independent of his authority and obligation to make refunds of moneys paid in connection with such entries. Although entries must be rejected or canceled, repayments can be made only when a statute specifically authorizes them and have no bearing on the Secretary's authority to reject applications or cancel entries. See *Joseph Gibson*, 37 L.D. 338 (1908); *Heirs of Isaac W. Talkington*, 5 L.D. 114 (1886); *George A. Stone (On Review)*, 25 L.D. 111 (1897); *State of Oregon*, 33 L.D. 374 (1904); *Instructions*, 49 L.D. 541, 543 (1923).

In support of its opposition to the decision of January 21, 1959, Texas relies upon the proposition that if the United States seeks to cancel a patent, it must refund the consideration it received when it issued the patent.

However, in *United States* v. *Poland*, 251 U.S. 221, 228 (1920), the Court held that the Government is entitled to demand the cancellation of a patent issued in violation of law and that if the patent is canceled, the patentee may ask repayment of fees and commissions paid the land officers. This statement clearly indicates that cancellation and repayment need not be simultaneous and the patentee may be left to seek repayment after cancellation.

Furthermore, in *Causey* v. *United States*, 240 U.S. 399, 402 (1916), the Court said:

The further objection is made that the bill cannot be maintained because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. * * *[2]

Accordingly, it is concluded that The Texas Company has not shown cause why lease BLM–A 034714 should not 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), lease BLM–A 034714 is hereby canceled and as to the lands formerly covered thereby, the case is remanded to the Bureau of Land Management for further proceedings consistent herewith and with the decision of January 21, 1959.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEAL OF JAMES C. CHRISTOPHER d/b/a CHRISTOPHER CONSTRUCTION COMPANY

**IBCA–109** *Decided March 31, 1959*

**Contracts: Changes and Extras—Contracts: Interpretation—Contracts: Modification**

Acceptance by a contractor of a change order which stipulates that "the time necessary for the completion of the work" described in the order is a certain number of days and that "the contract time is extended accordingly" does not bar the allowance of a further extension on account of time lost

[2] To the same effect, *Heckman* v. *United States*, 224 U.S. 413, 446–447 (1912); *Pan-American Co.* v. *United States*, 273 U.S. 456, 505–510 (1927). The Department has always canceled oil and gas leases where the circumstances require such action and left the former lessees to seek refunds in a separate proceeding. *Cf. L. N. Hagood et al.*, 65 I.D. 405 (1958).

because of the inability of the contractor to perform portions of the original contract work until the Government had removed, through the issuance of the order, an excusable cause of delay.

**Contracts: Interpretation—Contracts: Performance—Contracts: Unforeseeable Causes**

The provision in the standard-form construction contract that the contractor shall at his own expense "obtain all licenses and permits required for the prosecution of the work" does not impose upon a contractor, whose undertakings include installing sanitary plumbing on Government property and connecting such plumbing with a county sewer, the responsibility for paying a charge assessed by the county for the use to be made of the sewer by the Government, nor for solving the impasse created by a conflict between the plumbing specifications of the contract and the county plumbing code. Refusal by the county to issue a permit for the connection save upon condition that such charge be paid and that the specifications be altered to conform to such code constitutes an excusable cause of delay under the standard-form "delays-damages" clause.

**BOARD OF CONTRACT APPEALS**

This appeal by James C. Christopher, d/b/a Christopher Construction Company, of Washington, D.C., involves a decision, in the form of a letter dated January 31, 1957, wherein the contracting officer denied a claim for an extension of time. No hearing was requested by either party, but a conference at which each was represented was held on February 3, 1959, pursuant to section 4.9 of the rules governing procedure before the Board.[1]

The matters in dispute arise under a contract dated June 28, 1956, with the National Park Service, in which the contracting officer was the superintendent of the National Capital Parks. The contract provided for the construction of a comfort station on the George Washington Memorial Parkway in Fairfax County, Virginia. It was on U.S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts. The price for the work was $35,000.

The General Provisions of the contract included the usual "delays-damages" provision (clause 5), under which the contractor was not to be charged with liquidated damages because of "any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including but not restricted to certain named categories, or because of "delays of subcontractors or suppliers due to such causes."

[1] 43 CFR, 1954 Rev., 4.9.

It was stipulated in the contract that the work should be completed within 90 calendar days from the date of receipt of notice to proceed. Appellant received notice to proceed on July 9, 1956, and the date for completion of the work was thus established as October 7, 1956. Extensions of time aggregating 38 calendar days were allowed by the contracting officer, thereby deferring the date for completion to November 14, 1956. The work, however, was not, in fact, substantially completed until 16 calendar days later, on November 30, 1956.

Because of this failure to perform the work on time, appellant was assessed liquidated damages, at the rate of $25 per calendar day fixed by the contract, for the 16 days of unexcused delay, or a total of $400.

After the liquidated damages had been assessed, appellant presented to the contracting officer a claim for an extension of time in the amount of 23 days on account of alleged difficulties in obtaining a sewer connection permit.

The contracting officer considered and rejected this claim in his decision of January 31, 1957. The rejection was bottomed upon the grounds that appellant had been derelict in making application for the sewer connection permit, and in informing the Government of the requirements imposed by the issuing authority. From this decision the instant appeal was taken.

One of appellant's duties under the contract was to connect the sewage disposal main of the comfort station to a sewer belonging to Fairfax County, Va. During the month of August 1956, appellant's plumbing subcontractor applied to the county officials for a permit to make the connection. These officials took the position that a permit would be issued only on two conditions: first, that the Government either pay or assume liability for the availability charge imposed by the county on persons making connections with its sewers; second, that the sanitary plumbing within the comfort station be in conformity with the county plumbing code.

The plumbing subcontractor appears to have learned that the county officials would insist on the first requirement, notwithstanding that the comfort station was to be a public facility in Federal ownership, on or about August 21. Oral notice of the requirement was promptly given to the representatives of the Government, followed by written notice in the form of a letter dated August 24. Sometime between August 28 and August 31 the Government furnished to the county a document wherein it assumed liability for the availability charge, thereby meeting this requirement.

Shortly thereafter the plumbing subcontractor appears to have ascertained that the second requirement would also be insisted upon, and that compliance with it would entail the installation of plumbing vents that differed from those called for by the contract. Oral notice of this was given to the representatives of the Government on or about September 6, followed by written notice in the form of a letter dated September 11. Under date of September 14 the Government wrote the county that alterations in the plumbing system venting would be made, and requested that "in anticipation of these alterations" the sewer connection permit be released. On September 20 a county plumbing inspector gave the subcontractor permission to make the connection, subject to the condition that the interior plumbing, when installed, be such as would satisfy the county code. Under date of September 27 the contracting officer by Change Order No. 3 revised the contract drawings and specifications so as to bring them into conformity with the county code, thereby meeting the second requirement.

Plumbing work under the changed plans began on October 1 and a permit covering the interior work was issued by the county on October 2. The sewer connection itself was not made until October 10.

The Government contends that appellant's claim for an extension of time on account of these events is wholly barred by reason of the provision in the "delays-damages" clause which calls for the giving of written notice of causes of delay "within 10 days from the beginning of any such delay." This contention completely overlooks the notices contained in appellant's letters of August 24 and September 11, and, hence, must be rejected.

It is also contended that the claim is barred by reason of appellant's acceptance of Change Order No. 3. This order increased the contract price by $304 in order to compensate appellant for the extra costs incident to the changes which the order made in the plumbing plans. In addition, it stated:

> It is agreed that the time necessary for the completion of the work of Change Order No. 3 is five (5) calendar days and the contract time is extended accordingly.

The language used in the change order, which appellant accepted in writing as satisfactory, expresses a mutual agreement of the parties that 5 days is to be deemed the amount of time "necessary for the completion of the work" described in that order. There is, however, no language in the order or the acceptance which expresses a

mutual agreement, or even an unilateral determination, as to the amount of time lost prior to the issuance of the order because of the inability of appellant to perform portions of the original contract work while the sewer connection question remained unsettled. Nor is there anything in the record which indicates that the parties intended the order to operate as an adjustment of the time so lost. As the terms and intent of the order are confined to the adjustment to be made on account of the changed work, its acceptance by appellant does not bar the allowance of an extension of time for the causes of delay that form the subject of this appeal.[2]

Thus the merits of appellant's claim are open for determination by the Board.

The requirements imposed by the county officials seem plainly to have been excusable causes of delay within the meaning of the "delays-damages" clause of the contract. True, it was provided in clause 11 of the General Provisions of the contract that

> The Contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work.

This stipulation, however, did not impose upon appellant the responsibility for paying the availability charge, which was a charge for the use to be made of the sewer by the Government, rather than a charge for allowing the contractor to perform the connection work.[3] Nor did it impose upon appellant the responsibility for solving the impasse created by the conflict between the Government's plumbing plans and the county's plumbing code, neither of which could be altered or, with impunity, be disregarded by appellant or his plumbing subcontractor.[4] In the circumstances we consider that appellant was not bound to foresee, when bidding on the contract, that for one or the other of these reasons the obtaining of a sewer connection permit might consume much more than the usual short time.

Concerning the extent of the delay, the case is somewhat less clear. The Government argues that appellant was at fault in not having his plumbing subcontractor make application for the permit at an earlier date, and in support of this argument points out that according to appellant's approved construction program all plumbing work should have been completed by September 17. The record does not

[2] *Chas. I. Cunningham Co.*, 64 I. D. 449, 456, 57–2 BCA par. 1541 (1957), and authorities there cited.

[3] *Cf. Bein* v. *United States*, 101 Ct. Cl. 144, 146–48, 164–65 (1943); *Bolef*, ASBCA No. 1922 (May 25, 1954).

[4] *Cf. Anthony P. Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 285–92, 331 (1948).

show precisely when application for the permit was first made, but in any event it was not later than August 21. Issuance of the permit was a prerequisite for the performance of only a part of the plumbing work. This part of the work, the subcontractor stated, could have been done in 3 days by a force of 3 plumbers. It is a reasonable inference that the application, even if not made until August 21, was in ample time to have admitted of the completion by September 17 of the plumbing work dependent thereon, had no questions arisen concerning the availability charge or the conformity of the vents to the plumbing code.

Appellant likewise seems to have been free from fault in failing to have the sewer connection made when permission was given by the county inspector on September 20. This permission was given on a condition which appellant could not meet without violating the terms of its contract with the Government, as then written. Conversely, if appellant should have had the connection made, and if the Government had then chosen to stand on its rights and insisted that the interior plumbing be installed in accordance with its original plans, appellant would have placed himself and his plumbing subcontractor in a position where they could be accused of having violated the county plumbing code.

On the other hand, appellant appears to have been less diligent than it might well have been in prosecuting those parts of the job that were capable of being accomplished while the sewer connection question was still unresolved. During the pendency of this question, appellant could not, of course, make the sewer connection, or install the plumbing items which the Government had indicated it might alter, or perform work that was dependent upon the installation of those items, such as pouring floor slabs. Nevertheless, there was much work that could be done and, while appellant did carry on a variety of construction operations during this time, the rate of progress being achieved was on more than one occasion criticized by the representatives of the Government.

All in all, the record persuades us that the permit requirements imposed by the county officials were substantial causes of delay, although not the only ones, during the period from August 21 to September 27. This period amounts to 37 calendar days as compared with the 16 days of delay in completion that were left unexcused by the contracting officer. Considering the various factors that have been discussed, the Board finds that appellant was excusably delayed for 16 days by the requirements in question. This delay was not concurrent with

any of those for which extensions of time were allowed by the contracting officer.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F.R. 9428), the decision of the contracting officer is reversed, with instructions to allow an extension of time in the amount of 16 calendar days, in addition to those previously granted.

HERBERT J. SLAUGHTER, *Member.*

We concur:

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

## APPEAL OF WAXBERG CONSTRUCTION COMPANY

**IBCA-144** *Decided March 31, 1959*

**Contracts: Changed Conditions—Contracts: Changes and Extras—Contracts: Specifications—Contracts: Additional Compensation**

A contractor who, in excavating for a septic tank and seepage pits, which were to be parts of a sewage disposal system for a school in a town in Alaska, encountered a water table that fluctuated seasonally, as well silt of a fluid consistency, although such conditions were contrary to indications in the plans, with the result that the Government engineers to avoid health hazards had to redesign the sewage disposal system entirely, may be said to have encountered unanticipated conditions which were "changed conditions" within the meaning of the applicable contract provision, notwithstanding that the specifications included also a general caveatory provision with respect to soil conditions. The acceptance by the contractor of the change orders, which provided for the redesign of the sewage disposal system, did not bar it from requesting an equitable adjustment of its increased costs prior to the redesign of the system.

BOARD OF CONTRACT APPEALS

George Gilbertson and A. E. Waxberg, co-partners, doing business as A. E. Waxberg Construction Company, has filed a timely appeal from the findings of fact and decision of the contracting officer in the form of a letter dated November 22, 1957, denying its claim for additional compensation in the amount of $9,208.19 for the performance of Contract No. 13-04-001-256 with Alaska Public Works, Office of Territories, hereinafter referred to as APW.

The contract, which was dated August 25, 1955, was on U.S. Standard Form 23 (revised March 1953), and incorporated the General Provisions of U.S. Standard Form 23A (March 1953). It provided for the construction of a school building at Nenana, Alaska, for the lump sum of $335,240. The work was completed and accepted as of June 7, 1957.

The claim of the appellant arises out of the construction of the sewer system for the school, as outlined in division M. 2 of the specifications, and is based on the contention that it encountered "changed conditions" within the meaning of clause 4 of the General Provisions of the contract which made the work more difficult and finally compelled the Government to alter radically the original plan for the construction of the sewer system.

Clause 4 refers to two different categories of changed conditions: (*1*) subsurface or latent physical conditions at the site differing materially from those indicated in the contract, and (*2*) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The first category contemplates a variance between the conditions actually encountered and those represented in the specifications and drawings, while the second contemplates conditions that are otherwise unexpected or unanticipated.

The Nenana school site is within the Nenana townsite, which is located at the confluence of the Tanana and Nenana Rivers. The Nenana school site itself is located only several blocks from the Nenana River, and the ground is fairly level, the elevation varying only between 98.42 feet and 100.83 feet above sea level.

The school site was explored by the Government prior to the making of the plans for the construction of the school, and the results of the exploration were recorded on sheet 1 of the plans. In all, 20 test holes were dug in 4 rows, there being 4 holes in the first row, 6 in the second row, and 5 each in the third and fourth rows. Except for a few holes which went down to a depth of 19 feet, the holes were approximately 7 to 8 feet in depth. The test holes indicated that the subsurface material consisted generally of silt and sand which in some instances were underlain by gravel at depths of 14 feet or more.[1]

Of particular importance were the test holes in rows 3 and 4, which were south of the school building, where the septic tank and seepage

[1] Three of the test holes showed silt to a depth of 1'; four to a depth of 1'6"; six to a depth of 2'; one to a depth of 2'6"; three to a depth of 3'; and three to a depth of 3'6".

pits were to be located. The materials in all the test holes in rows 3 and 4 were shown to be silt and sand. The test holes in row 4 were closest to the proposed site of the septic tank, being approximately 55 feet north thereof, and showed silt which did not exceed 2′ 6″ in depth. The ground water level was shown in three of the test holes in rows 1 and 2, all of which were in the space to be occupied by the school building itself, and was shown to be at elevation 89, which would be approximately 10 feet below the surface of the ground. However, sheet 1 of the plans bore the notation: "Water level (WL) determined 11–18–54," and paragraph 2.2 of division 2 of the specifications, headed "Subsurface Soil Data," provided as follows:

> Investigations have been made to determine subsurface soil conditions for foundation design and limits of excavation. The Contractor may draw his own conclusions for (sic) this data as no claim for extra compensation or extension of time will be allowed because of subsoil conditions inconsistent with data shown, except as provided elsewhere herein.[2]

As designed, the sewage disposal system for the school was to consist of a concrete septic tank and two concrete block seepage pits, located south of the school building, connected with the building and each other by piping, for the installation of which trenches of sufficient width and depth were to be constructed.

The appellant successfully installed the sewer line from the school building to the site of the septic tank but encountered a great deal of difficulty in excavating for the septic tank itself. Under date of August 31, 1955, the appellant wrote to C. H. Webber, the area engineer, complaining that it was finding the soil so unstable that it was not possible to excavate with a dozer, and expressing the surmise that this might be due "to the water level at the present time." It added that in view of these conditions it could accept no responsibility for "the efficiency of the septic tank nor the two seepage pits." Under date of February 24, 1956, the appellant wrote again to Webber, stating that it had checked the water elevation at various times, and found it to vary as follows:

| *Date* | *Elevation* |
|---|---|
| August 31, 1955 | 97.00 |
| September 21, 1955 | 95.50 |
| November 10, 1955 | 94.00 |
| November 29, 1955 | 95.00 |
| February 11, 1956 | 92.27 |

[2] It is apparent from section 3(b) of part III of the specifications that additional compensation under the "changes" and "changed conditions" clauses was contemplated, and hence it is apparent that the intention was not to limit or modify the application of these clauses themselves.

In the same letter, the appellant pointed out that since the elevation of the invert at the seepage pit was 93.50 feet, the sewerage discharge lines on August 31, 1955, was 4.67 feet below the water level; on September 21, 1955, was 2 feet below, on November 10, 1955, was 6 inches below, and on November 29, 1955, was 1.5 feet below the water level. The appellant also reported that it had been compelled to drive wood piling in performing its excavation work at the seepage pits but that, despite pumping, the water kept turning the silt into quicksand, and the silt kept coming up from the bottom of the excavation.

Under date of February 27, 1956, C. H. Webber, the area engineer of APW, addressed a memorandum to A. H. Boberg, the supervising construction engineer of APW, in which he commented on the appellant's letters of August 31, 1955, and February 24, 1956, as well as on a letter of February 24, 1956, from a Dr. Troy L. Pewe, an engineering geologist with the U.S. Department of Geological Survey, to himself. Webber explained that shortly after the appellant's letter of August 31, 1955, had been received, the ground water level appeared to be getting gradually lower, and since it appeared that there was a possibility that the septic tank and seepage pits excavations could be completed without too much difficulty, the letter had been merely filed for future reference. After noting that the invert elevation of the sewer outfall line at the septic tank was shown to be 94.35, and at the outlet at the seepage pits was shown to be 93.50 on the contract plans, he commented also that if the water level was fluctuating as set forth in the appellant's letter of February 24, 1956, the sewer system "could not possibly have functioned properly during the three month period from August 31 to November 29, 1955." He then went on to say:

> 6. From the information contained in the letter of February 24, 1956, from Dr. Troy Pewe, Engineering Geologist with the U.S. Department of Geological Survey, it is apparent that the ground water level indicated in Mr. Waxbergs letter of February 24, 1956, was about average or normal.
>
> 7. We have been informed orally by Dr. James C. Ryan, Supt. of Fairbanks Schools, that while he was Territorial Commissioner of Education, he employed a Mr. Felix Toner, Engineer, to make a study of the ground water conditions in Nenana. From his recollection of the report submitted by Mr. Toner, he was under the impression that ground water conditions in Nenana were extremely bad.
>
> 8. The soil conditions at the location of the Septic tank and seepage pits are such that much difficulty is being encountered in the attempt to excavate to the grade shown on the contract plans. The contractor finds that he cannot maintain a stable sub-grade due to the silt coming up from the bottom of the excavation. It is our belief that this difficulty can be overcome by driving steel sheet piling.

9. We question, however, the feasibility of installing the sewage collection system in accordance with the contract plans and specifications, inasmuch as it is our firm belief that it cannot possibly function properly. * * *

Dr. Pewe's letter to which reference was made in the area engineer's memorandum was written in response to his request for information concerning the water table at Nenana and reads as follows:

In answer to your request for information concerning water table conditions at Nenana in regard to construction of a new school, may we state that the geologic setting of Nenana is such that the water table would be close to the surface of the entire area of the town. Lying as it does, at the confluence of two large rivers and on the slip-off side of the meander, the area is well supplied with considerable ground water through the underlying pervous (sic) sand and gravel. The position of the water table is closely regulated by the stage of the rivers; high water stage results in high water table, and low water stage results in low water table. As far as I know, the depth to the water table measures from about 2 to 10 feet from year to year and season to season, and according to the stage of the Nenana and Tanana Rivers. I would not expect the water table to drop more than 12 to 14 feet below the surface at its maximum depth.

The older and main part of the town is on a broad natural levee adjacent to the river and is about one to three feet higher than the area a couple of hundred yards to the south where the school is to be built. I would expect this school site to have a very shallow water table (average 2 to 6 feet) and poor drainage. *Farther to the south* the land surface rises and the water table is deeper, but in this area the geology is complicated by the presence of permafrost and complex accumulation of sediment *including much silt.* (Italics supplied.)

In a memorandum dated March 14, 1956, to John A. Argetsinger, chief engineer of APW, Webber reported on a conversation which he had had with Waxberg about investigating the ground conditions at the locations of the septic tank and seepage pits and about the possibility of constructing the septic tank while the ground was frozen, in order to overcome the adverse soil and water conditions. In the third paragraph of this memorandum, Webber commented as follows:

In the case of the seepage pit installation we are of the opinion that the soil will not be frozen to a depth sufficient to permit the construction to be completed as suggested. Our opinion is based on the fact that during the attempt to complete the excavation at the seepage pit locations last fall, the soil below the bottom of the excavation surged up through the bottom of the excavation so fast that it could not be taken care of through ordinary methods. The excavation was abandoned last fall because of the inability of the contractor to cope with the situation, using the equipment then on hand at the site, and the holes have partly filled in again. It is doubtful that the frost has extended to a depth sufficient to overcome the upsurge of the soil from below. Had borings been taken and the log included in the contract drawings, the con-

tractor would have been able to determine the type of equipment needed for this phase of the work and planned accordingly. In view of the fact that the water level was indicated on the contract drawings in three locations, in the area occupied by the building to be at 10 feet below the surface of the ground, it was assumed by the contractor that this level would not vary greatly from that at the septic tank and seepage pit locations. Subsequent developments indicate that the ground water level, as shown on the contract drawings is not the average for that area. From such information as we have been able to gather from other sources, we are convinced that the fluctuation of the water table varies from one foot below the surface of the ground to a maximum of not over six feet below, except in remote instances, and that the average can be assumed to lay between the two depths mentioned.

In the next paragraph of the memorandum Webber reported that Waxberg had just telephoned to him to give him the existing water level at the septic tank location, which then stood at 92.35, or practically as previously indicated for February 11, 1956. Webber deduced from this that the excavation for the septic tank would have to be carried to elevation 88.93, or 3.42 feet below the present water level, and for the seepage pits to elevation 86.50, or 5.75 feet below the present water level, and again concluded that it would be inadvisable to proceed with the construction of the sewage system in accordance with the design.

Webber also recorded his views concerning the conditions encountered by the appellant in excavating for the seepage pits and the septic tank in two memoranda, dated March 29 and May 15, 1956, respectively. The first memorandum reported his observations during his visit to the project site on March 27, and included the following comment:

> The soil encountered at the location of the seepage pits can be generally classified as river silt, the fine grained and close knit characteristics of which are deemed unsuitable for the intended purpose indicated in the contract design. In case of a high water table, little, if any of the polluted water, discharging from the septic tank could be dissipated through the underground channels. Instead, by capillary action the soil above would become saturated creating a breeding ground for vermin and disease.

In his later memorandum, in which he discussed a tentative plan of moving the septic tank closer to the school building, Webber further observed:

> At the contract location of the septic tank, *soil conditions were found to vary from those indicated in the boring data.* Fine silt was encountered in the excavation for the full depth to contract grade and extends below this point for an undetermined depth. The silt has a fluid consistency and boils up from the bottom of the excavation as fast as the material is removed. It is necessary

to use a pump to continue the excavation since it is too soupy to employ the usual equipment for excavating. (Italics supplied.)

At about this same time the Alaska Department of Health at Juneau, which apparently had approved the original plans for the Nenana school sewage disposal system, appears to have become interested in the difficulties being encountered in constructing it, and sent Charles Mitchell, its regional sanitary engineer at Fairbanks, to the job site to review the problem, which he did in the company of Webber. In his report to his chief, Amos J. Alter, dated March 28, 1956, Mitchell stated that a drill test made about 30 feet to the east of the east seepage pit showed the elevation of the water table there to be 91.21, and that since the plans placed the elevation of the invert at the seepage pit at 93.5, it was only 2.3 feet above the present level of the water table. He concluded that since the effective depth of the seepage pit was 6 feet, it was apparent that "about two-thirds of the seepage pit would be submerged in the water table at this particular time."

As a result of this report, Alter wrote to Argetsinger, who was then acting director of APW, under date of April 9, 1956, making the following recommendation:

> Due to the high water table, sewage effluent should be discharged to a sewer conducting wastes to a point where they will receive appropriate dilution. The present high water table will create considerable difficulty in operation and maintenance of the presently designed school waste disposal system. In addition to problems of operation, it is most probable that discharge of school wastes into the ground water table might cause contamination of water supplies in the area.

After receiving this recommendation, Argetsinger, under date of April 12, 1956, wrote to Lee S. Linck, of the Alaska Architectural and Engineering Company, which had been employed in connection with the design of the school, to confirm the decision of the contracting officer that the sewage disposal system for the Nenana school be redesigned. He informed him that the first "step" to be taken was that "the presently designed system be considered not tenable, as the seepage pits cannot properly function due to the relatively high water table on the site, and the requirements of the Department of Health cannot be met."

By item 7 of change order No. 4, accepted by the appellant on May 16, 1956, and approved by the contracting officer on May 31, 1956, the appellant was authorized to drill a test hole in the area

near the location of the septic tank to determine the level of the water table. The justification for this item, which was prepared by Webber but approved by the contracting officer, was formulated as follows:

*The contract plans indicate the water table elevation to be at 10 feet +—below the surface of the ground.* To determine whether the elevation of the water table was *as shown on the contract plans* the contractor was authorized to perform the necessary work of drilling a test hole. It was found that the elevation of the water table was *much higher than indicated,* and that the sewer system if installed as designed, would not function as intended. As a result of this investigation the sewer system is to be re-designed.[3] (Italics supplied.)

The record indicates that various methods of redesigning the sewer system were then considered. The first partial expedient adopted was to instruct the appellant to turn the septic tank 90°, so that the outflow would be discharged to the west rather than to the south. This instruction is evidenced by change order No. 8, accepted by the appellant on April 15, 1957, and approved by the contracting officer on May 3, 1957, but it is evident from the justifications for the order that the attempt to turn the septic tank had occurred a considerable time before its entry, for it is recited therein that the appellant had excavated for the septic tank down to 16″ above the planned grade at the contract location but that, being unable to excavate deeper due to ground water above elevation 89 and "flowing fine silt similar to quicksand," and the Alaska Department of Public Health having determined that the high-water table prevailing during extended periods "would not allow the disposal of the effluent in the seepage pits as contemplated by the designers," the appellant had been verbally instructed to proceed with the installation of the septic tank but to turn it. It is then further recited in the justification for the change order that the attempt to continue work on the septic tank at its original location had had to be abandoned when the appellant "again encountered the same problems with high water and flowing silt," and that it had then been decided to relocate the septic tank in a park reserve across the street, which was a block west of the school site, where it would function as part of a redesigned sewage disposal system.

As finally redesigned and constructed, the sewage disposal system consisted of a sewage lift station, dosing siphon and septic tank, with a raised drain field in the park reserve area, as hereinbefore men-

[3] It is apparent from this justification that the test hole had actually been drilled prior to the entry of the change order.

tioned. In addition to new piping, partial use was made of some of the piping already laid south of the school to a point where a manhole, from which the new piping ran to the west, was constructed as part of the new design.[4]

In the letter which constitutes the contracting officer's findings of fact and decision, he made no attempt to review the history of the performance of the contract, or to outline the difficulties encountered by the appellant in constructing the sewage disposal system. He gave, however, a number of reasons for rejecting the appellant's claim that it had encountered "changed conditions" within the meaning of clause 4 of the General Conditions of the contract. These reasons were as follows:

(1) That since the closest test holes were approximately 55 feet northerly from the original site of the septic tank, there was no "allegation" as to the soil conditions which would be encountered there, and that, therefore, they could not be said to vary from those shown on Sheet 1 of the plan.

(2) That the water level was shown on Sheet 1 of the plans only with respect to test holes in rows 1 and 2, which were located in the space now occupied by the school building, and that the water level there was correctly shown to be at elevation 89 as of November 18, 1954.

(3) That local inquiry, when the appellant inspected the site prior to bidding, would have revealed that the ground water level could be expected to vary, and that this should have influenced the appellant's bidding and its "selection of methods for dewatering the site to facilitate the excavation."

This, essentially, is also the Government's position in the appeal. Department counsel contends that "the only reasonable conclusion that can be drawn" is that the appellant did not encounter "changed conditions" within the meaning of clause 4 of the General Provisions of the contract, whether they be considered as falling within the first or the second category. He argues that the closeness of the school site to the Tanana and Nenana Rivers, which are affected by seasonal run-off, precipitation, ice obstruction, evaporation and like causes, should have led the appellant to expect that it would encounter a highly variable water table, which would affect the soil conditions indicated on sheet 1 of the plans. Like the contracting officer, De-

[4] Provision was made for these changes in change orders Nos. 6 and 7. Change order No. 6, which was accepted by the appellant on November 5, and approved by the contracting officer on December 6, 1956, provided for additional compensation in the amount of $9,316.60. Change order No. 7, which was accepted by the appellant December 5, 1956, and approved by the contracting officer on February 4, 1957, provided for additional compensation in the amount of $17,895.87. Thus quite apart from the additional compensation provided for in Change order No. 8, which was in the amount of $5,522.61, a total of $27,212.47 was to be paid to the appellant for constructing the redesigned sewage disposal system.

partment counsel stresses the appellant's duty to investigate the site, and the dating of the water level on the plan, but he points also to the caveat contained in paragraph 2.2 of division 2 of the specifications. In addition, he contends that change order No. 8, which provided for a change in the axis of the septic tank, was intended to provide whatever equitable adjustment the appellant might be entitled to, and hence that additional compensation could not now be allowed. In support of this contention, he cites *Loftis d/b/a V. P. Loftis Company* (W. D. BCA No. 291), 1 CCF 1108.

In a memorandum to the Board, dated September 26, 1958, Department counsel requested a hearing. He subsequently withdrew the request, however, in a memorandum dated October 17, 1958, in which he stated that he assumed that "the facts are as stated by the Contracting Officer in his Findings of Fact dated November 22, 1957, and the Statement of Government's Position with attached exhibits (including the Findings of Fact, Exhibit C)." In a letter to the Board dated October 24, 1958, counsel for the appellant informed the Board that he concurred with Department counsel that "the appeal may be decided upon the basis of the statements, briefs and other documents" filed by the appellant. Clearly, this exchange did not produce an agreed statement of facts, nor indeed even an agreed basis for the consideration of the appeal, except that the parties appear to have agreed that the case might be decided without holding a hearing for the purpose of taking testimony. In view of the inadequacies of the existing appeal file, the Board obtained and examined the correspondence file relating to the performance of the contract, and incorporated in the appeal file various documents which were relevant to the issues in the appeal. In the light of the record as so made, there cannot be any real dispute as to the basic facts, and no purpose would be served by a hearing for the purpose of taking testimony. The appeal, therefore, will be decided on the written record.

This record makes it apparent that the appellant encountered great difficulties in excavating both for the septic tank and the seepage pits in accordance with the original plan for the sewage disposal system, and that the abandonment of this plan was attributable entirely to these difficulties, which arose from a combination of two distinct causes. In the first place, the appellant encountered silt at much greater depths than were indicated by the test holes. In the second place, the ground water level was much higher than was indicated, and fluctuated, moreover, from season to season. The water, in combination with the silt created soupy conditions, which magnified the

difficulties of the excavations. Since the higher water level would have created serious health hazards had the sewage disposal system been constructed as originally designed, it was necessary to completely redesign and relocate the system in order to avoid such hazards.

To find that the appellant encountered "changed conditions" in the first category, the Board must be able to conclude that the test hole information given on the first sheet of the plans amounted to definite representations of conditions which the contractor would encounter. The Board has recognized, however, that the results of a subsurface exploration are not ordinarily to be regarded as representations, except insofar, of course, as they indicate the subsurface conditions in the particular test holes.[5] The Board has generally treated subsurface explorations as sampling operations, rather than as definite representations of conditions which will be encountered throughout an excavation, especially when the area of an excavation is extensive, the subsurface exploration is rather limited, and the information concerning the subsurface exploration is accompanied by caveatory provisions warning the contractor that the accuracy of the information is not guaranteed, or there are other provisions in the plans or specifications which would make it unreasonable for the contractor to assume that definite representations were intended,[6] for logically such caveats are inconsistent with the idea of representation.

In view of the small area of the school site, the levelness of the terrain, the extensiveness of the subsurface exploration and the rather close proximity of some of the test holes to the location of the septic tank, and the fact that not only the area engineer but also the contracting officer conceded that the conditions encountered were at variance with those indicated by the plans, there would be a good deal to be said in this case for the view that the results of the exploration were intended to be definite representations, if it were not for the caveat contained in paragraph 2.2 of division 2 of the specifications. While this caveat is expressly limited to "soil conditions," this term appears to be broad enough to include the water level. However, the mere dating of the water level would not necessarily imply that it would fluctuate.

The Board does not deem it necessary, however, to determine whether a changed condition in the first category was encountered, for it seems clear to the Board that if such was not the case the appellant did en-

[5] See *Carson Construction Company*, 62 I.D. 311, 321 (1955).
[6] See *Carson Construction Company*, 62 I.D. 422, 431 (1955), and *J. A. Terteling & Sons, Inc.*, 64 I.D. 466, 483 (1957).

counter changed conditions in the second category. It is true, as the Board has recently had occasion to recognize, that proof of changed conditions in this category is ordinarily difficult in the absence of a hearing for the purpose of taking testimony,[7] and that such a hearing has not been held in the present case. The implications of the present record are, however, fairly plain. To establish a changed condition in the second category a contractor must show not only that the condition was "unknown" but also that it was "unusual," which means that it would be unexpected in the particular circumstances of the case. Obviously, the conditions encountered were unknown both to the appellant and the engineers of the APW. The letter of Dr. Pewe shows that a fluctuating water table of the kind encountered should have been expected at the Nenana school site, although plainly it was not expected by the APW engineers, for otherwise they would not have designed the sewage disposal system which they did design. However, Dr. Pewe's letter indicates that the silty condition encountered by the appellant at the deeper levels of the excavation should have been found only south of the school site, and the statement of the area engineer and the contracting officer indicating that the soil condition did not correspond to what was indicated by the logs of exploration makes it apparent that it was also unexpected to the APW engineers. As the silt was a major factor in contributing to the appellant's difficulties, it is immaterial that the fluctuation of the water table should have been expected, for even though this condition would not be sufficient in itself to establish a changed condition, the two factors in combination are sufficient. In the last analysis, the type of sewage disposal system designed by the APW engineers was itself an indication that the contractor would not encounter physical conditions which would make its construction impossible. As for the question whether the appellent could have ascertained the actual conditions by an independent site investigation, the Board will not assume that it could have discovered what even the APW engineers could not have told its representatives.

As for the effect of the appellant's acceptance of change order No. 8, the Board finds nothing in its terms, or the circumstances surrounding its execution, which would indicate that it was intended to cover more than the future work that was contemplated by it,[8] and hence that it

[7] See *Reid Contracting Co.*, 65 I.D. 500, 522 (1958).

[8] Indeed, in paragraph 2 of his findings of November 22, 1957, the contracting officer treated the claim as one for "the expense involved prior to your having been notified to change the direction of the septic tank."

is not a bar to the allowance of the appellant's claim. The administrative decision in the *Loftis* case which is cited for a contrary conclusion was reversed and set aside by the Court of Claims.[9]

By reason of having encountered changed conditions, the appellant is entitled to additional compensation as an equitable adjustment of its extra costs. The appellant states in its release that its claim of $9,208.19 represents "part of the expense involved prior to the undersigned being notified to change the direction of the septic tank." Department counsel states that the appellant has received "the entire initial contract price," as well as the additional amounts due under the various change orders. The appellant is, however, entitled to be paid not only the initial contract price for the work performed prior to the redesign of the sewage disposal system but such additional amount as will compensate it for the more difficult work attributable to the changed conditions, and the Board assumes that this is the basis of its claim, although the record is not absolutely clear in this respect. For this reason, the claim is remanded to the contracting officer, so that he may determine the amount to which the appellant is entitled, and enter an appropriate change order providing for the payment of such amount. In any event, although the appellant's claim is supported by an affidavit, the contracting officer should have an opportunity to review the items which make up the appellant's claim. If the appellant should be dissatisfied with the amount allowed by the contracting officer, he may file an appeal to the Board in accordance with the terms of the disputes clause of the contract.

## 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 appellant is reversed, and he is directed to proceed as outlined above.

William Seagle, *Member.*

We concur:

Theodore H. Haas, *Chairman.*

K. K. Young, *Alternate Member.*

[9] See *Loftis* v. *United States,* 110 Ct. Cl. 551 (1948).

## STATE OF WISCONSIN

A-27844 *Decided April 1, 1959*

**School Lands: Generally—Swamplands: Generally**

Unsurveyed school sections found upon survey to be swamp in character pass to the State of Wisconsin, in accordance with the general rule, if at all, under the school grant and not the later swampland grant.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Wisconsin has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated July 30, 1958, which affirmed a decision of the chief of the adjudication section of the Eastern States land office dated August 16, 1955, rejecting the State's application for patent to certain land under the Swamp and Overflowed Lands Grant Act of September 28, 1850 (9 Stat. 519; see 43 U.S.C., 1952 ed., sec. 981 *et seq.*).

The State's application, covering lots 13 and 14 in sec. 16, T. 43 N., R. 6 E., 4th P. M., was filed on June 10, 1955. The application indicates that the right to patent is predicated upon the swampland grant and that the State relies upon the field notes of the U.S. survey, rather than an investigation of its own, to establish the swampy character of the land which makes it subject to the grant (see 43 CFR, Part 271, Note).

The chief of the adjudication section of the Eastern States office held that the land designated in the application of June 10, 1955, could not pass to the State of Wisconsin under the Federal grant of swampland to the States for the reason that this land had been legally appropriated to the State of Wisconsin under the grant of school lands contained in section 7 of the enabling act approved August 6, 1846 (9 Stat. 56, 58), which granted section 16 in each township of the State for the use of the schools. On appeal, the Director denied that there was any legal appropriation of the land in question under the school grant before the passage of the swampland grant act, but affirmed the Eastern States office decision on the ground that the Congress did not intend to remove from the operation of the school grant any of the land designated as school sections because they were found to be swamplands within the meaning of the swampland grant act.

On appeal to the Secretary, the State contends that the grant of school lands included in the enabling act of 1846 did not effect a legal

appropriation of section 16 lands before the survey of such lands so that such sections remained subject to disposal by the United States in 1850 when the Congress made the swampland grant which was, by its terms, a grant *in praesenti*, passing title to the State to the swamplands within its boundaries whether surveyed or unsurveyed. The single question thus presented by this appeal is whether title to unsurveyed swampland later identified by survey as being within a certain section 16 passes to the State upon survey under the school-land grant or whether equitable title has already passed to the State under the swampland grant so that the vesting of legal title in the State may be evidenced by delivery of a patent in accordance with statutory procedures following a determination of the swampy character of the land.

The applicable portion of the enabling act reads as follows:

> Sec. 7. *And be it further enacted*, That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin, for acceptance or rejection; and if accepted by said convention, and ratified by an article in said constitution, they shall be obligatory on the United States:
>
> *First.* That section numbered sixteen, in every township of the public lands in said State, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. * * * (9 Stat. 58).

Section 2 of Article II of the Constitution of Wisconsin (West's Wis. Stats. Anno. (1957), p. 23) expressly declares that the propositions of the Congress contained in the enabling act are "accepted, ratified and confirmed" and "shall remain irrevocable without the consent of the United States." Accordingly, the school grant became effective on May 29, 1848, when Wisconsin was admitted to be one of the United States of America on an equal footing with the Original States by express provision of the Congress (9 Stat. 233).

It is well established that the title to unsurveyed school sections does not pass to a State until they have been surveyed and until surveyed they are subject to other disposition under acts of Congress, leaving the State to compensation for its loss by lieu selections. *United States* v. *Morrison*, 240 U.S. 192, 210 (1916); *United States* v. *Wyoming*, 331 U.S. 440, 454 (1947).

In an attempt to establish uniformity in the school-land grants, the Congress, on February 28, 1891, redefined the conditions under which indemnity selections may be made; prescribed that indemnity

selections shall be made from unappropriated, surveyed public lands that are nonmineral in character within the State or Territory where the losses occur; and fixed the limit of indemnity selections in cases of fractional townships (43 U.S.C., 1952 ed., secs. 851, 852).

The Swamp Land Grant Act, *supra*, provides in section 1:

> That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State. (9 Stat. 519)

Section 2 requires the Secretary of the Interior to make an accurate list and plats of these lands and transmit them to the governor and at the request of the governor to cause patents to be issued, conveying title in fee simple to the State (9 Stat. 519). Section 4 provides that the provisions of the act be extended to and the benefits be conferred upon each of the other States of the Union in which swamp and overflowed lands may be situated (9 Stat. 520).

The nature and effect of the grant thus made have been considered and described in a number of authoritative opinions. In 1858, the Attorney General, in passing upon the effect of the swamp grant of 1850 and the railroad grant of 1853 to the State of Arkansas, said:

> * * * It is not necessary that the patent should issue before the title vests in the State under the act of 1850. The act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect; and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands, and cause a patent to be issued therefor. But when a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title. * * * (9 Atty. Gen. 253, 254–255.)

This conclusion was reaffirmed in 1906 (25 Atty. Gen. 626, 629).

In *Rice* v. *Sioux City & St. Paul R.R. Co.*, 110 U.S. 695 (1884), the United States Supreme Court also held that the swampland grant act operated as a grant *in praesenti* to the States then in existence but not as to States not then in existence. Since the State of Wisconsin was in existence in 1850, the swampland grant act applied to Wisconsin and it is equally effective in relation to Wisconsin as it is to other States. In *United States* v. *Minnesota*, 270 U.S. 181, 202–203 (1926), the Court, in construing a subsequent act extending the swamp act to Minnesota, said:

> By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section was in the usual terms of a grant *in praesenti*, its words being

that the lands described 'shall be, and the same are hereby, granted.' The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governor's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti* and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was *in praesenti* in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253, was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases. *French* v. *Fyan*, 93 U.S. 169, 170; *Wright* v. *Roseberry*, 121 U.S. 488, 500, *et seq.*; *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U.S. 559, 570; *Work* v. *Louisiana*, 269 U.S. 250. * * *

It appears, therefore, that the swampland act became effective in 1850 as a grant *in praesenti*, conveying title in fee simple to the State of Wisconsin of all lands within the State which were swamp in character. The school grant, which became effective in 1848 when Wisconsin became a State, did not effect passage of title until surveys were made and the various sections numbered 16 were thereby created. The land which is the subject of this appeal was swampland in 1848 when the school grant became effective and in 1850, although it was shown on a plat of survey approved April 6, 1863, as part of a lake.

However, a resurvey, the plat of which was accepted on August 11, 1954, established the fact that lots 13 and 14, among others, were improperly omitted from the original survey and are swamp in character.

Since the land in question is in section 16, it passed to the State as school land as soon as the resurvey was approved if equitable title had not already passed under the swampland grant.

The contention advanced by the State of Wisconsin in favor of passage of title to the State under the swampland grant instead of the school grant is advantageous to the State since the State thus presumably remains entitled to indemnity under the school grant. The converse would not be true because of the absence of any provision for indemnity in the swampland grant.

However, the Department has long followed the rule that title to unsurveyed swamplands which, upon survey, are found to be within a school section passes to the State under the school-land grant.

In 1878, the Attorney General considered the effect of the swamp-land grant of 1850 and a subsequent school-land grant to the State of California. In the course of his opinion, he said:

> It is to be observed that with all the other States to which both school and swamp lands have been granted by Congress the school-land grants are prior in date to the swamp-land grants. By reason of the priority of the former grants, the school sections in these States, where they happen to fall within a swamp, pass to the State as *school* land, not as swamp; and I am not aware of the existence of any general provision of law under which such State is entitled to indemnity for so much of the swamp land within its borders as has been previously granted thereto for school purposes. Accordingly, where the two grants thus lap, these States sustain an apparent diminution *pro tanto* in the appropriation of lands made for the purposes named in the swamp grant. (15 Atty. Gen. 454, 455.)

In 1909, in *State of Florida*, 38 L.D. 350, the Department considered whether the State of Florida was entitled to school indemnity selections in lieu of unsurveyed sections in the Everglades area which had been specifically excluded by the Department from the State's list of swamplands. The Florida school-land grant was effected by the act of March 3, 1845 (5 Stat. 788), and the act of February 28, 1891, *supra*, gave Florida the privilege of making indemnity selections. In determining that no indemnity selections could be made, the Department said:

> As contended by the State, this Department and the courts have uniformly held that the grant of school sections in place does not attach to any particular tract of land until the same is identified by survey. See *Heydenfeldt* v. *Daney Gold and Silver Mining Co.* (93 U.S., 634); *Minnesota* v. *Hitchcock* (185 U.S., 373); *Black Hills National Forest* (37 L.D., 469), and cases cited. That Congress, therefore, had the authority prior to the survey of any school section in Florida to make other disposition thereof can not be doubted, and the question to be determined is as to whether or not Congress, by making the swamp land grant in 1850, intended thereby to make such a disposition of school sections afterwards found upon survey to be swamp as to impair the school grant and to render it necessary and competent for the State to select indemnity therefor.
>
> It is a well-established rule that after a tract of land has been appropriated to any special purpose, it is thereafter severed from the mass of public lands, and that no subsequent law, provision, or sale can be construed to embrace it or to operate upon it, although no reservation were made of it. It is true that while the grant made to the State of Florida by the act of 1845, for school purposes, attached to no specific section 16 until they were surveyed, and that under the decisions of the courts and the Department it was competent for

Congress to make other disposition of the school section prior to the survey, nevertheless, it must clearly appear that it was the intention of Congress to make some other disposition of the school sections before the Department would be justified in holding that such was its intention. (P. 352.)

* * * it was the the intention of Congress to reserve for the State of Florida, for common school purposes, the sixteenth section in every township, and, this being so, it is not reasonable to suppose that in making the subsequent grant of swamp lands to the State in 1850 Congress intended to convey to the State lands which it had previously declared should be granted to it for another purpose. As indicated above, that Congress could have made some other disposition of the school lands can not be doubted; but the Department is of the opinion that such was not the intention in this case.

* * * * * * *

The views expressed by the Attorney-General in * * * [15 Op. A. G. 454, 455 cited, *supra.*] accord with the practice which has uniformly obtained in this Department respecting those States to which the school grant was prior to the date of the swamp grant. To grant the relief sought in this case would be tantamount to holding that in every State to which Congress granted both school lands and swamp lands, the State acquired title under the latter grant to all of the school sections not surveyed at the date of that grant, and is therefore entitled to idemnity on account thereof by virtue of the school grant. This Department can not believe that such was the intention of Congress. (P. 354.)[1]

Congress has recognized the validity of the Department's view by enacting several statutes granting a State unsurveyed school sections falling within large swampland areas previously patented or certified to a State on the basis of the projection of surveys over the swamp or of a meander survey of the swamp. Act of April 23, 1912, 37 Stat. 90; act of September 22, 1922, 42 Stat. 1017.[2] See *State of Florida*, fn. 1; *Louisiana Furs, Inc., et al.* v. *State of Louisiana*, 53 I.D. 363 (1931).

Thus the Department has always adhered to the rule that unsurveyed school sections swamp in character pass to a State, if at all, under the school grant and not the swampland grant.

It does not appear that the question of overlapping school and swampland grants has previously arisen in Wisconsin, but nothing

[1] See also *State of Florida*, 24 L.D. 147 (1897); *State of Louisiana*, 30 L.D. 276 (1900); *State of Minnesota*, 32 L.D. 325 (1903).

[2] In a letter dated May 26, 1922, from the Acting Secretary of the Interior to the President of the United States recommending approval of S. 3641, 67th Cong., 2d Sess., which became the act of September 22, 1922, the Acting Secretary said:

> "The State of Florida by the swamp-land act of September 28, 1850, was granted all the swamp and overflowed lands within the State. By the school grant the State of Florida was given all sections 16 not mineral in character and not occupied or disposed of prior to survey. In the area surrounding Lake Okechobee, and known as the Everglades, it was decided by this Department that it would not be necessary to extend the public-land surveys over the large swampy

has been presented in support of the State's contention in this case which affords any basis for the announcement of a special rule for the State of Wisconsin.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Acting Solicitor.*

## APPEAL OF PARKER-SCHRAM COMPANY

**IBCA-96** *Decided April 7, 1959*

**Contracts: Appeals—Contracts: Damages: Liquidated Damages—Contracts: Unforeseeable Causes—Contracts: Waiver and Estoppel**

Although the "disputes" clause of the U.S. standard form of construction contract provides that in connection with an appeal the contractor shall be afforded an opportunity to offer evidence in support of its appeal, and the regulations governing procedure before the Board provide for a hearing if the appeal involves disputed issues of fact, they contemplate that a hearing for the purpose of taking testimony shall be mandatory only when appellant has tendered issues of fact that are genuine and material. Hence, a request for a hearing made by a contractor engaged in constructing an access road to a Bonneville transmission line who pleads no excusable cause of delay but attacks the validity and effect of the liquidated damages provision itself need not be granted, and the appeal may be decided on the written record. In particular, no genuine and material issue of fact is raised by the allegation that unnamed Bonneville inspectors assured the contractor that there was no urgent need for the access road, since such assurances would be unauthorized even if made, and hence could not form the basis for a waiver of the liquidated damages provision. The fact that the liquidated damages imposed on the contractor exceeded the amount of the consideration for the performance of the work is in itself immaterial.

BOARD OF CONTRACT APPEALS

Parker-Schram Company, of Portland, Oregon, has filed a timely appeal from findings of fact and decision of the contracting officer, dated December 11, 1956, denying its request for an extension of time

area involved, but that the land could be described by its outer boundary lines, and so patented to the State under the swamp grant. This was done, and patent issued in 1903. However, this patent did not convey title to the State of the school sections within the area, as they passed to the State, if at all, under the school grant and not the swamp grant, and ordinarily a survey of the sections is required before title can vest in the State."

of 35 calendar days for the construction of Access Road FC–S–AR–117B, which was Item 32 of Schedule II under Contract No. 14–03–001–12671 with the Bonneville Power Administration. The estimated contract price for the access road was $1,400, although the estimated contract price as a whole was $581,808.75.

The contract, which was dated July 23, 1956, was on U.S. Standard Form 23 (revised March 1953), and incorporated the General Provisions of U.S. Standard Form 23A (March 1953). It provided for the construction of the Chief Joseph Powerhouse-Switchyard Line No. 4 and Chief Joseph-Columbia River and Berne-Scenic Sections of Chief Joseph-Snohomish Line No. 4 of the Bonneville Power Administration.

Under the terms of paragraph 1–106 of the specifications the access road was to be completed within 60 calendar days of receipt of notice to proceed, which was to be issued so as to be received within 45 calendar days of the opening of bids, and for failure to complete the road within the specified time liquidated damages in the amount of $50 a calendar day were to be paid by the contractor. Notice to proceed was issued with the consent of the contractor to be effective August 6, 1956,[1] which thus fixed the date for the completion of the access road as October 5, 1956. It was not completed, however, until November 8, 1956, and for the 34 days' delay in completion liquidated damages in the amount of $1,700 were assessed against the appellant.

The appellant's request for an extension of time for the completion of the access road was made in a letter to the contracting officer dated October 30, 1956, and his findings of fact and decision of December 11, 1956, were made in response to this letter.

In its letter of October 30, the appellant based its request for an extension of time upon the allegations that (*1*) "Our Project Superintendent was advised there was no urgent need for the access road and no immediate use that it would serve even if completed within the October 5 time limit," and (*2*) because of a September 1, 1957, deadline for the energization of the Berne-Scenic section of the Chief Joseph-Snohomish Line No. 4, and the short construction season in the summer of 1957, it had decided to concentrate on the construction of this line. At the same time it pleaded that while the Government had suffered no inconvenience or loss by reason of the delay, the proposed penalty, which would be out of all proportion to the value that could be placed upon the interim use of the road, would work an ex-

[1] This date is erroneously given in the findings as August 5, 1956.

treme hardship upon it, and also that, although it had agreed to accept notice to proceed as early as August 6, 1956, it had done so only to get a start as soon as possible on the Berne-Scenic section of the line.

In his findings of fact and decision the contracting officer held that there was no evidence to indicate that any Government employee had purported to modify the contract requirement relating to the time for the completion of the road, and that actually the appellant was merely alleging that some unnamed member of the Government's inspection forces had made statements concerning the need for the access road which even if true could not have the effect of altering the contract requirement. He also held that, while the energization of the Berne-Scenic section of the line was important, so was the completion of the access road which the appellant had also undertaken, and that the need for the access road might have become critical at any time in connection with the Foster Creek-Snohomish Line. He concluded that the appellant had not shown any excusable cause of delay within the meanings of clause 5(c) of the General Provisions of the contract,[2] and he dismissed the special pleas of the appellant, such as lack of actual damage to the Government and hardship on the appellant as legally irrelevant. In this connection he pointed out, however, that had an emergency outage developed necessitating use of the access road for maintenance the Government unquestionably could have been damaged in excess of the cost of the road.

In its appeal, which was in the form of a letter dated January 9, 1957, the appellant reiterated in general the contentions previously submitted to the contracting officer but, now, in alleging that it had been told by "the personnel of the Bonneville Power Administration," that there was no urgent need for the road and that the contracting officer could have ascertained this, it only made it clear that the latter was not responsible for any such statements, and that, therefore, no waiver of the contract requirement had occurred. However, in its appeal the appellant did advance as an additional basis for relief the ground that it had been advised that there existed an access road roughly parallel to and only 200 feet distant from the access road to be constructed under the contract, and that this existing road, which had served the Bonneville Power Administration for maintenance purposes for over 5 years, was adequate to maintain the towers in the area.

[2] This excused delays in the completion of the work "due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including but not restricted to certain named causes among which were "acts of the Government."

In the statement of its position with respect to the appeal, the Government explained that, while there had been another road by which access to Towers 208 and 210 had been gained, this road had been severed by gravel pit operations, and that this was the reason for the construction of the access road for which provision had been made in the contract. In the same statement, the Government also denied that any Bonneville personnel had made any representations with respect to the need for the access road, and challenged the appellant to name the persons who had made them. The Government takes the position that the appeal does not raise material issues of fact or justiciable issues of law, and moves that the Board dismiss the appeal for lack of jurisdiction.

In its reply, which was in the form of a short letter from its attorney dated June 2, 1958, the appellant did not specifically challenge the Government's explanation of the severance of the existing access road, nor supply the names of any Bonneville employees who allegedly had made the representations with respect to the access road being constructed under the contract, but advanced the contention that the provision for liquidated damages for failure to complete this road on time was, as applied in the present case, unlawful under the law of Oregon, and demanded that it be afforded an opportunity "to establish the necessary facts" at a hearing.

Clause 6 of the General Provisions of the contract, which is the "disputes" clause, provides that in connection with any appeal, "the Contractor shall be afforded an apportunity to be heard and to offer evidence in support of its appeal," and section 4.10 of the regulations governing procedure before the Board[3] provides: "If the appeal involves disputed questions of fact, the Board shall, at the request of either party, grant a hearing." These provisions contemplate, however, that a hearing for the purpose of taking testimony should be mandatory only when an appellant has tendered issues of fact that are genuine and material. It is apparent, however, that this is not true in the present case, and that therefore no purpose would be served by a hearing "to establish the necessary facts," as the appellant requests.

Indeed, the only genuine and material issue of fact which the appellant has tendered is possibly whether any of the Bonneville inspectors led the appellant to believe that there was no urgent need for the access road, and that it would not make any difference when

[3] 43 CFR, Part 4.

it was completed. However, even if the Board were to assume that the inspectors made statements which induced such a belief, and that such statements could constitute a waiver of the liquidated damages provision, it is clear that they would not have been authorized by the contracting officer, and therefore for this reason alone would have had no effect in altering the obligation of the contract.

The other assumptions or motives of the appellant are equally immaterial. It was free to plan the order in which it would perform the various items of work required under the contract but its decision to give priority to the Berne-Scenic section of the line was its own, and could no way affect its other obligations under the contract. Equally immaterial is its motive in accepting an earlier date for the notice to proceed than it thought to be expedient, for the fact remains that it did accept the date which was fixed within the 45 calendar days of the opening of bids, as provided in the contract.

As for the contentions of the appellant with reference to the validity and effect of the liquidated damages provision itself, they are entirely without merit. These questions must be determined under Federal law, rather than under the law of Oregon, as the appellant contends, and under Federal law it is quite immaterial that, as matters turned out, the Government suffered no inconvenience as the result of the delay, or that the appellant would be subjected to hardship by the imposition of the liquidated damages. It is true that even under Federal law a liquidated damages provision will not be enforced if in fact it constitutes a penalty. But to justify such a conclusion it must be established that it is plainly without reasonable relation to any probable damage which could follow from a delay in performance, and the circumstances of the present case would hardly warrant such a conclusion. Indeed, they show that the need for the access road was urgent, especially in view of the severance of the existing access road—a fact which the appellant does not now challenge. As for the rate of the liquidated damages, the practice is to enforce it as written, for a contractor should not lightly be permitted to repudiate a rate to which it has itself agreed. It has been held that in construing a liquidated damages provision there must be indulged a presumption, arising from the very incorporation of the provision in the contract, that it had been premised upon due consideration of all the attendant circumstances.[4] Actually, the hardship upon the appellant in the present case, if any, has not arisen from the rate of the liquidated damages for which provision was made in the contract but from the

[4] See 28 Comp. Gen. 435, 437 (1949).

long duration of the delay in completing the work to which the rate was applicable. In any event the fact that the amount of the liquidated damages in the present case exceeded the consideration for the performance of the work has been held by the Comptroller General to be immaterial. Indeed he has even held that such excess is not in itself an adequate basis for the exercise of his equitable power to remit liquidated damages under section 10(a) of the act of September 5, 1950 (64 Stat. 578, 591; 41 U.S.C., 1952 ed., sec. 256a).[5] Obviously, what the Comptroller General will not do on equitable grounds, the Board should hardly do on legal grounds. Moreover, it should not be forgotten that, while the liquidated damages exceeded in the present case the consideration for the work under the contract, this was only one item, and a minor one, in a contract in which the consideration for the work as a whole was over half a million dollars.

Department counsel's motion to dismiss the appeal for lack of jurisdiction is doubtless based upon the theory that the Board could not exercise a power to remit the liquidated damages on equitable grounds. This in itself is true but there are other legal issues in the case over which the Board does have jurisdiction, and the motion is, therefore, not entirely apposite. However, no good reason appears why the findings of fact and decision of the contracting officer should not be affirmed.

CONCLUSION

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

WILLIAM SEAGLE, *Member.*

I concur:

THEODORE H. HAAS, *Chairman.*

Board member HERBERT J. SLAUGHTER did not participate in the consideration and disposition of this appeal.

[5] See 32 Comp. Gen. 67 (1952).

## STEPHEN P. DILLON
## MARTHA M. RODERICK

A–27880 *Decided April 7, 1959*

**Alaska: Oil and Gas Leases—Oil and Gas Leases: Applications**

Where there is an approved corner of the public land survey within two miles, an offer for a noncompetitive lease of unsurveyed lands in Alaska which is not connected to that corner is defective and earns the offeror no priority.

**Oil and Gas Leases: Applications**

An offer for a noncompetitive oil and gas lease is properly rejected where the lands applied for are embraced in an existing oil and gas lease.

**Oil and Gas Leases: Lands Subject to**

Land embraced within an outstanding lease becomes land unavailable for leasing from the date the lease is signed by an authorized officer of the United States even though the lease term does not begin until the first of the following month and an offer filed for such land after the signing of the lease must be rejected.

**Oil and Gas Leases: Cancellation**

An oil and gas lease which has been issued on the basis of an offer defective in that the description of the lands applied for was not tied to an approved corner of a public land survey as required by 43 CFR 71.2(a)(1) will not be canceled where there are no intervening rights of third parties.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Stephen P. Dillon has appealed to the Secretary of the Interior from a decision dated August 27, 1958, of the acting director of the Bureau of Land Management which affirmed a decision of the manager of the Anchorage land office holding Dillon's noncompetitive oil and gas lease, Anchorage 029668, for cancellation in part and approving the issuance of a lease to Martha M. Roderick under her lease offer, Anchorage 032789, as to the land to be deleted from Dillon's lease.

On April 6, 1955, Dillon filed a noncompetitive offer to lease for oil and gas pursuant to the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226), covering two parcels of unsurveyed land in Alaska. He described each parcel by metes and bounds and purported to tie each description to a corner of the public land survey. Parcel 2, with which this appeal is concerned, is described as follows:

* * * beginning at the NE corner of T 29S R 41W, thence east 7¾ miles the point of beginning parcel #2, thence south 3 miles, east ½ mile, north 3 miles,

west ½ mile the point of beginning which will when surveyed be the east half of the east half of Sec. 5 the west half of the west half of Sec. 4; the east half of the east half of Sec. 8, the west half of the west half of Sec. 9; the east half of the east half of Sec. 17, the west half of the west half of Sec. 16 T 29S, Range 39 W.

The record shows that on July 12, 1956, the acting manager issued Dillon a lease effective August 1, 1956, for the lands described in his offer.

On July 20, 1956, between the signing of the Dillon lease and its effective date, Mrs. Roderick filed her offer for land described as follows:

> "Unsurveyed.
> Beginning 13¾ miles E of SW cor. sec. 18, T 29 S, R 41 W.
> "Thence N 3 miles, E ½ mile, S 3 miles, W ½ mile.
> "Probably will be when surveyed:
> W½W½ secs. 4, 9 & 16;
> E½E½ secs. 5, 8 & 17, T 29 S, R 39 W."

On December 21, 1956, Mrs. Roderick filed a protest with respect to parcel No. 2 of Dillon's offer on the ground that the corner to which the description of the parcel was tied, the NE corner of T. 29 S., R. 41 W., is not established in the field, that as a consequence the offer was defective because it was not connected with a corner of the public land survey, that her intervening offer for the same land was proper, and that Dillon's lease should be canceled as to the conflict and a lease issued to her.

The manager held that the pertinent provision of the oil and gas regulations (43 CFR 192.42(d)) required that a description of unsurveyed lands be connected to a corner of a public land survey; that Dillon's offer was not so connected because the corner he used was merely a projected corner, not one that had been surveyed in the field and monumented; that Dillon's offer was fatally defective; that Mrs. Roderick's offer was proper; that she had earned a preference right to a lease which the Department must honor. He thereupon canceled Dillon's lease as to parcel No. 2 and approved a lease as applied for by Mrs. Roderick.

From the affirmance of the manager's decision by the acting director for the same reasons, Dillon has taken this appeal.

The basic premise underlying the decisions below is that Mrs. Roderick, as the first person to file a proper application for the land available for leasing, has earned a statutory preference right which must be honored even though a lease has been issued to another.

*McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C. 1955); *Arnold R. Gilbert*, 63 I.D. 328 (1956). While the rule relied upon is well established, it does not control this matter for several reasons.

First, as has been set out above, Dillon's lease was signed on July 12, 1956, and became a binding instrument on that date despite the fact that the effective date was delayed until August 1, 1956. 43 CFR 192.40a; 192.42(i); *Charles D. Edmonson et al.*, 61 I.D. 355, 363 (1954); *R. S. Prows*, 66 I.D. 19 (1959). From the date on which the Dillon lease was signed, the lands it covers were in an outstanding lease and were no longer available for leasing (*R. S. Prows* (*supra*)). Lands in an outstanding oil and gas lease are not open to filing and offers filed for them must be rejected. *Raymond J. and Harold J. Hansen et al.*, A–27503 (January 3, 1958); *Margaret A. Andrews et al.*, 64 I.D. 9, 11 (1957); *Arnold R. Gilbert*, *supra*. Thus at the time Mrs. Roderick filed her offer the land she applied for was not available for leasing and it earned her no preference and should have been rejected. *Id.*

Secondly, when both Dillon and Mrs. Roderick filed their offers, the pertinent regulation[1] relating to offers to lease lands in Alaska pursuant to the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 181, *et seq.*), provided:

> (a) Applications for leases of unsurveyed lands shall describe them by metes and bounds; the corners must be plainly marked on the ground by setting substantial posts or heaping up mounts of stone, and the boundaries must conform to true cardinal directions insofar as practicable.
>
> (1) *Where the lands are within two miles of an approved public land survey corner, a corner of the area applied for shall be connected by courses and distances to that corner.* There may be utilized as the point of reference the initial monument erected by another applicant who has described said monument by courses and distances with reference to a public survey corner. In such case the location of the adopted monument with respect to the public land survey corner must be stated, or the field notes or calculations by which the location of the applicant's initial monument, with reference to the public survey monument, was obtained, must be furnished. (43 CFR 71.2; italics added.)

The records of the Department reveal that a survey of some of the exteriors of Ts. 27–30 S., Rs. 39–45 W., Seward Meridian, was accepted on November 18, 1922. According to the plat of survey, the southern boundary of Ts. 28 S., Rs. 40 and 41 W., and the section and half section corners falling thereon were surveyed. The northern boundary of parcel No. 2 lies along the surveyed line, with its north-

[1] The decisions below assumed that the equivalent provision of the general oil and gas regulations, 43 CFR 192.42(d), applied. However, the regulations relating to Alaska specifically state that the regulations in Part 192 are subject to the provisions of 43 CFR 71.2 and 3. 43 CFR 71.1.

western corner coming very close to the surveyed common corner of secs. 34 and 35 [2] and a little over a mile from the common corner of secs. 33 and 34, T. 28 S., R. 39 W., indicating that there are at least two approved corners of the public land survey within 2 miles of the applied for land.

Thus, Mrs. Roderick's offer, which tied the metes and bounds description to a corner 13¾ miles away, did not comply with the requirements of the regulation. She, therefore, did not file a proper offer and did not earn a preference right to a lease. *George Sabolsice*, A–27548 (May 23, 1958); *Duncan Miller*, A–27535 (March 10, 1958); see *Layton A. Bennett et al.*, A–27659 (November 3, 1958).

For either of the reasons discussed above, Mrs. Roderick was not a qualified offeror for the land in conflict and her offer must be rejected without priority.

It is also clear that Dillon's offer, too, was defective for failure to make a tie to an approved corner of a public land survey within 2 miles of the applied for land. However, with the rejection of Mrs. Roderick's offer, there do not appear to be any intervening rights of third parties which require consideration. In the absence of intervening rights the Department has often held that it will not cancel a lease, otherwise regular, because it has been issued in violation of some provision of the regulations which, if made known prior to the issuance of the lease, would have required that the offer be rejected. The Department has applied this rule to a lease issued upon a description insufficient to identify the land and allowed the lessee to amend his description. *Columbia Carbon Co., Liss*, 63 I.D. 166, 171–172 (1956), aff'd *Liss* v. *Seaton*, No. 3233–56 (D.D.C.), decided January 9, 1958. It has also refused to cancel leases issued in violation of the six-mile square rule (*D. Miller*, 63 I.D. 257 (1956); *Arnold R. Gilbert, supra; Earl W. Hamilton*, 61 I.D. 129 (1953)).[3]

Accordingly, in the absence of any question as to the sufficiency of the description in Dillon's lease to identify the land it covers or of his qualifications to hold a lease, under the rule stated, there is no occasion to cancel his lease.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is reversed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

[2] According to the plat, the tier of Ts. 29 S. does not lie directly below the Ts. 28 S. in the same range, but are offset almost 2½ miles to the east.

[3] See also: *Sidney A. Martin, C. C. Thomas*, 64 I.D. 81, 86 (1957).

## PEXCO, INC., ET AL.

A-27868 *Decided April 7, 1959*

**Alaska: Navigable Waters—Alaska: Oil and Gas Leases—Alaska: Tidelands—Oil and Gas Leases: Lands Subject to**

Lands consisting of tidelands along the Alaska coast or of beds and bottoms of navigable rivers or lakes in Alaska are not subject to leasing under the Mineral Leasing Act.

**Alaska: Oil and Gas Leases—Oil and Gas Leases: Generally**

Upon the admission of Alaska into the Union, the authority granted to the Secretary of the Interior by the act of July 3, 1958, to lease lands beneath nontidal navigable waters terminated.

**Alaska: Oil and Gas Leases—Oil and Gas Leases: Preference Right Leases**

Section 6 of the act of July 3, 1958, gave a preference right to an oil and gas lease to lands beneath nontidal navigable waters only to those whose leases (or offers or applications) included public lands otherwise available for leasing adjacent to such lands.

### APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Pexco, Inc., L. E. Grammer, Don E. Woodward, and Norman G. Lange have each appealed to the Secretary of the Interior from a decision dated August 15, 1958, of the acting director of the Bureau of Land Management which affirmed the action of the manager of the Anchorage land office rejecting one or more of their respective noncompetitive offers to lease for oil and gas filed by them pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

The lands included within the applications are either tidelands along the Alaska coast or are the beds and bottoms of an Alaskan river (the Ninilchik) or of several navigable lakes in Alaska.

The acting director held, first, that the tidelands and submerged lands off the coast of Alaska are not subject to leasing under the Mineral Leasing Act, as amended. He then held that the remaining applications describing only lands underlying inland navigable waters did not fall within the provisions of the act of July 3, 1958 (72 Stat. 322), which under certain conditions authorized the Secretary to lease such lands.

It has long been the Department's position that the Secretary was not authorized to issue leases under the Mineral Leasing Act for lands below the high watermark along the coast. Solicitor's opinion, 60 I.D. 26 (1947); *Layton A. Bennett et al.*, A-27659 (November 3,

1958); see *Justheim* v. *McKay*, 229 F. 2d 29 (C.A.D.C. 1954), *cert. denied*, 351 U.S. 933; *Jesse C. Martin*, 32 L.D. 1 (1903). Therefore, the applications were properly rejected insofar as they covered tidelands.

In any event, upon the admission of Alaska into the Union as a State on January 3, 1959 (Presidential Proclamation 3269, 24 F.R. 81), the tidelands bordering its coast became the property of the State. *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 15 (1935). The Federal Government, after the admission of a State, has no power to convey tidelands which have vested in the State. *Id.*, 16. Furthermore, the Submerged Lands Act (43 U.S.C., 1952 ed., Supp. V, sec. 1301 *et seq.*) recognized, confirmed, established, and vested in and assigned to the respective States title to and ownership of "lands beneath navigable waters" within its boundaries, a term which included tidelands, *id.*, sec. 1301, 1311. This act was explicity made applicable to Alaska by section 6(m) of the act of July 7, 1958, providing for the admission of Alaska into the Union (72 Stat. 339, 343).

Therefore, the United States has now no authority to lease the tidelands and, for this additional reason, the rejection of the applications covering tidelands was proper.

Turning now to the lands applied for which are the bed or bottom of a navigable river or lake, it has been the Department's position that it had no authority under the Mineral Leasing Act to lease such lands. See letter dated May 29, 1957, to Speaker, House of Representatives, from Under Secretary of the Interior (H. Rept. 774, 85th Cong., p. 3). This view was restated in both House (*id.*, p. 1) and Senate reports (S. Rept. 1720, 85th Cong., p. 3) on H. R. 8504, and was the justification for the passage of the act of July 3, 1958 (*supra*), which provided for the leasing of such lands.

Upon the admission of Alaska to the Union the title to lands underlying inland navigable waters passed to it. *United States* v. *Oregon*, 295 U.S. 1, 14 (1935). Thereafter, the United States would not have any authority to lease them. *A. C. Hornung*, A-26403 (July 28, 1952).

In any event, the act of July 3, 1958, provided that its provisions would cease to apply to any lands beneath nontidal navigable waters upon the transfer of such lands to any State erected out of the Territory of Alaska (sec. 7). Upon the admission of Alaska into the Union, the authority of the Secretary under the act came to an end.

However, Pexco, Inc., the only appellant whose applications cover lands other than tidelands, contends that it has a preference right to a lease under section 6 of the act of July 3, 1958.

The pertinent sections of the act provide:

Sec. 6. If any oil and gas lease issued for public land pursuant to the Mineral Leasing Act (or any application or offer for such a lease of such land, which is pending on the date of this Act and subsequently becomes effective), embraces within the boundaries described in the lease (for application or offer) any lands beneath nontidal navigable waters in the Territory of Alaska not within any known geological structure of a producing oil or gas field on the date the application or offer for any such lease was filed with the Bureau of Land Management, the lessee (or applicant or offeror) shall, upon application filed while such lease (or application or offer) is still in effect but not more than one year after the date of approval of this Act and under regulations to be prescribed by the Secretary, have a preference right to have included within such lease (or application or offer) such lands beneath nontidal navigable waters in the Territory of Alaska. For the purposes of this section an area shall be considered to be within the boundaries described in the lease (or application or offer) even though it is excluded from such description by general terms which exclude all described lands that are or may be situated beneath navigable waters.

Sec. 7. Upon the transfer to the Territory of Alaska or to any future State or States erected out of the Territory of Alaska of title to any of the lands beneath nontidal navigable waters in the Territory of Alaska, the provisions of this Act shall cease to apply to any lands which are so transferred: *Provided, however*, That any lease issued pursuant to this Act (or application or offer for such a lease) or unitization or other agreement approved or prescribed by the Secretary as to any of the lands covered by any such lease which is in effect at the time of such transfer of title to any of the lands beneath nontidal navigable waters in the Territory of Alaska shall not be terminated or otherwise affected by such transfer of title; but all the right, title, and interest of the United States under such lease (or application or offer for lease) or unitization or other agreement, including any authority to modify its terms and conditions that may have been retained by the United States, and all obligations thereunder shall vest in the Territory of Alaska or the State to which title to those lands beneath nontidal navigable waters in the Territory of Alaska covered by the lease (or application or offer for lease) or unitization or other agreement is transferred.

In explanation of section 7, Senate Report 1720 (*supra*, p. 8) stated:

Section 7 states that the terms of the act shall cease to apply to any lands which are hereafter transferred to the Territory or the future State of Alaska. Rights under any outstanding lease, application or offer * * * would be maintained in force; but the Territory or the State, as the case may be, will succeed to all the rights and powers of the United States under such instruments.

Thus, if Pexco did have a preference right under section 6, the authority to act upon it has been transferred to the State of Alaska and the Secretary has no authority over it.

Furthermore, it is my opinion that Pexco was not one of those to whom section 6 gave a preference right. Section 6 applies only to offers for oil and gas leases for public land which embrace within their boundaries lands beneath nontidal navigable waters. In explanation of this section, Senate Report 1720, *supra*, stated:

> It is intended that a valid lease or application or offer must be in existence as a condition precedent to the vesting of any preference right. Therefore, if a lease (or application or offer) includes within its described boundaries no lands which are, in fact, situated above the ordinary high-water mark, the lease (or application or offer) is not valid and cannot support a claim to any preference right. (P. 8.)

Since Pexco's offers describe only lands below ordinary high watermark, they were not valid offers prior to the passage of the act of July 3, 1958, and gained no preference right thereunder.

Pexco has also asked that the Secretary determine, pursuant to section 4 of the act of July 3, 1958, whether the lands it has applied for underlie nontidal navigable waters and to designate the line marking the mouth of the Ninilchik River, if it is held to be a navigable stream. A determination that the lands applied for were lands beneath nontidal navigable waters was implicit in the decisions of the manager and the acting director. The appellant has not offered any evidence that the Ninilchik River or the lakes are nonnavigable. Accordingly, there is no reason to disturb the decisions below on this point.

As to the other request, the only reason for designating the line marking the mouth of a stream was to separate the tidal from the nontidal navigable waters as defined in section 1(a) of the act. Upon the admission of Alaska into the Union, lands beneath either tidal or nontidal navigable waters at the mouth of a stream passed to it. Therefore, since such a determination can have no bearing upon the appellant's offer, there is no necessity to make it.

Finally, Woodward asks that his offers not be rejected now but kept pending in case the Alaska legislature decides to give a preference right to offers such as his. I find no merit in this request because Alaska may recognize a preference right to offers previously filed with this Department on such terms as it desires, whether or not they have been rejected by this Department.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed.

EDMUND T. FRITZ,
*Deputy Solictor.*

## APPEAL OF BUSHMAN CONSTRUCTION COMPANY

IBCA-193 *Decided April 23, 1959*

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

A contracting officer's findings that the drawings submitted to bidders and incorporated in the executed contract contained data from which in about 2 hours' time a qualified person could prepare an estimate of quantity which would have revealed that the material to be excavated did not exceed the quantity that was ultimately removed, deals with technical engineering questions which are essentially questions of fact under the "disputes" clause of the standard form of Government construction contract. Hence, an appeal from such findings must be taken within 30 days from receipt of the findings.

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

When the thirtieth or last day on which an appeal may be taken from findings of fact under the "disputes" clause falls on a State holiday not declared by the Congress to be a legal public holiday, the time for taking the appeal is not extended to the next business day.

**Contracts: Generally**

In view of the need for uniformity in matters involving the construction and application of Government contracts, such matters are under the exclusive control of Federal law as fashioned by Congress and the Federal courts.

### BOARD OF CONTRACT APPEALS

This disposes of the Government's motion to dismiss the appeal of the Bushman Construction Company from findings of fact and decision of the contracting officer, dated January 5, 1959, which dismissed a claim for additional compensation in the amount of $19,467.53 under Contract No. 14-06-D-2237 with the Bureau of Reclamation.

The contract provided for the construction and completion of earthwork and structures for Kirwin South Canal from Station 0+52 to Station 860+50, laterals and drains, under Schedules Nos. 1 and 2 of Specifications No. DC-4792, Kirwin, Unit, Kansas, Solomon Division, Missouri River Basin Project. It was on a unit price basis, the largest single item being "Excavation for canal" in the estimated quantity of 842,000 cubic yards. And it included the customary "disputes" clause.[1]

In general outlines, the claim on which the contractor seeks relief is that the quantity of material which actually had to be excavated for

[1] Clause 6 of Standard Form 23A (March 1953) as modified to incorporate the limitations upon the finality of administrative decisions imposed by the act of May 11, 1954 (68 Stat. 81; 41 U.S.C., 1952 ed., Supp. V, secs. 321, 322).

the canal was approximately 310,000 cubic yards less than the amount stated in the bidding schedules, that the underrun was chiefly in those categories of material which were comparatively inexpensive to excavate, that the material actually removed included a higher percentage of those categories which were comparatively expensive to excavate than the contractor had reasonably computed would be the case on the basis of the 842,000 cubic yards stated in the schedules and other information made available to bidders by the Government, and that the contract unit price for canal excavation should be adjusted upward so as to reflect this change in the relative proportions of the various categories of material.

The contracting officer in the findings of fact and decision appealed from concluded that in view of the provisions of the "approximate quantities" clause of the contract [2] there was no basis for considering the claim under the terms of the contract, and that, therefore, it could only be regarded as a claim for unliquidated damages which he had no authority to entertain and settle. In the course of reaching these conclusions the contracting officer conceded that there had been an underrun of approximately 310,000 cubic yards, due to a discrepancy between the quantity of canal excavation stated in the schedules and the canal dimensions shown on the drawings submitted to bidders and incorporated in the executed contract, but made no findings with respect to most of the other matters alleged by the contractor.

The findings of fact and decision were forwarded to the contractor by certified mail, and the post office receipt shows that the document was received by the latter on January 13, 1959, at its office in St. Joseph, Missouri.

The appeal, which was forwarded to the Board in Washington, D.C., by counsel for the contractor by registered mail, was deposited in the mail at Ellsworth, Kansas, on February 13, 1959. This was 31 calendar days after the contractor had received the findings of fact and decision.

While the notice of appeal should have been transmitted through the contracting officer, this defect is not jurisdictional and, in the absence of any grounds for considering that the Government may have been prejudiced thereby, is not a sufficient reason for dismissing an appeal in the circumstances here involved.[3]

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[2] The pertinent part of this clause, which constituted paragraph 4 of the specifications, is 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."

[3] *Larsen-Meyer Construction Co.*, 65 I.D. 463, 465, 58–2 BCA par. 1987 (1958).

On the other hand, it is well established that neither the Board nor any administrative authority is empowered to waive or extend the 30-day period allowed for the taking of an appeal by a "disputes" clause such as the one incorporated in this contract.[4] That clause, however, by its own terms relates only to disputes concerning questions of fact, whereas in the instant case it might be argued that, the existence of the underrun having been conceded, nothing but questions of law are really in issue. Nevertheless, the contracting officer did make findings, among others, to the effect that the drawings contained data from which, in about 2 hours' time, a qualified person could prepare an estimate of quantity which would have revealed that the material to be excavated did not exceed the quantity that was ultimately removed. These findings, when considered in the light of the principles of law governing the allowance of additional compensation for overruns or underruns in estimated quantities,[5] cover matters that, on their face, would seem to be pertinent in any determination of the ultimate issue of whether the claim here presented is one that could be allowed administratively. The technical engineering questions with which these findings deal would, moreover, seem to be essentially questions of fact within the intendment of the "disputes" clause. For this reason, if no other, it must be concluded that the present appeal falls outside the rule that appeals to the Board which involve only questions of law need not necessarily be taken within 30 days from receipt of the findings of fact or decision sought to be reversed.[6]

This brings us to the question of whether the time for mailing the notice of appeal, which normally would have expired on Thursday, February 12, 1959, was extended to Friday, February 13, 1959, by reason of the fact that the former was Lincoln's Birthday. A Kansas statute declares Lincoln's Birthday to be a "legal holiday." [7]

When the last day of a period prescribed by statute for bringing suit against the United States falls on a Sunday, it has been held that the suit may be begun on the following business day.[8] This is in accordance with the general doctrine that where the last day for per-

[4] The rules governing procedure before the Board expressly incorporate this principle, 43 CFR 4.5, 4.16.

[5] See *J. D. Armstrong Co.*, 63 I.D. 289, 305–7 (1956).

[6] *Hagerman Construction*, IBCA–183, 59–1 BCA par. 2065 (1959); *Gustav Hirsch Organization, Inc.*, IBCA–175, 58–2 BCA par. 1972 (1958); *Welch Industries, Inc.*, 61 I.D. 68 (1953). *Cf. Haddox*, IBCA–84, 57–2 BCA par. 1350 (1957).

[7] Kansas General Statutes, 1949, sec. 35–104.

[8] *Schultz* v. *United States*, 132 Ct. Cl. 618 (1955), and authorities there cited. In this case the Court of Claims expressly overruled its earlier contrary decision in *Harmon* v. *United States*, 124 Ct. Cl. 751 (1953).

formance of an act falls on a Sunday, performance on the next day is timely.[9] Following these precedents, the rule has become well settled that when the last day of the 30-day period allowed by the "disputes" clause falls on a Sunday, the notice of appeal may be mailed on the following business day.[10]

This rule has been extended by the Armed Services Board of Contract Appeals to days that have been established as public holidays by Federal law.[11] Eight days in all, namely, New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day and Christmas Day, have been declared by Federal statute to constitute "legal public holidays." [12] These same 8 days, together with, in every fourth year, Inauguration Day, also constitute the legal holidays in the District of Columbia.[13] There is, however, no Federal statute which provides that Lincoln's Birthday shall be a public or legal holiday. Whereas Federal offices throughout the country are, with minor exceptions, closed on each of the 8 days which the Congress has declared to be legal public holidays, they are open for business on Lincoln's Birthday to the same extent, in general, as on any workday.

Many of the statutes, rules of court, and other documents that prescribe the time for taking appeals, filing papers, or performing other acts contain express exclusions of Saturdays or Sundays or holidays, and some of them expressly define what days are comprehended within the latter term. The "disputes" clause, however, contains no such provisions. In their absence, we think the most that can be read into the clause by implication is that when the thirtieth day falls on a Sunday or a day that is established as a public holiday by Federal law, the time for appealing does not expire until the end of the next succeeding day which is neither a Sunday nor a Federal holiday. It has been held that when the thirtieth day falls on a Saturday, the time for appealing is not extended to the succeeding Monday.[14] Yet there would be more reason for an extension in the case of Saturday—a day on which most Federal offices are closed wholly or in part—than in the case of Lincoln's Birthday—a day on which these offices are customarily in full operation.

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[9] *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949); 20 Comp. Gen. 310 (1940).

[10] See *Henly Construction Co.*, IBCA-165 (March 18, 1959), and authorities there cited.

[11] *Reading Clothing Manufacturing Co.*, ASBCA No. 3912, 57-1 BCA par. 1290 (1957); *Northrop Aircraft, Inc.*, ASBCA Nos. 391 and 400 (March 27, 1950).

[12] 5 U.S.C., 1952 ed., sec. 87, 87a, 87b; 5 U.S.C., 1952 ed., Supp. V, sec. 87a.

[13] 28 D.C. Code, 1951 ed., sec. 616; 5 U.S.C., 1952 ed., sec. 87a, 87b; 5 U.S.C., 1952 ed., Supp. V, sec. 87a.

[14] *Lormar Instrument Co.*, ASBCA No. 3297, 57-1 BCA par. 1228 (1957); *Pocono Apparel Manufacturing Co.*, ASBCA No. 2400 (December 7, 1954).

The principle is well established that the need for uniformity in matters involving the construction and application of Government contracts is such as to exclude these matters from the operation of State laws, and to bring them within the exclusive control of Federal law as fashioned by Congress and the Federal courts.[15] The instant case illustrates the validity of that principle. The notice of appeal was mailed in Kansas, in which State the contract work had its situs and counsel representing the contractor in this appeal has his office. The office of the contractor, however, is in Missouri. The office of the contracting officer, to which the notice of appeal should have been mailed, is in Colorado. And the office of the Board, to which the notice was actually mailed, is in the District of Columbia. If State laws as to holidays were to govern, a difficult question would be presented as to whether the applicable law was that of Kansas, or that of Missouri, or that of Colorado, or that of the District of Columbia. Thus, the spirit as well as the letter of the principle just mentioned appear to call for a conclusion that the only holidays which extend the time for appealing under the "disputes" clause are those established by Federal law.

For these reasons the instant appeal must be deemed untimely.

## 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 motion to dismiss is granted, and the appeal from the decision of the contracting officer is dismissed for lack of jurisdiction.

Theodore H. Haas, *Chairman.*

I concur:

Herbert J. Slaughter, *Member.*

Board member William Seagle, being absent on leave, did not participate in the disposition of this appeal.

[15] See *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558 (1946); *United States* v. *Allegheny County,* 322 U.S. 174 (1944); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943).

# UNITED STATES
v.
# LEM A. AND ELIZABETH D. HOUSTON

A-27846 *Decided April 29, 1959*

**Mining Claims: Patent**

An application for patent of lode and placer claims is properly rejected where the evidence does not disclose the existence of valid discoveries on the claims at the present time and discloses that any possible prior discoveries were made in material since mined out.

**Mining Claims: Patent**

It is the duty of an applicant for a mining patent to keep discovery points available for inspection by the Government mineral examiners.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lem A. and Elizabeth D. Houston have appealed to the Secretary of Interior from a decision of the Acting Director, Bureau of Land Management, dated July 25, 1958, which affirmed the decision of a hearings officer, dated May 9, 1955, denying their application for patent of 5 placer and 15 lode claims embracing lands located in secs. 29, 30 and 31, T. 13 S., R. 20 E., W. M., Oregon. The Forest Service, Department of Agriculture, filed a formal protest against allowance of the mineral patent application on October 22, 1953. The lands are located within the Ochoco National Forest, Oregon.

The charges brought by the Forest Service were that—

1. Minerals have not been found in sufficient quantities to constitute a valid discovery.
2. The land within the limits of the claims is more valuable for national forest purposes than for the mineral deposits therein.
3. The requisite expenditure of $500 in improvements and development has not been made on four of the claims.

On April 15, 16, 28, 29 and 30, 1954, a hearing was held in Portland, Oregon, before the manager of the Portland land office. After the hearing, the hearings officer [1] issued a decision which concluded that the Government had sustained its first and second charges and had failed to prove the third charge. The mining claimants thereupon appealed to the Director, who affirmed the hearings officer's decision on the ground that there was no valid discovery on any of the claims.

The Government's evidence consisted of the results of assays of 35 samples taken on the various claims by a mining engineer for the Forest Service. The mining engineer testified he was not able to find a place

[1] The land office manager who presided at the hearing did not issue the decision because of a change in policy of the Bureau.

to sample on every claim, but that he sampled every place that he felt he could find something worth sampling (Tr. 10).[2] He stated that the mine on Gold Hill, which is the area covered by the claims involved, has a recorded production of approximately $80,000, the greater part of which is noted as coming from placers along Scissors Creek; that the first recorded production was thought to be about 1880, and that the last evidence of production was 1925 or 1926; and that there is no evidence of recent mining activity aside from bulldozer cuts and one shaft on one of the claims (Tr. 15). He testified that as a result of his sampling he did not find anything that would lead him to believe that any of the claims could be worked at a profit, and that he had not found any evidence of mineralization or mineral bearing rock which he felt would justify a reasonably prudent man in expending time and money with a reasonable expectation of developing a paying mine (Tr. 65).

The Government's only other witness, a timber management assistant for the Forest Service, testified that there are approximately 4,500,000 feet of pine timber and about 1,000,000 feet of assorted species, mature and immature merchantable timber, on the land with an estimated total value of $183,305 (Tr. 84, 87).

In rebuttal to the Government's charges the mining claimants, in addition to their own testimony, introduced the testimony of four other witnesses, and a large number of exhibits.

Two of the claimants' witnesses, Charles Goodknight and Lloyd Leroy Davenport, testified as to their experiences in working in the mine in 1911, 1913, 1915 and 1917, and as to the values of the ores removed during those years as they remembered them.

Another witness, Philo H. Anderson, a civil engineer, testified that he made the mineral survey of the claims and related how the value of the improvements on the various claims was derived.

Fred J. Rosenberg, a mining geologist, testified that in 1938 he made an examination of the properties for a lessee, and did certain work on the Mayflower lode claim in 1940. He estimated, on the basis of his examinations, that the value of placer material excavated from a shaft sunk by him on one of the claims, was 29 cents per yard, and the overall value of the area was 27 cents per yard (Tr. 679–81, 684). He stated, however, that he was required to call on his memory as to the values because he had been unable to find his papers containing the values of the samples taken from the shaft. He also

[2] This reference (Tr.) and the ones that follow are to the pages in the transcript of the hearing before the manager. Exhibits submitted at the hearing are designated as "Exh."

stated that the claims contained possibilities for a low-grade development; that they would have to develop mill feed of at least $3 per ton on a large-scale operation; that he obtained an average of $1.70 in gold from 80 to 100 samples in the tunnel on the Mayflower claim; and that he found sufficient value in the area to justify expenditures on a drilling program with the idea that there was a potentially large low-grade occurrence (Tr. 689–91, 699). Rosenberg identified an assay report introduced by the claimants of a sample taken from the tunnel, although he was unable to say from what location, and another report of a concentration test which showed a high tailing loss which he stated can now be saved by new equipment.

Lem Houston testified that he located two of the lode claims, the Mary Martin and the Gold Bug No. 2, in 1948, and he gave testimony relating to certain assay reports of samples taken in 1948 from these two claims and the Bear and Mayflower claims.

Elizabeth D. Houston testified concerning the history of the claims. She also attempted to identify the areas from which shipments of ore were taken that were represented by shipping receipts, introduced in evidence, during the period from 1910 through 1920.

On the basis of all of the evidence and testimony the hearings officer concluded that a prudent man would not be justified in spending his time and money in hopes of developing a paying mine from the claims involved. He also stated that:

> It is my further opinion that these mines were once valuable gold producers but that what is left is a worked-out mine with low ore values with no hopes of developing a paying mine.

In his decision the Acting Director concluded that lack of sufficient mineral to constitute a valid discovery on any of the claims at the time of patent application is a proper charge to bring against a claim and that, where the charge is sustained, the application for patent must be rejected. He found that the charge of lack of discovery had been sustained on all the claims and that the application for patent must be rejected, but that since the Forest Service had requested only that the patent application be rejected, it was not necessary that any action to declare the claims null and void be taken. The rejection of the application for patent was stated to be without prejudice to the right of the appellants to continue to hold the claims and to continue their search for minerals sufficient to validate their locations.

In their appeal to the Secretary, and throughout the proceedings below, the appellants have contended that they have shown that a valid discovery was made on the claims by their predecessors in title and that it is unnecessary to have any additional discovery where the

original discovery has been exhausted. The gist of their argument is that the mining laws require a discovery in order to establish a valid location, but that once a discovery is made the validity of the location is established and nothing that occurs thereafter, such as the exhaustion of the discovery mineral, will invalidate the location. They also assert that minerals now remaining in the ground are sufficient to support a discovery.

The appellants cite no authority for the proposition that a discovery once made is valid for all time so as to require the issuance of a mineral patent regardless of whether or not the minerals have been mined out long before a patent application is filed. Indeed, I have been unable to find a single case which supports their proposition. On the other hand, in *United States* v. *Margherita Logomarcini*, 60 I.D. 371 (1949), the Department held that a mineral patent cannot be issued on a claim for land which is not valuable for minerals at the time of the application for patent, even though it may have been valuable for gold in the past. It would appear that the reasons which support the holding that land must be mineral in character at the time a patent is applied for are equally pertinent to the conclusion that there must at that time be a valuable discovery within the limits of a claim.

More recently, the Department has considered analogous situations in which it has reached conclusions consistent with the view that a valuable discovery must exist on the claim at the time an application for patent is considered and that a prior discovery no longer valid is insufficient to justify the issuance of a patent.

In *United States* v. *Pumice Sales Corporation, etc.*, A–27578 (July 28, 1958), the Department held that a showing of a past production of a mineral substance of wide occurrence, such as pumice, without a showing that there is a present demand for the production is not sufficient to validate a mining claim located for that mineral. In other words, even though the claim may at one time have been valid because the pumice was being marketed at a profit, a requisite for the validity of a discovery of a mineral substance of widespread occurrence, if that condition does not exist at the time the claim is contested, the claim is invalid.

In *United States* v. *Alonzo A. Adams et al.*, A–27364 (July 1, 1957), the Department held:

> It is not sufficient that at one time there may have been a valuable discovery made on a mining claim, the claim must be mineral in character and valuable for its mineral content at the time the application for patent is made.

The purpose of the mining laws is to encourage the exploration and development of mineral deposits in the public lands. When a

mineral locator has made a discovery, exploited it fully, and has been protected by the mining laws in his possession and enjoyment of the claim, the purpose of the mining laws has been fulfilled. As further reward for his discovery, he may obtain a patent for the lands covered by his claim.

However, if the locator elects not to carry his claim to patent, as he may, his rights to the minerals in the claim are not diminished,[3] but he exposes himself to the chance that at some time the conditions on his claim will no longer support the issuance of a patent. In such circumstances, the issuance of a patent would be unrelated to the mineral development of the land and would serve no purpose. Therefore, it is my conclusion that a mineral claimant can obtain a patent only when the current conditions on his claim satisfy the requirements of the mining law.

In view of this conclusion it is not necessary to determine whether there was a past discovery on each of the claims. However, it is not at all clear from the evidence that a past discovery was made on each of the claims or exactly on which of the claims there was a discovery. If it ever becomes material, the existence of a past discovery within the limits of each claim will have to be established with precision.[4]

As to the current mineral value of the claims, the appellants do not contend that there exists on any of their claims in their present state any substantial reserve of "shipping ore," but they argue that the claims do contain substantial reserves of mill feed ore which can be "sweetened up" by combining it with alleged stringers of relatively high grade ore to produce mill feed which it would be profitable to work.

In support of this contention the appellants point to a sample (Contestees' Exh. 2) taken from the Mary Martin by Lem Houston as an example of the mill feed ore and an official Government bulletin, U.S.G.S. Bulletin No. 846 A. They also place great reliance upon a

[3] Until a mineral locator obtains a patent his right to exploit the resources on the claim is limited to use incidental to mining. *United States* v. *Etcheverry,* 230 F. 2d 193 (10th Cir. 1956); *Albert Braach,* A–27225 (December 28, 1955).

[4] The appellants contend that, because the claims involved in their application are very old and the original locators have long ago passed away, the Department should relax its requirements as to method of proving discovery and accept what is admittedly hearsay evidence to prove that a discovery was made on each of the claims. Thus, for the most part the appellants' proof of discovery consists of smelter return receipts dated 30 or 40 years ago, and newspaper clippings and the like. Even if the smelter receipts are taken at their face value, the most that can be said for them is that they show that apparently valuable ores were taken from one or more of the claims during the production years, but the receipts do not purport to show specifically from which of the claims the ores were extracted. Thus, these receipts cannot possibly be construed as sufficient evidence to prove the requisite discovery on each of the 20 claims involved in this proceeding.

mineral survey made in 1926 by H. B. Kimmerlin, an alleged geologist. But Kimmerlin was not a witness at the hearing and thus not available for cross-examination.

As to the sample taken by Houston, he testified that this sample was taken at the bottom of a dozer cut which has since been covered over, that it was oxidized vein material but not base ore (Tr. 175, 176). The sample upon assay showed gold 0.16 oz. per ton, silver 0.46 oz. per ton and cobalt 0.17 oz. per ton. He also stated that the mineral examiner took a sample H–15 (Contestant's Exh. 1) from the same vein although possibly not in the same spot (Tr. 175). The mineral examiner's sample showed upon assay only a trace of gold and silver.

I do not think a single sample from one claim indicates a discovery of a very large quantity of low grade ore.

The Kimmerlin report, even taken at its face value, is purely speculative and conjectural and, as previously stated, without the presence of the author at the hearing for examination concerning his background or qualifications, as well as his methods and the bases for his conclusions, it cannot be given the weight the same report would be entitled to otherwise. The statement in the report that—

> There is no doubt in my mind that there are rich pockets of ore that can be opened up with a carefully worked out plan of development. As the ore from the large pockets was all very high grade, the general tenor of the total ore values would be considerably enriched.

is of little probative value unless the data from which this conclusion is drawn can be examined.

The U.S.G.S. bulletin to which the appellants refer has been carefully examined. This report was prepared in 1933 by G. F. Loughlin and James Gilully. In reference to the Gold Hill and vicinity the report states that—

> The following sketch of the local geology and ore deposits is written by G. F. Loughlin, who spent six days in the area in 1914. The principal mine workings were inaccessible, and no mining or prospecting was going on in 1930.

The report consists, for the most part, of a discussion of the geology of the area and a description of the ore bodies. Whether the report is to be considered as reporting the physical structures in place in 1933 when it was written, or as they existed in 1914 when Loughlin visited the properties, is not explained. However, in either case it does not constitute in itself substantial proof of the existence of large reserves of low grade ore on the claims.

The appellants also contend that the findings by Kimmerlin were largely confirmed by Fred J. Rosenberg. As previously mentioned,

Rosenberg testified that in 1940 he did some sampling of the Mayflower lode claim and the Mayflower tunnel. Although he testified at some length concerning his activities on the claims, with the exception of a map prepared by him and two mineral assays, his testimony consisted solely of his recollections of the mineral values. As for the assays (Contestees' Exhs. 36 and 37), the witness could only state where he thought the samples came from, but was unable to say what material the samples consisted of. Rosenberg's testimony is extremely indefinite, and even if taken on its face value would not establish as a present fact the existence of the large bodies of low grade ore which the appellants contend exist on their claims.

The appellants have also attacked the methods used by the mining engineer for the Forest Service in examining the claims.

The regulations of the Department, 43 CFR 195.53(a), provide that an application for patent should contain a full description of the kind and character of the mineral claimed and should state whether mineral has been extracted therefrom, and, if so, in what amount and what the value is. It is required that the application for patent contain a statement as to the precise place within the limits of each location embraced in the application where the mineral has been discovered. It is also required that:

> The showing in these regards should contain sufficient data to enable representatives of the Government to confirm the same by examination in the field and also to enable the Bureau of Land Management to determine whether a valuable deposit of mineral actually exists within the limits of each of the locations embraced in the application.

Under the mining laws a mineral claimant is not entitled to a patent for his mining claim until after he has made a discovery and the discovery point must be in such a condition that a representative of the Government may confirm the existence of a valid discovery by examining the alleged discovery point. It is neither the responsibility nor the obligation of the Government to go beyond the alleged discovery point and try to make a discovery for the applicant.

In examining the location notices filed by the appellants for the various claims I fail to note any written reference to points of discovery in the various claims. The plat of survey does contain notations such as "discovery trench, discovery cut, cut, trench," and the Government's mineral examiner testified that all of these spots were sampled wherever possible, or wherever there appeared to be something worth sampling (Tr. 10). However, he stated that on some of the claims he found that there was no material worth sampling or that the tunnels

were filled with water or caved in to such an extent as to make them impassable. It is my conclusion that if the mining engineer sampled all of the indicated discovery spots which were accessible for sampling he did all that he is required to do, and if some of the alleged points of discovery were inaccessible because they were located in covered tunnels or in tunnels filled with water, it was the responsibility of the mining claimants to keep their discovery points open for inspection. In the case of *United States* v. *Andrew A. Carothers et al.*, A–14542 (August 27, 1930), it was held in reply to an applicant's contention that the Department was without authority to require the applicant for patent to keep his discovery cut open for inspection of the alleged discovery point:

> The regulations above mentioned are deemed valid regulations which the Secretary has ample power to prescribe and are as much a legal requirement as if enacted by statute. The regulation is designed to prevent the grant of a patent for pretended discoveries. Unless claimant can positively and unambiguously state that the showings of mineral alleged to have been found by him are now susceptible of inspection and verification, no warrant is seen for further action on the application or for any disturbance of the decision rendered. *The Department is not disposed to grant a mineral patent on alleged specific discoveries in time past which can not on account of present physical conditions be verified by inspection.* (Italics supplied.)

It is concluded on the basis of all of the evidence produced at the hearing that only isolated pockets of mineral ores have been shown to exist on the claims at the present time; that there is lacking conclusive or even substantial evidence that valuable discoveries have been made on each of the claims at times in the past; that, although valuable ores may have been mined from some of the claims in the past, no showing has been made that there still exists on the claims valuable deposits of mineral which would justify a reasonably prudent man in expending his time and money in an effort to develop a paying mine; and that, therefore, the application for patent must be denied.

Denial of the patent application, it should be emphasized again, does not constitute a ruling that the claims are null and void. The appellants' rights in the claims remain as they were before the application for patent was filed and as they would be if no application for patent had ever been filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

U.S. GOVERNMENT PRINTING OFFICE: 1959

## UNITED STATES v. C. F. SMITH

A-27867 *Decided April 30, 1959*

**Mining Claims: Discovery**

The elements necessary to achieve a valid discovery in a lode claim under the mining laws are that there must be a vein or lode of quartz or other rock in place, that the quartz or other rock in place must carry some valuable mineral deposit, and that the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

**Mining Claims: Discovery**

Assays of samples taken from mining claims which show the presence of valuable minerals are proper evidence to be considered in arriving at a conclusion as to whether a prudent man would be justified in going ahead with the development of a mining claim.

**Mining Claims: Discovery**

It is not error to give weight to the opinions expressed at a hearing on the validity of a mining claim where those opinions are supported by testimony from which the hearings officer could properly conclude that a discovery sufficient to validate the claim has been made.

**Mining Claims: Patent Improvements**

Upon application for patent a relocator will not be permitted to include in his estimate of the value of the improvements required by law to be made as a condition precedent to patent any of the labor done or improvements made by the original locator.

**Mining Claims: Patent Improvements**

Roadways and buildings must be excluded from the estimated value of patent improvements unless it is clearly shown that they are associated with actual excavations, are essential to the practical development of the claim, and actually facilitate the extraction of minerals from the claim.

**Mining Claims: Patent Improvements**

Affidavits and other statements with respect to the value of improvements given by witnesses for an applicant for a mineral patent are not conclusive on the Government.

**Mining Claims: Common Improvements**

While it is permissible to allocate among a group of contiguous claims the value of improvements placed on one of the claims in the group, this can only be done where there is a showing that the labor performed or the improvements made on that claim were intended to aid in the development of all the claims and that the labor and improvements are of such a character as to redound to the benefit of all.

**Mining Claims: Patent Improvements—Mining Claims: Contests**

Even though the Government does not sustain its charge, brought by way of contest, that the necessary patent improvements have not been placed

on a claim, patent covering a relocated mining claim cannot issue until the applicant has submitted satisfactory proof that the required expenditure has been made on the claim since his relocation thereof.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On November 4, 1952, C. F. Smith filed an application for a mineral patent on two contiguous lode mining claims, the Mountain Cedar No. 2 and the Perplexity, situated in sec. 17, T. 29 N., R. 10 E., W. M., Washington, within the Snoqualmie National Forest, located under the provisions of the mining laws (30 U.S.C., 1952 ed., sec. 22 *et seq.*). As to the Mountain Cedar No. 2 claim, Smith claimed under a location notice filed by him on July 1, 1935, and, as to the Perplexity claim, Smith claimed under a location notice filed on July 1, 1940, by Loyd Becker, who, in 1943, relinquished his rights in the claim to Smith.

The United States Forest Service protested the application on the grounds, as to each claim, that:

1. Minerals have not been found in sufficient quantities to constitute a valid discovery.
2. The land is nonmineral in character.
3. The requisite expenditure of $500 in development has not been made.

Thereafter, a contest was initiated and a hearing was held on the charges on January 26, 27, and 28, 1955. In a decision dated June 10, 1955, the hearings officer found from the evidence produced at the hearing that there is a vein of quartz in place within the limits of the claims with sufficient quantity and quality of valuable minerals to warrant a prudent man to spend his labor and means in an effort to develop a paying mine; that a discovery sufficient to satisfy the requirements of the mining laws has been made on each claim; that the required expenditure of $500 has been made on the Mountain Cedar No. 2 claim; that Smith is not entitled to count toward the required expenditure on the Perplexity claim any amount which may have been expended for the development of that claim under a location of the claim, under the name of the Mountain Cedar No. 1 claim, made by Smith's brother on July 1, 1935; and that Smith has not shown that $500 worth of labor has been expended or improvements made on the Perplexity claim since July 1, 1940.

Both Smith and the Forest Service appealed to the Director of the Bureau of Land Management. Thereafter there was submitted on behalf of Smith an affidavit of O. L. Wood, who was shown at the hearing to have purchased the claims from Smith, that between June

1, 1956, and September 5, 1956, work had been performed on the Perplexity claim in the nature of development work and that there had actually been expended in cash for labor performed in doing such work the sum of $510 and that the cost of the materials used was $34.05, making a total expenditure for new improvements and development work of $544.05. Copy of the affidavit was served on the Forest Service and on October 5, 1957, the claim was again examined by the mining engineer who had testified at the hearing on behalf of the Government. He submitted a report in which he expressed the opinion that a liberal allowance for the value of the labor and improvements set forth in the affidavit would be $125.

On August 1, 1958, the Director affirmed the decision of the hearings officer, holding that neither appellant had shown that the decision of the hearings officer was in error or was not supported by the evidence and that where the hearings officer's findings of fact are supported by reliable, probative, and substantial evidence presented at the hearing "as we believe them to be in this instance," they will not be disturbed.

The Director noted that Smith's interest in the Mountain Cedar No. 2 claim dated from July 1, 1935, and that while there was no positive evidence that the improvements, valued at $1,245, had been made after that date the Forest Service had not presented any clear evidence that $500 worth of improvements had not been made for the benefit of the claim since July 1, 1935. He therefore held that the hearings officer was justified in holding that the third charge with respect to that claim had not been sustained. He directed that any patent which might issue for the Mountain Cedar No. 2 claim must exclude a small portion thereof (0.648 acres) found to be State land.

With respect to the Perplexity claim, the Director found that Smith's interest therein does not predate the location by Becker on July 1, 1940, and that only those improvements made for the benefit of the claim since that time could be considered; that the additional work performed in 1956, properly evaluated, was worth not more than $125, and that, even with this additional work, it had not been shown that a total of $500 worth of labor and improvements had been expended on the claim since 1940.

Appeals to the Secretary of the Interior were filed by both parties. That of the Forest Service will be considered first.

The Forest Service contends that the evidence produced at the hearing respecting the value of the minerals found on the claims was improperly evaluated; that, to support a discovery, the evidence must be such that it is more probable than not that a profitable mining op-

eration can ultimately be brought about; that sufficient values have not been shown to demonstrate that the claims could be worked at a profit; that it was improper to consider the opinions of witnesses expressed at the hearing that a prudent man would be justified in the further expenditure of his time and money on these claims in an effort to develop a paying mine; that these opinions are not matters of fact found by the hearings officer; that the hearings officer did not weigh conflicting evidence but merely came to the conclusion that the evidence which he heard leads to the decision that a discovery has been made, and that the Director erred in his affirmance of the conclusion reached by the hearings officer, as a matter of law, that a sufficient discovery had been made to validate the claims involved in this appeal.

The record made at the hearing has been carefully reviewed. That record fully supports the conclusion reached by the hearings officer that a discovery sufficient to satisfy the requirements of the mining laws has been made on each of the claims.

The mining laws do not require, as the Forest Service suggests, that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about. The time-honored test to be applied in determining whether a discovery has been made on a lode claim is that set forth in *Jefferson-Montana Copper Mines Company*, 41 L.D. 320 (1912), cited by the Forest Service as a correct statement of the elements necessary to achieve a valid discovery. Those elements are that there must be a vein or lode of quartz or other rock in place; that the quartz or other rock in place must carry gold or some other valuable mineral deposit; and that the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

The hearings officer in this case found that there is a vein of quartz in place within the limits of each claim. There is ample evidence in the record to support this finding (Tr. 258, 262, 263, 273, 397, 398, 403, 405, and 406). The hearings officer also found that the quartz carried a valuable mineral deposit. While he did not set this up as a separate finding of fact, it is implicit in his conclusion that because of the quantity and quality of the minerals found within the claims a prudent man would be warranted in the expenditure of his labor and means in an effort to develop a paying mine.

The hearings officer detailed in his decision the results of the assays produced at the hearing from samples taken from the claims. He recited what the evidence produced by the Forest Service showed and

what the evidence produced by Smith showed. The assays produced by both parties show both high values and low values. Certainly they show that the quartz carries valuable mineral deposits and they are proper evidence to be considered in arriving at a conclusion as to whether a prudent man would be justified in going ahead with the development of the claims.

With respect to the weight given to the opinions expressed at the hearing, it is found that those opinions are supported by testimony from which the hearings officer could properly reach the conclusion that a sufficient discovery to validate the claims had been made.

Accordingly, it must be held that the appeal of the Forest Service is without merit and that it was proper for the Director to have affirmed the decision of the hearings officer that, as a matter of law, a valid discovery has been made on each of the claims involved in this appeal.

Turning now to the appeal by the patent applicant, Smith alleges error on the part of the Director in refusing to credit him with expenditures said to have been made by Smith on the Perplexity claim prior to its location in 1940, in refusing to credit Smith with the amounts said to have been spent annually in maintaining trails and in building a cabin on the claim, in refusing to give effect to the affidavits of two witnesses and the United States mineral surveyor as to the value of work and improvements, and in failing to credit labor and improvements made on the Mountain Cedar No. 2 claim to both that claim and the Perplexity claim, apparently on the theory that the labor and improvements on the Mountain Cedar No. 2 claim were made for the benefit of both claims, as common improvements.

In order to obtain a patent on his claim under the mining laws, the applicant must show "that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors" (30 U.S.C., 1952 ed., sec. 29). Smith's application with respect to the Perplexity claim recites location of the claim on July 1, 1940. The location notice recites that the claim is forfeited and abandoned property and that the former owner of the claim, under the name of Mountain Cedar Mine No. 1, was Oscar Smith. The applicant claims that he and his brother Oscar located this and other claims jointly, that he had one-half interest in the claim, that he did all of the work on the Mountain Cedar No. 1 while the claim was in his brother's name, that his brother refused to pay for his share of the work, and that therefore he, the applicant, caused the claim to be relocated in 1940. He asserts that because the statute requires that the labor and improvements shall have been expended or made "by himself or grantors" and since he did all the labor and made the improve-

ments from 1935 on he has met the requirements thereof. Such is not the case. The quoted words obviously have reference to the locator of the claim, the applicant, or those under whom he claims. Smith does not claim under the location of his brother but, rather, in derogation of his brother's abandoned claim. That Smith may have expended $500 in labor and improvements on the claim before it was abandoned can avail him nothing. 43 CFR 185.43(c). No part of the value of improvements placed on land under an abandoned location can be credited to the later claim toward meeting the requirement of the statute. *Yankee Lode Claim*, 30 L.D. 289 (1900); *Russell et al.* v. *The Wilson Creek Consolidated Mining and Milling Co.*, 30 L.D. 322 (1900); *C. A. Sheldon et al.*, 43 L.D. 152 (1914).

Smith's claim, that he and his brother located the claim jointly and that therefore he should be allowed to receive credit for his expenditures thereon, is similar to the argument made in *Charles F. Guerin*, 54 I.D. 62 (1932). There, Guerin, owner of a one-half interest in a claim, on the refusal of his co-owners to do any further annual labor, caused another to relocate the claim and convey it to him. In denying Guerin the right to claim credit for expenditures made on the claim as first located, the Department said:

> Upon application for patent, the relocator will not be permitted to include in his estimate of the value of the improvements required by law to be made as a condition precedent to patent any of the labor done or improvements made by the original locator. * * *
>
> From the applicant's own avowals as to the purpose of the relocation it must be deemed as being one in opposition to the interests of his co-owners, whether with their acquiescence or not. Being a relocation, as the Commissioner states, it was in derogation and not in affirmance of his own previous estate in the prior location. *Wilbur* v. *Krushnic* (280 U.S. 306, 318). The relocation then not being made in furtherance of the prior location, no privity exists between the claimants of the former and the latter. *Burke* v. *Southern Pacific R.R. Co.* (234 U.S. 669, 693). The Commissioner was therefore clearly right in refusing to include the labor and improvements made for the Lewis and Clark as improvements or labor applicable to the Guerin location. * * * (P. 63.)

Accordingly, the Director was correct in refusing to allow Smith credit for the value of any labor or improvements which may have been expended or made on the Mountain Cedar No. 1 claim prior to its relocation as the Perplexity claim by Loyd Becker on July 1, 1940.

Smith's claim that he should have been allowed credit for the labor performed in maintaining trails on the claim and for the cost of a cabin built on the claim is not supported by any showing made by him. Nowhere in the record is there evidence of the cost or value of maintaining those trails or of the cost or value of the cabin or a showing that these alleged improvements have benefited the claim in any way. The vague statement that the trails had to be built each

year (Tr. 266) and the statement that the cabin, which was built between 1935 and 1939, under the prior location, no longer exists (Tr. 312), are no substitute for evidence that the value of the labor performed or the improvements made since July 1, 1940, amounts to $500.

The regulations (43 CFR 185.43(b)) require that roadways and buildings must be excluded from the estimate unless it is clearly shown that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., and are essential to the practical development of and actually facilitate the extraction of minerals from the claim. See also *Tacoma and Roche Harbor Lime Co.*, 43 L.D. 128 (1914), and *United States* v. *El Portal Mining Co.*, 55 I.D. 348 (1935). No such showing has been made with respect to the trails and the cabin for which Smith seeks credit.

Smith's contention that the Director erred in refusing to accept the affidavit of his witnesses and the United States mineral surveyor's statement regarding the value of the improvements is without merit. Such statements are not conclusive on the Government. They are subject to question by the Government, whose duty it is to see that the requirements of the mining laws have been fully satisfied before patent issues. None of these statements sets forth when the improvements were made. The mineral surveyor stated in his deposition (p. 15) that he did not know exactly what work was done after July 1, 1940, the crucial date as to the Perplexity claim, but was told by the claimant that he, the claimant, had done the work. The assertion that the requisite $500 worth of labor has been expended or improvements made on the claim since its relocation in 1940 was challenged by the Government. It was thereupon up to the applicant to meet this charge. *C. A. Sheldon et al., supra.* This Smith failed to do.

Smith's contention that the Director erred in failing to credit the labor performed on and improvements made on the Mountain Cedar No. 2 claim to both that claim and the Perplexity is likewise without merit. While it is permissible to allocate among a group of contiguous claims the value of improvements placed on one of the claims in the group, *Zephyr and Other Lode Mining Claims*, 30 L.D. 510 (1901), this can only be done where there is a showing that the labor performed or the improvements made on that claim was intended to aid in the development of all of the claims and that the labor and improvements are of such a character as to redound to the benefit of all. *Copper Glance Lode*, 29 L.D. 542 (1900); *Wood Placer Mining Co.* (On review), 32 L.D. 401 (1904); *James Carretto and Other Lode Claims*, 35 L.D. 361 (1907); *United States* v. *W. J. Moorhead*, 59 I.D. 192 (1946). Smith has made no showing that the improvements made

on the Mountain Cedar No. 2 claim were intended to or did benefit the Perplexity claim in any way.

Accordingly, the decision of the Director that Smith has not shown that $500 worth of labor or improvements has been placed on the Perplexity claim since July 1, 1940, is affirmed.

There remains for consideration, however, one statement made in the Director's decision which is open to question. That relates to the value of the improvements placed on the Mountain Cedar No. 2 claim. The hearings officer found that there had been more than $500 expended on the Mountain Cedar No. 2 claim. He made no finding as to when those improvements had been placed on the claim. The testimony does not indicate clearly that at least $500 had been expended on the claim since July 1, 1935. This claim, too, was a relocation of an abandoned claim and Smith testified regarding tunnels and cuts which he found on the property when he relocated it (Tr. 255, 257, 271, 272, 311).

The Director stated that the Forest Service had—

> not brought out any clear evidence either in the hearing or on appeal that $500 of improvements had not been made for the benefit of the Mountain Cedar No. 2 claim since July 1, 1935. Since the burden of proof lies with the contestant, the Hearings Officer was justified in finding that this charge had not been sustained, and his decision on this matter is affirmed.

If the Director meant by that statement that the claim can now pass to patent, his holding is in error. While it may be that the Government did not sustain the third charge against the Mountain Cedar No. 2 claim, nevertheless the fact remains that there is no positive evidence in the record that $500 has been expended for the benefit of the Mountain Cedar No. 2 claim since its relocation on July 1, 1935. Until such evidence is submitted, it cannot be said that the applicant has complied with the requirements of the mining laws and is thus entitled to receive a patent covering the claim.

In the circumstances and before patent can issue, Smith should be called upon to submit satisfactory proof that at least $500 worth of labor has been expended or improvements made on the Mountain Cedar No. 2 claim since its relocation by him on July 1, 1935.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management, as modified above with respect to the showing required relating to the Mountain Cedar No. 2 claim, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEALS OF CARSON CONSTRUCTION COMPANY

**IBCA-21, IBCA-25**
**IBCA-28, IBCA-34** *Decided May 20, 1959*

**Rules of Practice: Appeals: Generally**

Under rules governing its procedure, the Board of Contract Appeals is without authority to entertain more than one petition for reconsideration of a decision.

BOARD OF CONTRACT APPEALS

Under date of March 5, 1959, counsel for the contractor filed a petition for reconsideration by the Board of its decision relating to the so-called wall leakage claim involved in the appeals (IBCA-25), which was in the amount of $126,659. This amount was alleged to have been incurred by the contractor in an effort to eliminate numerous leaks that had appeared in the Ketchikan High School in Ketchikan, Alaska, after the structure had been almost completed.

In its decision, which was rendered by the Board on November 22, 1955 [62 I.D. 422], it held that the evidence showed that the contractor, which was claiming that the design of the Ketchikan High School was faulty, had failed to follow the requirements of the specifications in the construction of the building, and that the workmanship had been poor. In rejecting the claim, the Board also pointed out:

> * * * All but a small part of the claim could not be allowed in any event. The president of the contractor testified that of the $126,659 which the firm was claiming only $4,750 represented the direct costs of performing the corrective work involved in the attempts to eliminate the leaks. The rest of the amount claimed is only an estimate of damages suffered by the contractor as a result of alleged delays or acts of the Government. This represents a claim for unliquidated damages which the Board would have no jurisdiction to allow even if it were convinced of the meritoriousness of the claim. (Pp. 444-445.)

After the decision was rendered the contractor filed a petition for reconsideration. This was denied by the Board on March 9, 1956 [unpublished].

The present petition for reconsideration is based on allegedly newly discovered evidence showing that the design of the Ketchikan High School was faulty, and that it would have been impossible for the contractor to have constructed a watertight building. The newly discovered evidence is said to consist of a report of a firm of architects employed by the Department of the Interior in an effort to correct the leakage of the building; three other reports of firms of consulting engineers or architects; and various items of evidence, allegedly not heretofore available to the contractor, which would show that the design of the building was faulty.

The contractor's second petition for reconsideration must be denied for the following reasons:

(*1*) Over 3 years have elapsed since the original decision of the Board, as well as since the decision of the Board denying the first petition for reconsideration.

(*2*) The contractor has not shown that the allegedly newly discovered evidence, except for the report made to the Department, could not have been obtained by due diligence prior to the original hearing before the Board. At this hearing the petitioner had an unlimited opportunity to present evidence to the Board. It is obvious that the contractor could have obtained the views of consulting engineers and architects prior to the hearing.

(*3*) As the reconsideration of the claim, which is primarily for unliquidated damages, could not in any event result in the grant of relief by the Board, except for the relatively trivial amount involved in the actual corrective work, which, moreover, might not be recoverable for other reasons, no useful purpose would be served by a reconsideration. The Board should certainly not reconsider a claim which is beyond its jurisdiction.

(*4*) Section 4.15 of the rules governing procedure before the Board (43 CFR, 1954 Rev.) provides: "A request for reconsideration may be filed within 30 days after the date of the decision. Reconsideration of a decision, which may include a hearing or rehearing, may be granted if, in the judgment of the Board, sufficient reason therefor appears." It is the view of the Board that this rule contemplates that the Board may entertain only one petition for reconsideration, and it is, therefore, without authority to entertain a second petition for reconsideration.

## 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 second petition for reconsideration is denied.

Theodore H. Haas, *Chairman.*

William Seagle, *Member.*

Board Member Herbert J. Slaughter, being absent on leave, did not participate in the disposition of this matter.

# APPEAL OF INTER-CITY SAND AND GRAVEL CO. AND JOHN KOVTYNOVICH

**IBCA-128** *Decided May 29, 1959*

**Contracts: Additional Compensation—Contracts: Changed Conditions—Contracts: Drawings—Contracts: Specifications**

A claim for additional compensation by a contractor under the first category of the "changed conditions" clause of the contract, relating to divergent conditions, as distinguished from the second category of "changed conditions," relating to unanticipated conditions, on the ground that it encountered large quantities of hard material which, in view of the logs of subsurface exploration made available to it in the drawings, it could not reasonably have expected must be denied when the logs of exploration were outside the area to be excavated, and did not generally penetrate to grade, and in any event indicated that large quantities of hard material were present, and the presence of such hard material could have been ascertained by a more adequate site investigation. Whether or not logs of exploration can be regarded as unqualified representations must depend on the circumstances of each individual case. When a contract charges a contractor with the duty of investigating the site of the work, it must make such an investigation, whether or not it is asserting a changed condition in the first or the second category, unless, indeed, the claim is based on a representation of such a nature that a site investigation would be completely pointless. However, the standard of adequacy in conducting a site investigation may well be less rigorous in first than in second category cases.

**Contracts: Additional Compensation—Contracts: Changes and Extras—Contracts: Interpretation**

When the provisions of the specifications of a contract require the contractor to store inflow into a reservoir to a certain elevation and to provide temporary control works which should be capable of releasing water up to 250 cubic feet per second in the event permanent outlet works are not completed by a certain date, such works must be capable of passing 250 cubic feet per second during the whole irrigation season and not merely when the works were first constructed and water was released through them, since the need for water during the irrigation season is a continuing one. However, the contractor is entitled to an equitable adjustment if its costs were increased by failure of the Government to require a larger opening in the intake structure at the time when it was being built.

**Contracts: Additional Compensation—Contracts: Changes and Extras—Contracts: Interpretation**

When the Government in order to provide a maximum amount of water for irrigation purposes required the contractor to provide for storage of water in a reservoir above the maximum height designated in the contract, either by increasing the height of a temporary cofferdam previously constructed by the contractor or by increasing the height of the upstream edge of the partially completed embankment of the permanent dam, such requirement went beyond the provision of the specifications imposing on the contractor the obligation to take certain protective and control measures to divert

and care for the stream during construction and therefore constituted a change, entitling the contractor to an equitable adjustment. However, Government instructions to avert the threat of flood damage or to discharge other contractual obligations, apart from the change in storage requirements, did not constitute a change, entitling the contractor to an equitable adjustment.

BOARD OF CONTRACT APPEALS

This disposes of a timely appeal by Inter-City Sand and Gravel Co. and John Kovtynovich, parties to a joint venture, from the findings of fact and decision of the contracting officer dated July 2, 1957, which denied two claims against the Government for additional compensation totaling $85,936.96 under a contract dated December 30, 1954, with the Bureau of Reclamation. The contract, which was executed on U.S. Standard Form 23 (revised March 1953), and incorporated the General Provisions of U.S. Standard Form 23A (March 1953), provided for the construction and completion of the Crescent Lake Dam, Crescent Lake Dam Project, Oregon. The site of the job was at the outlet of Crescent Lake in Klamath County, Oregon.

Notice to proceed was received by the contractor on January 8, 1955. Paragraph 19 of the specifications provided for the completion of the work within 420 calendar days, or by March 3, 1956. The work was considered substantially complete on October 19, 1956, but since it was found that unusual weather and certain changes ordered by the Government were responsible for a delay of 230 calendar days, to and including the date of substantial completion, no liquidated damages were assessed.[1]

In its release on contract dated March 12, 1957, the contractor reserved claims against the Government for increased compensation in the aggregate amount of $85,936.96, as more particularly set forth in its attached letter of the same date.

At the request of both parties a hearing for the purpose of taking of testimony was held by the undersigned at Bend, Oreg., beginning on October 10, 1957. The day before the hearing the undersigned, accompanied by counsel and other representatives of both parties, visited the site of the work.

The claims of the appellant will be discussed in the order in which testimony was received at the hearing.

*Claim No. 1—Changed Conditions*

Claim No. 1 is for increased cost and expense under clause 4 of the General Provisions, relating to "changed conditions," in the perform-

[1] The extension of time was granted by Order For Changes No. 1 based on findings of fact dated March 20, 1956.

ance of the following items of the bidding schedule of the contract: Item No. 3, "Excavation for spillway and dam embankment foundations"; Item No. 4, "Excavation for concrete structures"; and Item No. 5, "Excavation for outlet-works channel." In the consideration of this claim, account will also be taken of Item No. 1 of the bidding schedule, "Diversion and care of stream during construction and removal of water from foundations," since in seeking additional compensation for that item in Claim No. 2 the contractor relies, in part, upon the same circumstances that form the basis of Claim No. 1.

The basis of the "changed conditions" claim is that from the specifications and drawings, coupled with a reasonable site investigation, the contractor could not have anticipated that it would encounter, except in a small area between Test Pits Nos. 10 and 12, hard material which could only be excavated with considerable difficulty, such as pockets of cemented boulders and cobbles.

The following table lists for each of the items involved in Claim No. 1 the estimated quantity of material to be excavated, as stated in the bidding schedule, the actual quantity of material excavated, as shown by the Government records, and the quantity of material encountered of each of the two types which the contractor maintains constituted changed conditions, as stipulated by the parties (Tr., pp. 241–43).

| Item No. | Estimated quantity (cubic yards) | Actual quantity (cubic yards) | Orange cemented material (cubic yards) | Other hard material (cubic yards) |
|---|---|---|---|---|
| 1 | (1) | 3,494 | 0 | 1,500 |
| 3 | 10,000 | 11,317 | 750 | 4,950 |
| 4 | 3,520 | 3,640 | 250 | 2,750 |
| 5 | 10,750 | 9,773 | 0 | 5,000 |
| Total | 24,270 | 28,224 | 1,000 | 14,200 |

[1] Item No. 1 was a lump-sum item for which no quantities were estimated in the bidding schedule.

The stipulated amounts of "orange cemented material" and "other hard material" aggregate 15,200 cubic yards and represent approximately 54 percent of the total volume of material actually excavated. Of the 1,000 cubic yards of orange cemented material, 742 cubic yards were 7 feet below, and 258 cubic yards were 7 feet above the original ground surface. Of the 14,200 cubic yards of other hard material, 5,196 cubic yards were 7 feet below, and 9,004 cubic yards were 7 feet

above the original ground surface. Thus, of the 15,200 cubic yards of hard material, 9,262 cubic yards, or approximately 61 percent, were encountered within 7 feet of the ground surface.

At the site of the work was an old timber-crib dam, together with a rock fill against the east bank of the stream. There was also an inlet channel leading from Crescent Lake down to the old dam and an outlet channel leading away from the dam. The construction of the new dam involved the removal of the old dam and its replacement at the same site with a more adequate earth-fill structure, having concrete outlet works through its central portion at stream level and a rip-rapped spillway across its right abutment. Improvements were also to be made in both of the channels.

In the immediate vicinity of the work to be done, the surface material consisted of a pumice layer extending to a depth of 4 or 5 feet, where it was undisturbed, and numerous boulders were visible. The material beneath the pumice consisted of sand and gravel deposited by glacial or torrential action, and likewise contained numerous boulders.

Paragraph 14 of the specifications stated that bidders would have an opportunity to make a site investigation, and that bidders who chose not to visit the site would nevertheless be charged with knowledge of conditions which a reasonable inspection would have disclosed.[2] Paragraph 35 of the specifications declared that the drawings included in them showed the available records of subsurface investigations for the work covered by them; that the Government did not represent that the available records showed completely the existing conditions and did not guarantee "any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions"; and that bidders would be responsible for making their own deductions and conclusions as to the nature of the materials to be excavated and the difficulties of performing excavation or other work affected by the geology at the site of the work. Paragraph 39 of the specifications provided that materials excavated would not be classified for payment and specifically defined various materials, including gravel, cobbles, and boulders.

Paragraph 101 of the specifications made 18 enumerated drawings part of the specifications. Contract Drawing 806–D–16 recorded the logs of exploration for nine test pits approximately 8 by 5 feet which had been excavated by dragline in 1950 and 1952.[3] The elevations of

[2] In the last paragraph of the Invitation for Bids prospective bidders were informed that if they desired to visit the site of the work they should communicate with the construction engineer of the project whose name, J. W. Taylor, was also given.

[3] As indicated by the logs of exploration, Test Pits 2, 3, 4, 5 and 6 were dug in June 1950, Test Pit 8 in July 1950, and Test Pits 10, 11, and 12 in October 1952. These last three test pits were dug for the purpose of testing the porosity of the soil.

the test pits varied from a low of 4,835.5 for Test Pit 11 to a high of 4,859.3 for Test Pit 4, which is a difference of no less than 23.8 feet. All of the test pits, except Test Pits 8 and 12, were located on the west or left side of the stream but were generally located outside of the outline dimensions of the dam. The existence of the old timber-crib dam prevented, of course, the digging of any test pits along the axis of the new dam, although all of the test pits except No. 8 were within 200 feet of its midpoint. The test pits that were dug penetrated to depths that ranged from a minimum of 6 feet in the case of Test Pit 11 to a maximum of slightly over 15 feet in the case of Test Pit 5, the average depth being somewhat over 11 feet. However, the bottoms of the test pits were in general considerably above the elevations of the deepest excavations and none of the test pits penetrated to within 5 feet of the lowest elevation of the excavation in the outlet works conduit or to within 12 feet of the elevations of the excavation for the stilling basin. Of the 3 test pits closest to the outlet works and stilling basin, Test Pit 8 ended 5 feet, Test Pit 11 ended 17 feet, and Test Pit 12 ended 21 feet higher than required excavation.[4]

The logs of exploration were subdivided into layers of material, varying from one layer in the case of Test Pit 11 to four layers in the case of Test Pits 2, 4 and 5, although sometimes two layers would show very similar material. In general, the logs of exploration showed that, except in the case of Test Pit 11, the topmost layer consisted of pumice, which was underlain by soft material deposited by glacial or torrential action.[5] Beginning at an average depth of 6 feet, the logs of exploration showed the presence of hard material but, in the case of Test Pit 11, the hard material was shown at ground surface and in the case of Test Pits 10 and 12 the hard material was reported to begin only 3 feet below the ground surface. Hard material was shown in no less than seven of the nine test pits but it was variously characterized. The logs of Test Pits 3, 4 and 6 included the characterization "fines, hard," and the log of Test Pit 5 included the characterization "fines, fairly hard."[6] The logs of Test Pit 11 characterized the material simply as "hard," while those for Test Pits 10 and 12 characterized the material not only as "hard" but also as "indurated."[7] The logs of all but two of the test pits also indi-

[4] See par. 6 of the findings of fact and decision of the contracting officer, dated July 2, 1957.

[5] This was indicated in the case of all the logs by such characterization as "angular to rounded" or "angular to subrounded," or as "subangular" or "subrounded."

[6] According to the geological testimony, this characterization would indicate that the material was compacted.

[7] Webster's New International Dictionary (2d ed., 1952) defines "indurated rock" as: "A rock hardened by the action of heat, pressure, or cementation" but the two geologists

cated the presence of boulders which, in the case of Test Pits 10 and 12, were shown at the ground surface, or of gravel in such large sizes as would commonly be referred to as boulders, and in some instances noted that the boulders became more numerous as the pit went deeper. The water level was shown only on the log of Test Pit 11.

Contract Drawing 806–D–16 also recorded the logs of exploration for 6 auger holes, which were dug with a 4-inch earth auger and which penetrated to depths from 6 to 8 feet. The logs noted for the most part only pumice and some small gravel and contained no characterizations of the hardness or softness of the material found. The location of the auger holes was confined to the area to be excavated for spillway purposes, which they were designed to test. As the record shows affirmatively, moreover, that no hard material was actually encountered in excavation for the spillway, no significance can properly be attached to the logs of the auger holes. The design of the spillway itself, which was to be an open cut lined with riprap, was some indication that hard material would be encountered at approximately the designed elevation of the bottom grade of the spillway cut, since the engineering testimony is to the effect that the design would not otherwise have been practical.

The drawings also included Drawing 806–D–7, entitled "General Plan and Sections," which included a "Profile On Axis of Dam." This indicated that the materials consisted of clay, silt, sand, gravel and cobbles covered by a layer of pumice. It should be noted that this profile named the materials without attempting to describe their qualities.

Apart from a geologist, A. O. Bartell, who testified on behalf of the appellant, its principal witness was John Kovtynovich, a partner in the joint venture which performed the contract. He testified that he "picked around a little bit" (Tr., p. 9) along the stream banks with a geologist's pick and a hand shovel and that a superficial examination seemed to indicate that the material consisted more or less of loose sand and gravel, with a few boulders near the surface which could be very readily excavated without too much trouble. He derived pretty much the same impression from the logs of exploration and the profile of the axis of the dam. The test pits shown on the contract drawings had been filled up,[8] but Kovtynovich testified that he concluded from an examination of the logs of the test pits that there was probably a

who testified at the hearing drew a distinction between induration and cementation. They agreed, however, that indurated material would necessarily be a hard material. The geological testimony also indicates that cementation is a widespread phenomenon that usually occurs at water level in glacial or torrential, as well as other deposits.

[8] This was necessitated by the fact that the test pits had been dug in a resort area.

lens or a seam of hard material running from Test Pit 10 to Test Pit 12, which were directly opposite each other across the stream bed. He also testified that he looked up the word "indurated" in the dictionary and found that it meant "hardened," and that although the word "boulders" did not appear on the profile drawing, that he anticipated encountering boulders. Kovtynovich's favorable impressions of the prospective excavation, based on the logs of exploration, and his superficial probing of the material along the stream banks were no doubt responsible for the even more superficial examination which he made of the conditions which might in general affect the performance of the work. He did, indeed, visit the site of the work in the fall of 1954 three times—the last two times accompanied by Sig Moe, an officer of the Inter-City Sand & Gravel Co.—but during his visits, he seems to have avoided any sources of information which might contradict the favorable impressions he had already formed.

Although Kovtynovich was aware of the notice in the Invitation for Bids to the effect that prospective bidders should arrange to consult with Construction Engineer Taylor, he neglected to do so. In fact, he failed to contact any Bureau representative at all. Although he also knew that there had been previous excavation in the channels, he failed to inquire about who had performed this excavation, or who owned the facility, and he conceded that he could easily have ascertained who owned the facility. He had an old friend, Perry, the local watermaster, whom he had known for at least 38 years, but although he talked to him for a considerable time, he was careful to refrain from putting to his old friend any question which might have disturbed his confidence. He carefully confined the conversation to the sphere of the watermaster's official competence. The record shows that if he had questioned Perry about the nature of the material the watermaster would have told him that he could expect to encounter hard material, for he knew that such material had been encountered in a prior re-excavation of the inlet channel. Moreover, the conversation between Kovtynovich and Perry may have occurred *after* the award of the contract. The only person to whom Kovtynovich talked about geological conditions in the area was a local service station operator, who would hardly be the sort of informant who would know anything useful.

The testimony of the Government witnesses, who included John P. Vertrees, the project construction engineer and Clifford J. Okeson, the Bureau's regional geologist, shows, moreover, that a more adequate site investigation would have warned the contractor of the difficulties

which it would encounter. Okeson, who had visited the site of the work in October of 1952, then saw for a distance of 300 feet, the bluffs of the inlet channel, which had been re-excavated, and from the steep banks of the channel it could be inferred that the subsurface material would be hard. Moreover, when he dug into the inlet channel for only a foot or so, he found the material to be "very well bound together" and "hard to dig" (Tr., p. 342). Indeed, there were places where he could see the hard material on the bluffs without digging. Vertrees testified that when the slope of the inlet channel was laid back in actual excavation and penetrated to a depth of only about a foot and a half or 2 feet, the material found was substantially as hard as it was in the deeper portions of the excavation. Kovtynovich himself, who picked around only in the *downstream* channel, attempted to excuse his failure to dig in the slopes of the *upstream* channel because of the presence of the water but the record shows that the water level in the upstream channel was more than two and one-half feet lower in 1954 than it had been in 1952 when Okeson had visited the site. If Kovtynovich had talked to Okeson, he might have learned that the hard material was present.

Kovtynovich testified also with respect to the difficulties encountered in actual excavation. It seems that after removing without trouble the pumice layer, which extended to a depth of 4 or 5 feet, and the boulders it contained, and then some sand, gravel, and cobbles, the workmen ran into streaks of hard material. Kovtynovich testified that there were boulders and cobbles nested in pockets, which "would lay there just like powdered lead" (Tr., p. 18) and be difficult to dig. As the work progressed, a cemented type of orange material was also encountered, and the material became increasingly hard. Sometimes the material was so tight that it was difficult to remove even with a power shovel on one side and a tractor on the other; some of the material was beaten out with a shovel, a cat equipped with a ripper, and a dozer; and in some instances in the cutoff trenches the material was broken up by jackhammers, supplemented by the use of drift picks, and then loaded by hand into a half-yard clam bucket. The same methods were used to remove the orange-cemented material as to remove the other hard material and the work was done at approximately the same rate.

Apart from testifying that the material became progressively harder as the depth of the excavation increased, Kovtynovich was rather vague, however, with respect to identifying the precise locations and elevations at which the hard material was encountered, espe-

cially in relation to the test pits. While the record shows that more than half of the hard material was on the average in the upper 7 feet of excavation, it is not possible to determine whether most of it was in the upper or lower part of this penetration. The latter may well have been the case. Indeed, this would be more consistent with Kovtynovich's testimony that the hard material was not encountered until the top pumice layer of 4 or 5 feet had been removed. Kovtynovich did locate, however, the orange-cemented material, which, he testified, was encountered in a seam 2 feet wide that ran parallel to the conduit and the inlet works of the structure at Elevation 4,825, which was considerably below the depth to which any of the test pits, except possibly the most distant Test Pit 8, penetrated. Some more details concerning the location of the hard material were supplied by Vertrees. Remarkably enough, in cross-examining him, the appellant seemed to be attempting to prove that the material was soft down to a depth of 10 to 12 feet! However, Vertrees would agree that this was true only in some places. Vertrees, who also gave considerable testimony with respect to the location of the test pits in relation to the excavation, testified that although the test pits adjoined the areas of excavation, there was no excavation at the test pits themselves. Moreover, he also testified that there had been no excavation at all in the area of Test Pits 3 and 6, and pointed out also that Test Pit 3 was up a hillside. Walters, the regional engineer of the Bureau of Reclamation, who also testified at the hearing, and who had also had training in geology, did not regard the test pits as close. Thus, he testified: "They were in the vicinity. There were none close right in the area. They were in the vicinity" (Tr., p. 266).

The testimony of the appellant's geologist, Bartell, who was not a civil engineer, and freely conceded that he knew nothing about the construction of dams, can be accepted only in part and with considerable reservations, for it manifests a considerable degree of confusion and contradiction on his part. For instance, although the drawing containing the logs of exploration plainly indicated that the test pits had been excavated by dragline, he testified that he had assumed that the test pits had not penetrated the grade of excavation because, having been dug *by hand*, the digging had got too hard. He also persistently failed to distinguish between the test pits and the auger holes, referring in his testimony to the 15 test pits or test holes, although there were only 9 test pits and 6 auger holes. This usage of his contributed, moreover, to his erroneous estimate of the amount of hard material which the appellant should have expected to en-

counter. He attached importance to only two of the test pits—Test Pits 10 and 12 which characterized the material as "indurated"—and quite unreasonably attached no importance to the characterization of the material as "hard" in many of the other logs, although on cross-examination he conceded that the characterization "fines, hard," which also appeared in several of the logs would indicate that the material was compacted, the very condition of which the appellant complains most. Bartell's failure to realize that the test pits and the auger holes were not the same led him to give it as his opinion that the appellant should have expected only two-fifteenths of the material to be hard. However, if the fraction two-ninths is applied, as it should be, to the 28,224 cubic yards actually excavated, on the basis of Bartell's own reasoning the appellant should have expected to encounter no less than 6,272 cubic yards of indurated material. This would be over 41 percent of the total amount of 15,200 cubic yards of hard material that was actually encountered. If Bartell had taken into consideration, as he obviously should have, the other logs which showed hard material close to the surface, his estimate should have mounted.

Bartell manifested the greatest faith in the logs of exploration, and this led him to testify that he would have accepted what the logs showed, and done no digging of his own, *although the appellant had done some digging of its own.* This faith appears to have rested on his great confidence in the ability of the Bureau geologists whom he described as "men of good reputation" and as "men of high caliber." Nevertheless, as he was pressed about the completeness and adequacy of the logs, he gave testimony which wholly contradicted his confidence in the Government geologists, and his faith in the logs themselves. He could not explain why the logs did not go deeper, and began to wonder about this. He also began to complain that the logs did not go down deep enough, nor show where the waterline was. He even remarked, "I would expect them to get the test pits down to where the contractor had to go." He followed this with the further remark: "I certainly would have put one of the holes to the depth the excavation was intended. Maybe they just picked a soft place to dig. You know that has happened." Apparently, he overlooked the rather obvious fact that the test pits could not be dug into the existing structures. In intimating that the geologists had picked a soft place to dig, he contradicted his prior declaration that they were men of high caliber.

In fact, Bartell made a number of highly significant admissions—perhaps unwittingly—which clearly negatived his own faith in the logs of exploration. He admitted that if a contractor did not have

data as to what lay below the test pits—which was precisely the situation in the present case—he would be "going in blind and he should bid a fool's amount" (Tr., p. 152); that, if by digging a foot or two into the existing cuts, hard material could be found—again this was precisely the situation in the present case—the contractor's bid should have been much higher; that a dam could not be put down on glacial material, and that if a dam had stood on the site for 30 years and had not leaked, it might indicate that the material was "tight"; and, finally that it would have been a questionable design to rest a riprap spillway on pumice material.

Moreover, Bartell testified, significantly, that the area of the job site was a glacial deposit, and that in such areas the formations are so random that one could expect to find virtually any kind of material. In areas of glacial or torrential deposits, he testified: "there was no order" (Tr., p. 137); "you could find almost anything"; the material "could be hard and it could be soft"; it could be cemented or not cemented; he admitted that even pumice material, which the logs of exploration uniformly showed to be at and below the surface, could be encountered at lower elevations.

Bartell also testified, to be sure, that he would not have expected the indurated material to have been "so widespread" as to constitute two-fifteenths of the material but this qualification does not weaken very much the force of his views with respect to the random character of the geological formation, or help to determine precisely how widespread the hard material could have been expected to be. The qualification is, indeed, only another example of Bartell's contradictions. He should not have put so much faith in the logs of exploration, if the formations were so random, and if they were random, a particular kind of material might be widespread. Actually, Bartell's qualification was based on what the test holes showed rather than on the probabilities with respect to the glacial material itself.

Clause 4 of the General Provisions of the contract provided for the making of an equitable adjustment (which might be upward or downward), in the contract price, whenever the contractor encountered (1) "subsurface or latent physical conditions at the site differing materially from those indicated in this contract" (the first category), or (2) "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract" (the second category).

The Board is of the opinion that the appellant has not carried the burden of proving that it encountered a changed condition in either the first or the second category of the "changed conditions" clause. The Board has said that the first category comprises "misrepresented conditions, while the second comprises unexpected conditions." [9]

To find a first category changed condition, it is necessary to conclude that the specifications contained an "unqualified representation." [10] Against such a representation, there cannot prevail caveatory provisions of the specifications, such as those requiring the contractor to visit and inspect the site and warning him to make his own estimate of the conditions involved in the work to be undertaken, including the character of the material which may be encountered in excavation. This is so because the contractor has a right to rely upon a representation that is unqualified. This reliance would clearly be without limitation in any case in which the specifications did not provide for a site investigation. But since such a provision is usually included in Government construction contracts, even in cases in which unqualified representations have been made, some effect must be given to the requirement. This presumably is the basis for requiring the contractor to show that he has made an adequate site investigation even in cases coming within the purview of the first category of the "changed conditions" clause,[11] unless indeed the representation is of such a nature that a site investigation would have been completely pointless. If a condition is readily discoverable by an examination of the site, however, the contractor can hardly claim that he was actually misled to his detriment.[12] It would seem to the Board, however, that even though a site investigation is ordinarily necessary even in first category cases, the standard of adequacy in conducting the investigation might well be less rigorous in first than in second category cases.

The Board has not usually regarded logs of exploration as unqualified representations of what will be found in actual excavation. It has tended to view investigations of subsurface material merely as

[9] *Reid Contracting Company, Inc.*, 65 I.D. 500, 519 (1958).

[10] *Hirsch* v. *United States*, 94 Ct. Cl. 602, 637 (1941).

[11] The problem of whether a site investigation is necessary in first category cases is not often clearly discussed in the cases because they do not always make sharp distinctions between first and second category cases. The following are some Court of Claims cases which appear to be in first category and in which the necessity of a site investigation was nevertheless assumed: *Blauner Construction Co.* v. *United States*, 94 Ct. Cl. 503 (1941); *John K. Ruff* v. *United States*, 96 Ct. Cl. 148 (1942); *Walsh Brothers* v. *United States*, 107 Ct. Cl. 627 (1947); *General Casualty Co.* v. *United States*, 130 Ct. Cl. 520 (1955); *cert. denied* 349 U.S. 938; *Puget Sound Bridge Dredging Co.* v. *United States*, 131 Ct. Cl. 490 (1955).

[12] See, for instance, *Midland Land & Improvement Co.* v. *United States*, 58 Ct. Cl. 671, 683 (1924).

sampling operations.[13] This is not to say, however, that logs of exploration can never be regarded as definite representations. Whether they are must depend, however, upon the circumstances of each case[14] which should include, for example, the nature and extent of the site to be explored, the nature of the work to be performed or the facility to be constructed, and the location, number, and penetration of the explorations in relation to the actual excavation.

It seems to the Board that, taking such factors into consideration, the appellant could not reasonably have relied on the logs of exploration of the test pits in the present case when—to recapitulate—the record shows that (*1*) none of the test pits were dug within the actual area of excavation; (*2*) the test pits were not in close proximity to the excavation; (*3*) the elevations at which the test pits were dug were generally higher than the elevations of the excavations and the test pits did not generally penetrate to the depth of excavation; (*4*) the significant test pits were too few in number to be adequate or representative; and (*5*) the test pits were dug in a glacial area where random formations were to be expected.

To the extent that the test pits were, however, *some* indication of the geological conditions in the area and of the types of material which might be encountered, the Board is satisfied that the appellant did not encounter hard material in materially greater quantity than could reasonably have been expected under the circumstances of the case, and that it did not encounter, therefore, a changed condition in the second category of the "changed conditions" clause. While the hard material represented more than half of the material excavated, a very large quantity of such material was to be expected. The provision for unclassified excavation should in itself have led the appellant to expect a substantial amount of hard material. There were also boulders at the surface—indeed, the appellant does not even complain of the presence of boulders per se. The orange-cemented material was not in itself unusual,[15] and was, moreover, no more difficult to remove than the other hard material. Since most of the test pits indicated the presence of hard material at various elevations, including in at least three instances elevations close to the surface of the ground, and were located in a random geological formation, there is no basis for saying

[13] See, for instance, *J. A. Terteling & Sons, Inc.*, 64 I.D. 466, 483, 493 (1957), 57—2 BCA par. 1539.

[14] In *Carson Construction Company*, 62 I.D. 311, 321 (1955), the Board recognized the existence of such special circumstances.

[15] Since the record does not show where the water table was located there is certainly no basis for saying it was unusual.

either that a large amount of hard material should not have been expected, or that it should not have been expected so close to the surface of the ground, even if this be assumed to be a fact. It is the total quantity of the hard material, rather than the levels at which it was found, that is the important consideration in the present case. As the Board assumes that the quantity of the hard material was within the range of expectation, it can matter little that most of the hard material may have been in the upper part of the excavation. This certainly would not make it either more difficult or expensive to excavate. When it is considered further that the record shows that the appellant could have discovered the hard material by digging a foot or so into the banks of stream, and that it would have found such material if its examination of the site had been more careful, the last prop of the apellant's case collapses. Indeed, some of the hard material was in the present case so close to the surface of the ground that it seems almost paradoxical to speak of it as a subsurface or latent physical condition.

So far as item 1 of the schedule is involved in the changed conditions claim, the fact that this was a lump-sum item would be an additional factor militating against the allowance of the claim by reason of the 1,500 cubic yards of hard material encountered. The Court of Claims has emphasized that under a lump-sum contract the contractor is required to do all the excavation that may be necessary, and that recovery must be denied unless the Government misrepresented the situation, or conditions were discovered which were unknown to either party and could not be ascertained by an examination of the site. Indeed, in its essentials the case in which the court made this pronouncement bears a strong resemblance to the present case.[16]

Accordingly, the changed conditions claim is denied, whether based on item 1, 3, 4, or 5 of the bidding schedule.

*Claim No. 2—Extra Work*

This claim consists of two parts, both of which are for the costs of performing work not initially contemplated by the contractor that is alleged to have been made necessary by unusually severe weather, changed conditions, and changes ordered by the Government.

The Government interprets the contractor's letter of March 12, 1957, which sets forth the claims that were to be excepted from the

[16] The case involved the construction of a post office building, and the Government had dug four test pits outside the area of the building site, three of which showed ledge rock at varying depths. When the contractor encountered ledge rock close to the surface of the ground, it claimed to have been misled by the logs of exploration, and filed a changed conditions claim but the court denied relief.

release on contract of the same date, as reserving this claim only to the extent that it is based upon the contention that changed conditions were encountered in the form of unusual weather conditions. Certainly, the emphasis in the letter was on changed conditions, but a fair intendment of its language encompasses extra work due to changes ordered by the contracting officer. Indeed, not only did the letter state that the contracting officer ordered extra work, but also Clause 3, the "changes" clause, was expressly referred to in the opening and closing phases of the letter. The Board, therefore, will consider all of the contentions made by the contractor in connection with this claim.

The Board further concludes that any failure to submit proper notices or protests with respect to either part of Claim No. 2 was waived by reason of the contracting officer having considered both parts on their merits in his findings of fact and decision. The contracting officer did not confine his analysis of the claim to the legal issue of whether weather could be a changed condition, but specifically considered all of the instructions that are alleged by the contractor to have constituted changes, and specifically ruled that the work performed in compliance with these instructions was work which formed a part of the responsibilities of the contractor under the terms of the contract and for which, therefore, no additional compensation was allowable. Failure to protest or to give notice of claims was not so much as mentioned.

A

The first part of Claim No. 2 is for work performed during the summer of 1955 to meet requirements for release of water for irrigation purposes.

Paragraph 37 of the specifications, as amended by Supplemental Notice No. 3, provided that no storage of inflow into the Crescent Lake reservoir would be required until April 1, 1955, but that between that date and July 15, 1955, the contractor should be prepared to store inflow to an elevation of 4,838. It also required the contractor to provide temporary control works which should be capable of releasing water up to 250 cubic feet per second if the permanent outlet works were not completed by July 15, 1955. The permanent outlet works were not completed by that date, allegedly because of two circumstances: unusually severe weather during the early months of 1955, and the hard material encountered in excavating for the dam.

The contractor, in response to the construction engineer's request of June 13, 1955, submitted on July 11, 1955, a plan for a temporary diversion channel to pass water from the reservoir for irrigation.

Under this plan the sill of the control structure was to be placed at elevation 4,831, whereas the sill of the permanent outlet works was to have been at elevation 4,821.5. The water level of Crescent Lake at this time was at elevation 4,836.

The Government does not contest the contractor's statement that the diversion channel as proposed would have initially passed 250 c.f.s., but contends that as the level of the lake was drawn down, the contractor's plan would not have provided a sustained flow approaching 250 c.f.s.

By letters of July 12 and 14, 1955, the contractor was directed to modify the works it had proposed, by lowering the sill of the control structure from elevation 4,831 to 4,828.6, and by deepening the diversion channel correspondingly. The grade so set corresponded approximately to that of the suggested diversion channel shown on the contract drawings, and also to that of the inlet channel serving the old dam. The contractor complied with these instructions, but on July 15, 1955, sent a written protest to the construction engineer stating that the original proposal fulfilled the contract requirements and that an increase in the cost of the contract was being claimed under clause 3 of the General Provisions.

The contractor was subsequently directed by letter dated August 9, 1955, to alter the intake structure, and clear out the upstream end of the diversion channel, so that they would continue to be sufficient to pass 250 c.f.s., notwithstanding the intervening draw-down of the reservoir. Pursuant to this directive, the contractor removed the center pier and part of the side walls of the control structure in order to facilitate the flow of water through that structure. On August 10, 1955, the contractor made a written protest to the construction engineer against the order of the preceding day. A few weeks later, at the request of the watermaster and the Deschutes County Municipal Improvement District, which obtained water for irrigation purposes from Crescent Lake, the contractor removed some material from the intake channel, thereby slightly increasing the flow.

One contention of the contractor is that exceptionally cold weather and heavy snow during the late winter and early spring of 1955 constituted a changed condition, and that this condition was a cause of the failure to complete the permanent outlet works by July 15, 1955, and, therefore, a cause of the expenditures incurred by the contractor in connection with the provision of the temporary control works.

It is, however, very well established that unusual weather is not a changed condition within the meaning of either of the two categories of such conditions for which relief is provided in clause 4 of the

contract.[17] While counsel for the contractor contends that this rule has been abrogated or modified by *John A. Johnson Contracting Corp.* v. *United States*, 132 Ct. Cl. 645 (1955), it is clear from a reading of the opinion and findings of the court that the matters which were there held to be changed conditions were certain identifiable properties of the soil at the job site, rather than any abnormalities of the weather. Delays due to unusual weather are excusable under the form of contract here involved but, as the contract does not contain specific language allowing damages for such delays, a contractor, even if he suffers damages as a result of such delays, is entitled only to the relief of an extension of time corresponding to the period of the delay.

Hence, the Board affirms the decision of the contracting officer that it is unnecessary to determine whether the delay in completion of the outlet works was caused by unusually severe weather.

Another contention of the contractor is that the hard material encountered in the excavations was a cause of the failure to complete the outlet works by July 15, 1955, and, therefore, a cause of the expenditures incurred in connection with the diversion channel and other temporary works. The Board's conclusion that the contractor did not encounter a changed condition is in itself sufficient to dispose of the contention.

A still further contention is that paragraph 37 of the specifications merely required diversion works that were capable of passing 250 c.f.s. when the reservoir elevation was at elevation 4,838, or, at most, that were capable of passing 250 c.f.s. at the reservoir elevation existing when the works were built, that is, elevation 4,836, and did not impose the obligation of providing works that would be capable of maintaining a flow of that quantity as the summer draw-down of the reservoir for irrigation progressed.

The Board is convinced, however, that the natural meaning of the contract provisions on this subject is that the temporary works were to be capable of passing 250 c.f.s. at all times when the water level of the reservoir was such as to admit of that quantity of water being passed through a diversion channel having, at the very least, controlling elevations no higher than those of the suggested channel shown by the drawings and of the inlet channel to the old dam. As the need for water during the irrigation season is a continuing one, it would be quite illogical to conclude that the adequacy of the capacity

[17] *Arundel Corp.* v. *United States*, 103 Ct. Cl. 688, 711–12 (1945), *cert. denied* 326 U.S. 752, *rehearing denied* 326 U.S. 808 (1945); *Koeneke*, ASBCA No. 3163, 57–1 BCA par. 1313 (1957).

of the works should be determined solely by reference to their capacity as of the time when water was first released through them.

It is apparent from the evidence that the plan of diversion proposed by the contractor on July 11, 1955, was insufficient to comply with the contract provisions, as thus construed. It is equally apparent from the evidence that the directions contained in the construction engineer's letters of July 12 and 14, 1955, were a reasonable exercise of the authority of the Government to require compliance with those provisions. Nor does it appear that the subsequent directions with respect to channel clearing called for work that was in excess of what the contract required, since paragraph 37 of the specifications expressly imposed upon the contractor the duty not merely to construct, but also to maintain, the diversion channel. As for the alteration of the intake structure, the reasonableness of the instructions contained in the construction engineer's letter of August 9, 1955, would seem to turn, in the circumstances here presented, upon whether the cost of erecting at the outset a structure with an opening of the dimensions ultimately provided would have been less than was incurred in initially erecting and subsequently altering the structure actually constructed. Presumably because of the stipulation entered into by the parties, no evidence as to these elements of cost was adduced at the hearing. The contracting officer should, therefore, make a determination on this point and allow the contractor an equitable adjustment if, in fact, the latter's costs were increased by reason of the failure to require the larger opening at the time when the intake structure was being built.

Apart from the matter last mentioned, there is no basis for a finding that extra work was demanded of the contractor in connection with the construction and maintenance of the temporary control works. Subject to the determination to be made by the contracting officer concerning the alteration of the control structure, Claim No. 2A must, therefore, be denied.

B

The second part of Claim No. 2 is for work performed during the latter part of 1955 and the early months of 1956 in order to provide winter storage and take care of the spring runoff.

Excessively rainy weather during the fall of 1955 necessitated deferment of the completion of the contract work until the next spring. When it became apparent that operations would have to be suspended for the winter, the construction engineer gave the contractor verbal instructions as to the handling of the Crescent Lake

reservoir during the intervening months. These instructions were to the effect that the contractor should provide for storage of water in the reservoir up to an elevation approaching 4,846, either by increasing the height of the temporary cofferdam previously constructed by the contractor or by increasing the height of the upstream edge of the partially completed embankment of the permanent dam. The construction engineer testified that he made these proposals in order to conserve the winter flows for subsequent irrigation use, and Kovtynovich testified that the construction engineer advised him that the irrigation district was entitled to all the water that could be obtained by storage methods.

The contractor would have preferred to bypass the winter flows through the permanent outlet works which, by this time, had been largely completed, or, at least, to have held the reservoir at its then existing level. However, in view of the instructions it had been given, it elected to, and did, build the cofferdam to the height desired by the construction engineer. No protest concerning this matter was made in writing, or brought to the attention of the contracting officer, until several months later.

As the winter progressed it became evident that there was substantial danger of the cofferdam being overtopped, or of its spillway being eroded. The construction engineer warned the contractor by a letter dated January 13, 1956, that the reservoir was filling more rapidly than normal, that failure of the works would result in damage to the uncompleted dam and possibly to private property downstream, and that the contractor was responsible for preventing damage to persons and property. By telephone conversations on March 2 and March 16, 1956, which were confirmed by letters of the same dates, the contractor was warned again of the possibility of such damage.

As a result of these communications and a written warning from the attorneys for the irrigation district, dated March 7, 1956, the contractor placed two 48-inch culverts through the cofferdam and took certain other protective measures. Immediately after installation of the culverts, the contractor informed the Government by a letter dated April 3, 1956, that it was entitled to additional compensation for so doing because the cofferdam and other temporary works, as originally built, would have been capable of handling all water which could be reasonably anticipated during the winter and spring months but for the requirement that as much water as possible be conserved for the irrigation district. After receiving another warning letter, dated May 29, 1956, in which the construction engineer asked that temporary

means be improvised for operating the gates of the permanent outlet works to control the flow in case of a cofferdam break, the contractor by letters of June 2, 1956, claimed additional compensation for building up a section of the permanent dam, tying off the four upstream outlet gates so that they could be closed, and installing temporary fish screens.

The record clearly shows, and the contractor admits, that in the spring of 1956 there was a serious danger of damage from floods when the Government ordered the installation of the two 48-inch culverts. If the cofferdam had been washed away, escaping water from Crescent Lake might have damaged the partially completed dam, and washed out or otherwise damaged private property, including a railroad track approximately a mile downstream.

Clause 11 of the General Provisions described the general responsibilities of the contractor in this connection as follows:

> * * * He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. He shall also be responsible for all material delivered and work performed until completion and final acceptance, except for any completed unit thereof which theretofore may have been finally accepted. Upon completion of the contract, or final acceptance of any completed unit thereof, the work shall be delivered complete and undamaged.

Paragraph 37 of the specifications, as amended by Supplemental Notice No. 3, contained detailed requirements concerning the diversion and care of the stream during construction. It provided that the contractor should construct and maintain all necessary cofferdams, channels, control works, and other temporary diversion and protective works, and should be responsible for any damage to the foundations or other parts of the work caused by floods, water, or failure of any part of the diversion or protective works. It stated that the contractor's plan for the diversion and care of the stream during construction should be subject to the approval of the contracting officer, but that nothing in the paragraph should relieve the contractor from full responsibility for the adequacy of the diversion, control, and protective works. With respect to temporary storage, it included, in addition to the provisions mentioned in the discussion of Claim No. 2A, a provision that "the maximum elevation permitted for storage of water behind the contractor's cofferdam will be 4,840." It further specified that: "After completion of the outlet works, release of water from the reservoir shall be as directed by the contracting officer." The outlet works, however, were not to be deemed ready for such use until, among other things, the dam embankment

had been completed to an elevation that would prevent it from being overtopped, as determined by the contracting officer.

From a consideration of the contractual provisions as a whole, the Board has concluded that they imposed upon the contractor the obligation to store water during the winter shut-down of operations only to the extent that such storage could be accomplished through the use of the permanent dam and its appurtenant works in their then state of completion, but that if these works were inadequate to provide storage up to elevation 4,838 the contractor was further obligated to provide temporary facilities for the storage, up to that elevation, of inflows occurring on or after April 1, 1956. The Board believes that this interpretation properly applies the terms of the contract, when read in light of the understanding of its purposes which the parties must be deemed to have had at the time of its execution, to the water storage problems created by the unexpected adversity of the weather and the consequent prolongation of the work long beyond the time for which provision was made in the specifications.[18]

It follows that neither of the alternatives relating to winter storage proposed by the construction engineer in the fall of 1955 was compatible with the terms of the contract, and that the instructions given the contractor to adopt one or the other of them constituted a change in the specifications for which the contractor is entitled under clause 3 to an equitable adjustment.[19] The record shows, furthermore, that to a substantial degree the protective and control measures taken in the spring of 1956 were measures that became necessary only because winter storage was not confined within the limits of the storage requirements of the contract, as above construed. These later measures to the extent that they became necessary solely by reason of the original instructions to provide storage in excess of those limits are measures properly attributable to such change and, therefore, measures to which the equitable adjustment should extend. Pursuant to the stipulation of the parties, the particular measures that meet this test and the amount of the equitable adjustment to be made are to be determined by the contracting officer, subject to appeal to the Board in accordance with the "disputes" clause of the contract.

On the other hand, insofar as the measures taken pursuant to the series of warning letters mentioned above were measures that would have been necessary, in order to avert the threat of flood damage or to discharge other obligations imposed by the contract, even if no change

[18] See *Phoenix Bridge Co.* v. *United States*, 211 U.S. 188 (1908).

[19] The Government makes no contention that the construction engineer lacked authority to order this change.

had been made in the storage requirements of the contract, it is clear that the contractor has no allowable claim. Nor does it appear that the provision of temporary fish screens could itself serve as a basis for the allowance of additional compensation, since the general requirement for protective works in paragraph 37 of the specifications is broad enough to encompass reasonable measures for the protection of the fish resources of the reservoir and stream.

The parties agree that unusually heavy snowfalls resulted in an abnormal inflow of water into the reservoir during the early months of 1956. The unusualness of the condition, however, does not affect the respective rights of the parties, as just explained, for the contractor in entering into the contract assumed the risk that adverse weather might affect the cost of performing the work requirements as originally specified,[20] and the Government in exercising its authority to order a change assumed the risk that adverse weather might affect the cost of performing the work requirements as enlarged by such change.[21] Hence, in determining the extent to which the costs actually incurred by the contractor were or were not costs that had to be incurred solely by reason of the change in the storage requirements of the contract, any issues as to cause and effect involving weather conditions should be resolved in the same manner as though the conditions actually experienced were ones that could reasonably have been anticipated.

Claim No. 2B, accordingly, should not have been denied in its entirety by the contracting officer.

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F.R. 9428), the findings of fact and decision of the contracting officer are affirmed, except as modified, and he is directed to proceed as outlined above.

Theodore H. Haas, *Chairman.*

I concur:

William Seagle, *Member.*

Board member Herbert J. Slaughter dissents from the opinion insofar as it denies the changed condition claim in its entirety.

[20] *De Armas* v. *United States,* 108 Ct. Cl. 436, 466–68 (1947).
[21] See *Harding,* ASBCA No. 2477 (February 2, 1955).

U.S. GOVERNMENT PRINTING OFFICE: 1959

## L. E. GRAMMER

A-27797 *Decided May 4, 1959**

**Oil and Gas Leases: Cancellation—Oil and Gas Leases: Patented or Entered Lands**

An oil and gas lease is properly canceled where the lease was issued on land in an existing settlement claim in Alaska not subject to a mineral reservation without notifying the entryman and affording him an opportunity to show that the land was not prospectively valuable for oil or gas and the entryman has submitted an acceptable final proof prior to a determination by the Geological Survey that the land is prospectively valuable for oil and gas.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

L. E. Grammer has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated June 10, 1958, which affirmed a decision of the manager of the Anchorage, Alaska, land office, dated July 10, 1956, canceling his oil and gas lease, Anchorage 028430, as to approximately 25 acres in conflict with a prior homestead settlement claim, Anchorage 027756, for which Donald G. Graham filed notice of settlement claim on August 27, 1954, covering 160 acres of unsurveyed land. No reservation of oil and gas was imposed upon the claim and on July 12, 1956, Graham filed acceptable final proof.

The record shows that the appellant's noncompetitive oil and gas lease offer was filed on November 30, 1954, and a lease was issued effective as of February 1, 1955. A Geological Survey report of December 5, 1957, states that:

> At the time the lease was issued it was not definitely known that oil and gas deposits existed in the Kenai Peninsula and no information was available concerning subsurface structural and stratigraphic conditions. On May 27, 1955, the Survey reported that the lands in Homestead Settlement Claim, Anchorage 027756, filed August 27, 1954, consisting of 160 acres, was valuable prospectively for coal but was without value for other minerals.
>
> * * * * * * *
>
> In accordance with 43 CFR 192.71, it is determined administratively that previous to the appeal of August 30, 1956, the land in conflict was not regarded as prospectively valuable for oil and gas. Therefore no change in classification is warranted and the land was properly subject to classification as not valuable prospectively for oil and gas at that time.[1]

Thus, the Geological Survey has determined that as of a date after Graham filed final proof, the land was not prospectively valuable for oil and gas.

*Not in chronological order.

[1] By supplemental report, dated April 2, 1958, the Geological Survey reported that the lands involved in this appeal are considered prospectively valuable for oil and gas at the present time.

In his decision the Director pointed out that the general rule with respect to the homestead laws is that the date of filing satisfactory final proof, assuming compliance with the other requirements of those laws, is the date of vesting of equitable title in the entryman, and that after submission of such proof the Government cannot maintain a contest of the entry because of any subsequent discovery of mineral in the lands based on knowledge acquired after that date that the lands are mineral in character. Solicitor's opinion, 65 I.D. 39 (1958).

The Director also pointed out that the Department's regulation, 43 CFR 192.71(a), states that an offer for a noncompetitive lease of entered or settled land not impressed with an oil or gas reservation will be rejected unless it is found that the land is prospectively valuable for oil and gas.

The Director concluded that inasmuch as at the time the appellant's oil and gas lease offer was filed the offer was in conflict with a homestead settlement claim not impressed with an oil and gas reservation, and the lands were not considered to be prospectively valuable for oil and gas, and since by the filing of acceptable final proof the entryman has acquired equitable title to the lands, including the oil and gas deposits therein, the oil and gas lease must be canceled as to any lands found to be in conflict with the homestead entry. The Director also stated that:

> Because the lands in both the homestead entry and the oil and gas lease are unsurveyed, it is impossible to determine the exact area of conflict. However, the Operations Supervisor for Anchorage has advised that actual surveying of the homestead is scheduled for the 1958 field season. Accordingly, when this decision becomes final the case will be remanded to the Land Office with instructions that after the lands have been surveyed, the lease will be amended to exclude any lands found to be in conflict with the homestead entry.[2]

The pertinent regulation of the Department, 43 CFR 192.71, provides as follows:

> (a) Where an offer is filed to lease lands noncompetitively in an entry or settlement claim not impressed with an oil or gas reservation, the offer will be rejected unless it is found that the land is prospectively valuable for oil or gas. An offeror for a lease for land already embraced in a nonmineral entry without a reservation of the mineral, and likewise a nonmineral entryman or settler who is contending that the land is nonmineral in character should submit with their respective offer and application, showings of as complete and accurate geologic data as may be procurable, preferably the reports and opinions of qualified experts.
>
> (b) Should the land be found to be prospectively valuable for oil or gas, the entryman or settler will be required to consent to a reservation of the oil and gas to the United States or to contest the mineral finding. If he does neither,

[2] Since the Director's decision the homestead claim has been surveyed, the survey being approved on April 9, 1959. The survey shows a conflict with the appellant's lease of approximately 14½ acres instead of 25 acres. The appellant's lease covered 2,560 acres when issued.

the entry will be canceled or his settlement rights denied. If he consents, or contests the finding or is unsuccessful, a lease will be granted to the offeror, unless the entryman or settler has a preference right, but if the entryman or settler prevails in a contest, the offer will be rejected.

Thus the regulation states, first, that an oil and gas offer for land in an unpatented settlement claim not impressed with an oil and gas reservation will be rejected if the land is not prospectively valuable for oil and gas. Since it has been found that at all times through the filing of final proof the land in the homestead entry was not prospectively valuable for oil and gas, Grammer's application would have been rejected to the extent of the conflict if it had been known. *George H. Waters et al.*, A–26936 (August 20, 1954); see *Edward R. Coney*, A–27575 (June 23, 1958).

Then, if the land is determined to be prospectively valuable for oil and gas, the regulation requires that the settler or entryman on unsurveyed land not impressed with a mineral reservation be required to consent to a mineral reservation or be allowed an opportunity to show that the land in his claim is nonmineral in character. In other words, there must be notice to the settler that an oil and gas lease offer has been filed for the lands in his entry, and an opportunity afforded him to contest the proposed lease if he desires to do so before any lease may be issued. An oil and gas lease which is issued without affording the settler such an opportunity is issued in violation of the Department's regulation. The courts have held that a departmental regulation has the effect of law so that the Secretary may not isue an oil and gas lease in violation of his own regulation. *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C. 1955).

The appellant argues that the issuance of the oil and gas lease to him constituted a determination that as of the date the lease was issued the lands were prospectively valuable for oil and gas. Assuming this is so, as has just been pointed out, the regulation requires that, where land included in an offer is determined to be prospectively valuable for oil and gas, the entryman be given an opportunity to contest the determination.

Therefore, since the procedure required by the cited regulation was not followed prior to the issuance of the appellant's lease, and, if it had been, the lease would not have issued, the lease was issued in violation of the Department's regulation and the settler's rights. It is, therefore, subject to cancellation.

The normal procedure in a case such as this would be to remand the case to the land office in Anchorage so that each party could be given an opportunity to submit geologic data to show that the lands were or were not prospectively valuable for oil and gas prior to the

filing of final proof. However, the record shows that the appellant has had the opportunity to submit data to show that the lands were prospectively valuable for oil and gas on that date, and has attempted to do so. The data submitted, however, is not sufficient to warrant a change in the Geological Survey's determination. Therefore, there is no reason to remand in this case.

In summary, it is concluded that because the settlement claimant has filed his final proof the Department is barred from requiring a reservation of the minerals in the lands based upon information ascertained thereafter, the appellant's lease was issued in violation of the Department's regulations, and it must be canceled insofar as the lease conflicts with the settlement claim.

Having considered all of the facts and circumstances, it can only be concluded that there was no error in the Director's decision and that the decision should be affirmed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Acting Solicitor.*

## MRS. VIRGINIA E. LEWIS
## MAX B. LEWIS

A-27902 *Decided May 8, 1959* *

**School Lands: Grants of Land—School Lands: Mineral Lands**

Numbered school sections which are included in mineral leases and applications are excepted from the provisions of subsection (c) of section 1 of the act of January 25, 1927, as amended, which prevent the attachment of the grant to States of numbered mineral school sections if, among other circumstances, the land is included in a valid application, claim, or right initiated or held under Federal laws until such application or right is relinquished or canceled.

**Oil and Gas Leases: Applications—School Lands: Grants of Land**

Oil and gas lease applications pending when the plats of survey of school sections are accepted do not prevent attachment of the grant to the State of such school sections under the act of January 25, 1927, as amended by the acts of April 22, 1954, and July 11, 1956, even though the applications are filed 3 days before the acceptance of the plats of survey.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Virginia E. Lewis and Max B. Lewis have appealed to the Secretary of the Interior from a decision of September 18, 1958, by

*Not in chronological order.

the Director of the Bureau of Land Management affirming the partial rejection of noncompetitive oil and gas lease offers on lands in Ts. 38 and 39 S., Rs. 1 and 2 E., S.L.M., Utah (30 U.S.C., 1952 ed., Supp. V, sec. 226).

On September 10, 1957, the appellants filed offers for unsurveyed lands which were described in their applications by metes and bounds. Each of the offers included one of the numbered sections of land which, under certain conditions, was granted for the support of the common schools of Utah upon its admission as a State into the Union by the Enabling Act of July 16, 1894 (28 Stat. 107). The grant of land to a State for school purposes which is unsurveyed on the date of admission of the State into the Union becomes effective upon the date of the acceptance of the plat of survey by the Director of the Bureau of Land Management (43 CFR 270.24). The official survey of the exterior boundaries of each of the townships involved in this appeal and of the school sections within each of these townships was approved on September 13, 1957, 3 days after the appellants' lease offers were filed. The decisions partially rejecting the offers held that title to the numbered school sections included in the appellants' applications had passed to the State of Utah.

The appellants contend that the partial rejection of their offers was improper because, under the controlling statutory provisions, the pending oil and gas applications prevented attachment of the State's title to the school sections on September 13, 1957, the date of the acceptance of the plats of survey of those sections. The issue raised on appeal requires consideration, first, of the broad provisions and then of several specific sections of the act of January 25, 1927 (43 U.S.C., 1952 ed., sec. 870), as amended by the acts of April 22, 1954, and July 11, 1956 (43 U.S.C., 1952 ed., Supp. V, sec. 870(c) and (d)).

The enabling acts originally granting to States upon their admission into the Union numbered sections of land for the support of the common or public schools generally excluded lands which were mineral in character. The act of January 25, 1927 (*supra*), removed this restriction and provided that, subject to a number of exceptions, the grants to the States of numbered sections in place for the support or in aid of common or public schools be extended to include numbered school sections which were mineral in character unless indemnity or lieu land had been previously selected in place of such numbered sections. However, under subsection (c) of section 1 of this act, any lands which were subject to or included in existing reservations, Federal court proceedings, or in any valid application, claim, or right initiated or held under Federal law were excluded from the provisions of the act until such application, claim, or right was relinquished or canceled. Consequently, the grant to a State of a numbered min-

eral school section did not attach upon acceptance of the plat of survey of the land if the land was included, *inter alia*, in an application or lease under the Mineral Leasing Act (see *Margaret Scharf et al.*, 57 I.D. 348, 358 *ff.* (1941)).

On April 22, 1954, the act of January 25, 1927, was amended to provide that outstanding mineral leases or applications shall not prevent the grant to the States of numbered mineral school sections upon completion of survey and that if a lease is outstanding when survey is completed the State shall succeed to the position of the United States as lessor. On July 11, 1956, the act was again amended to provide that outstanding mineral leases or applications shall not prevent the grant to the States of any numbered school section whether or not mineral in character. As a result of these amendments, the existence of a mineral lease or leases or applications therefor on any numbered school section at the time of its survey does not prevent the attachment of the grant to a State of such numbered school sections (see Acting Associate Solicitor's opinion M–36408 (February 7, 1957)).

The specific sections of the act of January 25, 1927, as amended by the acts of April 22, 1954, and July 11, 1956 (*supra*), which are relevant in deciding this appeal are as follows:

That, subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections. [44 Stat. 1026.]

* * * * * * *

(c) Except as provided in subsection (d), any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the exisiting laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act. [47 Stat. 140; 68 Stat. 57, 58.]

(d) (1) Notwithstanding subsection (c), the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this Act.

(2) Any such numbered school section which has been surveyed prior to the date of approval of this amendment [July 11, 1956], and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by

the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after the date of approval of this amendment [July 11, 1956] and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the United States, shall (unless excluded from the provisions of this section by subsection (c) for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this Act, in accordance with the Act of June 12, 1934 (48 Stat. 1185, 43 U.S.C. 871a). Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State. [70 Stat. 529.]

Subsection (d) (1) expressly provides that the fact that an application for a mineral lease is outstanding on any numbered school section, whether or not the section is mineral in character, at the time of survey thereof shall not prevent the grant of such numbered school section to the State concerned. The holding in the Director's decision that title to the school sections here involved passed to the State of Utah even though lease applications for the land were pending when the survey plats were accepted is in accord with subsection (d) (1). The Director's decision did not so state, but presumably title passed to the State of Utah on September 13, 1957, the date when the plats of survey were accepted, in accordance with the usual rule regarding passage of title to school sections (see 43 CFR 270.24; *Margaret Scharf et al., supra*, p. 356 *ff.*).

The appellants contend that although an outstanding mineral *lease* on a numbered school section which is surveyed on or after July 11, 1956, does not prevent the attachment of the grant of such section to the State immediately upon completion of the survey, nonetheless, if an *application* for a mineral lease on such a numbered school section is pending when the survey is completed, the pending *application* prevents the grant to the State from attaching. In support of this contention, it is argued that the provisions of subsection (d) (1) with respect to mineral leases and applications on numbered school sections do not specify *when* the grant of these sections shall vest in the States but only provide that such leases and applications shall not prevent the grant to the State from attaching; that subsections (d) (2) and (3) are the only statutory provisions governing the time when the grant of school sections to the State attaches; and that neither subsection (d) (2) nor (3) makes any provision about the effective date of the grant of a school section which is included in an application for a lease where the section has been surveyed after

July 11, 1956. It is asserted further that as subsection (d) (2) refers only to sections surveyed before July 11, 1956, which are included in leases or applications therefor and as subsection (d) (3) governs the vesting of school sections surveyed after July 11, 1956, which are included in mineral *leases* and there is no provision in subsection (d) regarding the time when the grant to a State of school sections surveyed after July 11, 1956, and included in mineral *applications*, like those here involved, becomes effective, title to the sections here under consideration did not pass to the State of Utah upon acceptance of the plat of survey because subsection (c) of the act prevented attachment of the State's title until the outstanding applications are relinquished or canceled. This result, it is argued, follows from the provision in subsection (c) which precludes, except as provided in subsection (d), the attachment of the grant of numbered mineral sections to the State upon completion of the survey if the land is included, among other things, in a valid application.

The appellants' contention is incorrect for a number of reasons. Subsection (c), which begins with the clause "Except as provided in subjection (d)," clearly excepts from its operation the subject matter of subsection (d), namely, mineral leases and applications therefor. The appellants' contention to the effect that the "except" clause at the beginning of subsection (c) means "except as provided in subsection (d) (3)" violates the plain language of the provision, and, in addition, is inconsistent with the purpose of the amendments of April 22, 1954, and July 11, 1956, as the legislative histories of these acts indicate.

The "except" clause at the beginning of subsection (c) was added by the act of April 22, 1954, the purpose of which was to change the act of January 25, 1927, by allowing the grant to the States of numbered mineral school sections to attach upon completion of the survey even though mineral leases or applications therefor were then outstanding on the land, and the scope of the clause was enlarged by the act of July 11, 1956, to include numbered school sections whether or not they were mineral. In a report [H. Rept. 1357, 83d Cong., 2d sess.] of March 12, 1954, to the Chairman of the House Committee on Interior and Insular Affairs, recommending the enactment of H.R. 7110 (83d Cong., 2d sess.), the bill which became the act of April 22, 1954, the Secretary of the Interior stated in part that:

> * * * H.R. 7110 grants to the States the school sections in place even though they are subject to outstanding mineral leases or applications, and provides that the States shall succeed to the position of the United States as lessor. * * *

The fact that under the act of April 22, 1954, applications for mineral leases, as well as leases, were intended *not* to prevent the States from obtaining title to school lands is even more evident when consideration is given to H.R. 6881 (83d Cong., 2d sess.), the original bill on

the subject which was superseded by H.R. 7110. H.R. 6881, introduced in the House by Representative Dawson of Utah, contained no reference in subsections (d) (1) and (2) to lease applications. With a letter of January 8, 1954, to Representative Dawson, the Director of the Bureau of Land Management submitted a revised draft of the bill as first introduced. The letter of January 8, 1954, states in part:

> * * * The revised draft provides that *applications* for leases as well as leases themselves shall *not* prevent the States from obtaining title to school lands. This change is needed because under paragraph (c) of section 1 of the 1927 act (43 U.S.C., 1946 ed., sec. 870), as it now stands, States may not acquire title to lands subject to an application to lease. [Italics added.]

The proposals for revision suggested in the revised draft accompanying the Director's letter of January 8, 1954, were adopted without change in subsections (d) (1) and (2) of H.R. 7110, also introduced by Representative Dawson. The provisions in (d) (1) and (2) regarding lease applications were affected by the act of July 11, 1956, only by extending the provisions to include numbered school sections whether or not mineral in character. Thus, the legislative history of these provisions is consistent with the language of subsection (d) (1) that mineral applications shall not prevent the attachment of a grant to a State of numbered school sections, and the assertion on this appeal to the effect that the amendments of the act of January 25, 1927, indicate an intention that school sections surveyed after July 11, 1956, on which applications for leases are pending shall not pass to the States is without merit.

With respect to the argument that if applications had been intended to be included within the scope of subsection (d) (3), they would have been expressly mentioned, as they are in subsections (d) (1) and (2), as was pointed out in the above-quoted portion of the letter from the Director of the Bureau to Representative Dawson, it was necessary to include applications in subsection (d) (1) in order to make inoperative the provision in subsection (c) of the 1927 act which prevented the grant of school sections to States if an application or lease under the Mineral Leasing Act were outstanding on the completion of survey. The provision regarding applications was likewise necessary in subsection (d) (2), which deals with numbered school sections surveyed *before* the amendments of April 22, 1954, and July 11, 1956, were enacted because lease applications as well as leases on numbered mineral sections prevented the attachment of the State's title to such lands under subsection (c) of the act of January 25, 1927. But lands which are included in mineral leases or applications therefor and surveyed *after* the enactment of these amendments are excepted from subsection (c) and are governed only by subsection (d). As subsection (d) (1) provides that mineral

leases or applications shall not prevent the grant of numbered school sections, any further provision relating to when a State's title attaches to school sections on which lease applications are pending on the completion of survey was unnecessary because no right to a lease results from filing an application,[1] and, unlike a lessee, a lease applicant has no interest in land included in his application which would survive passage to the State of title to the land. Consequently, title to school sections on which lease applications are pending at the completion of survey passes to the State upon acceptance of the plat of survey, in accordance with departmental regulation and administrative decisions, the presumption being that a State's title to a school section attaches at that time in the absence of evidence that some positive bar prevents the grant (43 CFR 270.24; see *Margaret Scharf et al., supra*, 356, 360–361).

The appellants' entire case rests upon the omission in subsection (d) (3) of language pertaining to applications for leases. From this omission they seek to draw a congressional intent that as to school sections which are surveyed after July 11, 1956, and which are included in applications when the survey is accepted, title will not pass to the State until the application ripens into a lease; then title will pass subject to the lease. The appellants point to nothing in the legislative history of either the 1954 or the 1956 acts which even suggests that this novel intent was in the mind of Congress.

On the contrary, using the appellants' own basis for statutory construction, that is, considering only the language of the statute, it becomes apparent that Congress had no such subtle distinction in mind. The act of April 22, 1954, provided in subsection (d) (2) and (3) as follows:

> (2) Any numbered mineral section which has been surveyed *prior to the date of the enactment of this subsection*, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a lease or leases * * * or an application therefor, is hereby granted * * *.
>
> (3) Any numbered mineral section which is surveyed on or after *the date of the enactment of this subsection*, and on which there is outstanding at the time of such survey a lease or leases entered into by the United States, shall * * * be granted to the State concerned immediately upon completion of such survey * * *. [Italics added.]

The "date of the enactment of this subsection" was, of course, April 22, 1954. Appellants therefore would have to argue that if a school

[1] By filing an oil and gas lease application, the first qualified applicant becomes entitled only to a preference right to a lease if the United States leases the land. It is always possible that, after an oil and gas lease application is filed, the land applied for may become unavailable for leasing because it is withdrawn, reserved, or appropriated under any of a variety of statutes, in which event the oil and gas lease application must be rejected (see *Carlos P. Alexander*, A–26799 (October 7, 1953); *Jack Bruton et al.*, A–26775 (September 14, 1953)).

section were surveyed after that date, say, on July 1, 1956, and there were an application on the land at that date, title to the school section would not pass to the State until a lease was issued. But on July 11, 1956, subsection (d)(2), as amended on that date, provided that as to school sections surveyed "prior to the date of approval of this amendment" (which was July 11, 1956) title to which would have passed but for the reason that a lease or *application* was outstanding on the land at the time of survey, title shall be granted to the State, regardless of whether a lease has been issued on the application.

This would mean that in our supposititious case of a survey accepted on July 1, 1956, title would pass under the act of July 11, 1956, even though no lease had been issued on the application although, under the appellants' view, the act of April 22, 1954, would have up to July 11, 1956, prohibited passage of title until a lease was issued. But again, under the appellants' view, a school section surveyed after July 11, 1956, and included only in an application at the time of survey would not pass to a State until a lease was issued.

What explanation is there for Congress' deciding on July 11, 1956, to grant title to school sections included only in applications for leases when previously, under the 1954 act, title would not have passed until a lease was issued? Why did Congress still refuse to grant title to school sections included in applications for leases where such sections were not to be surveyed until after July 11, 1956? What possible reason would there be for Congress' adopting such a peculiar changing scheme of disposing of school sections in a period of a little over 2 years? The appellants offer absolutely no explanation. Indeed, they cannot, for the legislative history of the two acts reveals not the slightest intent on the part of Congress to adopt such an irrational scheme of disposal of school sections.

For the reasons discussed herein, the decision of the Director, Bureau of Land Management, rejecting the appellants' applications to the extent that they include school sections, the title to which had passed to the State of Utah, was correct (see *John E. Miles*, A–27577 (June 12, 1958)).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## DISPOSAL OF LOTS IN SAXMAN, ALASKA

**Alaska: Indian and Native Affairs**

No payment is required of native occupants of Alaskan native villages, either by way of purchase money or fees, upon conveyances to them by trustee of native village lands patented to trustee pursuant to section 3 of the act of May 25, 1926 (48 U.S.C., 1952 ed., sec. 355(c)).

**Alaska: Indian and Native Affairs**

Native village lands patented to trustee pursuant to section 3 of the act of May 25, 1926 (48 U.S.C., 1952 ed., sec. 355(c)), cannot be disposed of by competitive bidding.

**Alaska: Townsites**

Reference to townsite provisions (sec. 2387, Rev. Stat. and act of Mar. 3, 1891 (26 Stat. 1095)) in patent conveying native village lands to trustee pursuant to section 3 of the act of May 25, 1926 (48 U.S.C., 1952 ed., sec. 355(c)), is *pro forma* and not intended to apply purchase money or fee requirements to subsequent conveyances by trustee.

M-36563 MAY 11, 1959.*

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

Your Bureau has referred to me certain inquiries concerning the disposal of lots in Saxman, Alaska, which is located about 2 miles south of Ketchikan. It appears that an Indian village was established there in 1894 by the Cape Fox and Tongass branches of the Tlingit Tribe of Native Alaskans. The area was surveyed and the plat for "Saxman Municipality (Saxman Indian Village) Alaska," U.S. Survey No. 1652 accepted by the General Land Office [Bureau of Land Management] on June 20, 1929.

On December 13, 1929, the Register of the Anchorage Land Office issued a final certificate—

> "under the act of May 25, 1926, Section 3 (44 Stat. 629) and Sec. 11 of the act of March 3, 1891 (26 Stat. 1095)"

for 364.97 acres embraced in U.S. Survey No. 1652. Patent 1035992 issued on April 7, 1930, to the trustee—

> "pursuant to Section 2387 of the Revised Statutes of the United States and Section eleven of the act of March 3, 1891 (26 Stat. 1095), as amended by Section three of the act of May 25, 1926 (44 Stat. 629) * * *."

The patent was issued—

> "subject to all the provisions, limitations, and restrictions of said Act of May 25, 1926."

Revised Statutes, section 2387 (43 U.S.C., 1952 ed., sec. 718) authorizes the entry by town authorities for occupants of public land as a townsite upon payment of the "minimum price." See Revised

*Not in chronological order.

Statutes, sec. 2357 (43 U.S.C., 1952 ed., sec. 678). Section 11 of the 1891 act (48 U.S.C., 1952 ed., sec. 355) authorizes the entry of public land in Alaska by a trustee appointed by the Secretary of the Interior for townsite purposes for the benefit of the occupants—

> under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be * * *.

Section 3 of the act of May 25, 1926 (48 U.S.C., 1952 ed., sec. 355c) authorizes the Secretary of the Interior to survey out public lands claimed and occupied as a native town or village and—

> to issue a patent therefor to a trustee who shall convey to the individual Indian or Eskimo the land so claimed and occupied * * *.

The Secretary issued regulations (43 CFR, 1954 Rev., 80.22) under the 1926 act, *supra*, which provided that:

> In connection with the entry of lands as a native town or village under section 3 of the said act of May 25, 1926, no payment need be made as purchase money or as fees, and the publication and proof which are ordinarily required in connection with trustee town-sites will not be required.

Section 3 does not include by reference payment, acreage, or other limiting requirements in public land laws providing for townsite entries on public lands.

Since both the final certificate and the patent expressly indicate that Saxman Indian Village is conveyed to the trustee under section 3 of the 1926 act, *supra*, 43 CFR 80.22 seems clearly to prohibit a requirement of payment as purchase money or as fees for the entry of that village. The approval of the final certificate was sent to the Register at Anchorage by memorandum of February 14, 1930, which specifically refers to the 1926 act pointing out that the act—

> * * * makes no provision for any fees for filing for native townsites, established thereunder, the regulations in pursuance thereof found on pages 105, 106, 107 of Circular 491, approved February 24, 1928, provide "no payment need be made as purchase money or as fees and publication and proof which are ordinarily required in connection with trustee townsites will not be required."

In another memorandum dated May 9, 1930, the trustee stated to the Commissioner—

> * * * there are no funds available for paying the recording fee, and it is not presumed that any funds for this purpose will be realized from the disposal of the lots, as there are to be no assessments against any of the lots in this townsite.

It is quite clear that Saxman qualified as a native town or village under 43 CFR 80.22. An undated memorandum in our file signed by the Commissioner, General Land Office, to the trustee, stated:

> The final certificate issued on said entry December 13, 1929, has been approved for patenting. Patents will issue in due course of business.
>
> You state that there are 38 native owners of property in the village occupying a total of 45 lots and that there is no evidence of other occupation of any lot by a white person other than natives except one lot occupied by the Salvation Army.

In this light, it seems very unlikely that there was any intention to provide for the disposal of lots under 43 CFR 80.23 which relates to native towns occupied partly by white lot occupants. There is clear evidence from the memoranda already cited that it was not intended to deny the natives of Saxman Indian Village the benefits of 43 CFR 80.22. We will certainly not act now to upset the application of section 3 of the 1926 act and the benefits of the regulations under the act with respect to the Saxman Indian Village conferred almost 30 years ago.

The 1926 act should be liberally construed for the benefit of the natives since it was intended as a relief measure. S. Rept. 793, 69th Cong. (May 6, 1926) and H. Rept. 450, 69th Cong. (March 3, 1926). 43 CFR 80.22 is a clear statement of departmental policy for the benefit of the occupants of native towns. We can interpret the references in the patent to section 2387, Revised Statutes, *supra*, and the 1891 act as *pro forma* and not as intended to apply purchase money or fee requirements with respect to Saxman Indian Village. We conclude therefore that the provisions of section 3 of the act of May 25, 1926, *supra*, and the regulations issued thereunder control the disposal of lots within the area of Saxman covered by U.S. Survey No. 1652. No payments should be required of native Alaskans as purchase money or as fees in connection with such disposals. If any native has made a payment of any kind for a lot in Saxman in the past, he is entitled to a refund.

There remains the question as to the disposal of additional lots in Saxman. A subdivisional survey, No. 1652A, was accepted on March 8, 1956, for a portion of U.S. Survey No. 1652.

The trustee must carry out his trust in accordance with the governing statute and applicable regulations of this Department. Section 3 of the 1926 act was intended to provide a means for disposal of lots to native occupants of a native town or village. The regulations (43 CFR 80.21) provide the trustee with broad authority under section 3 of the 1926 act to—

> take such action as may be necessary to accomplish the objects sought to be accomplished by that section.

It does not appear, therefore, that the trustee's trust would permit him to dispose of additional lots to white purchasers by competitive bidding under 43 CFR 80.14 or otherwise.

In view of the broad discretion given the trustee by the regulations, 43 CFR 80.21, however, there could be no legal objection to any provision for the disposal of the lots which is reasonably calculated to carry out the objectives of section 3 of the 1926 act for the benefit of native occupants. The trustee could execute his trust by permitting occupancy of the additional lots by natives and conveying the lots to the native occupants.

It seems desirable, however, that the trustee have some general guidance as to disposal policy in cases like Saxman where the area covered by the patent to the trustee greatly exceeds the area occupied by individuals at the time of the survey and issuance of the patent. You should consider, therefore, whether the matter should be submitted to the Secretary for such policy determination and for possible revision of the regulations.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## J. LEONARD NEAL

A-27922 *Decided June 4, 1959*

**Grazing Permits and Licenses: Generally—Trespass: Measure of Damages**

The grazing of an excess number of cattle within an area covered by an individual grazing allotment constitutes a trespass on public land even though a portion of the area is privately owned land enclosed by a fence and damages for such trespass are properly computed on the basis of the number of cattle in excess of the allotment, the length of such unauthorized grazing, and a reasonable charge for the forage thus consumed.

**Grazing Permits and Licenses: Cancellation and Reductions—Trespass: Generally**

A grazing licensee who grazes a number of animals in excess of the number covered by his exisiting grazing license is properly charged with willful trespass upon the public domain and subjected to disciplinary reduction of his grazing license where the circumstances do not comport with the notion that he acted in good faith and innocent mistake.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. Leonard Neal has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated October 28, 1958, which affirmed a decision of a hearing examiner dated January 21, 1958, assessing damages in the amount of $126 and reducing his annual grazing license by 200 animal units for 1 year because of unauthorized use of the Federal range during the grazing season of 1957.

The record in this case shows that Neal has three different grazing allotments on Federal range: The Lone Mountain, the Cane Springs and the Walsh Ranch which he holds under lease. He was licensed to graze 300 cattle from January 1, 1957, to June 30, 1957, on the Lone Mountain allotment; 500 cattle and 20 horses from July 1, 1956, to June 30, 1957, on the Cane Springs allotment; and 300 cattle under the license issued to Mrs. Walsh from July 15, 1956, to June 30, 1957. All are individual allotments. In all of these areas the Federal range is arranged in a checkerboard pattern with privately and State owned land. In the Lone Mountain area the proportion of Federal land is 29 percent to 71 percent of privately owned or controlled land. Accordingly, Neal was charged with only 29 percent of the forage consumed by his cattle in this allotment in his license for 1957.

The range manager was making a routine check of range conditions on April 3, 1957, in a military jeep when he noticed an abnormally large number of animals in the Lone Mountain area. He made a tally of the animals within the allotment boundaries, estimating, as he observed them, whether the young animals were under or over 6 months old and excluding from his count all that he believed were under 6 months of age. On this basis, he tallied 99 in the privately owned fenced pasture referred to as the bull pasture and an additional 568 in the unfenced areas designated as the calf pasture, the Berry pasture, the West pasture and the East pasture, making a total of 667 cattle. The range manager conceded that he was not able to read the brand in all cases, but Neal subsequently asserted that all of the cattle grazing within this allotment at that time were his cattle.

After the manager had conferred with his superior and the two of them had checked his method of tallying, they conferred with Neal and issued a notice of trespass on April 5, 1957, covering 367 animals. Neal suggested that the cattle in excess of his allotment of 300 in the Lone Mountain area had come from the Cane Springs area 9 miles away. Accordingly, on April 10, 1957, the range manager and a fellow employee made a count of the animals in the Cane Springs area. Neal and his son were present, some of the time, but did not participate. The count showed 479 cattle in this area. Arrangements were made to recount the Lone Mountain cattle the next day and Neal agreed to meet them and accompany them on the recount, although the manager feared an argument if he did so. He changed his mind and did not appear. The new tally showed 112 in the fenced pasture and 609 in the others, a total of 721 animals.

An additional notice of trespass covering 54 animals was then issued on April 11, 1957, after the manager had conferred with Neal and failed to obtain a satisfactory explanation. Neal then stated that he had had approximately 400 cattle in corrals at his headquar-

ters on supplemental feed and later substantiated this statement with a letter from the inspector for the county livestock sanitary board which established that 400 cattle were in the headquarters corrals from December 5, 1956, until after March 20, 1957. The original claim of trespass was altered by deletion of 400 animals through March 20, and Neal was charged with 29 percent of the forage for 367 cattle from January 1, 1957, to April 6, 1957, and for 54 cattle from January 1, 1957, to April 12, 1957, less 29 percent of the forage for 400 cattle from January 1, 1957, to March 21, 1957, at $1.50 per animal per month, a total of $126.

Neal voluntarily applied for an additional license to cover 367 cattle from April 6, 54 cattle from April 12, and 31 cattle from April 15, 1957, and it was granted. Thus his licenses were increased from 300 to 600 cattle on Lone Mountain without increase of acreage. The 31 cattle were not included in the tally of unauthorized use, but were regarded by Bureau officials as of an age that they should be under license.

Neal refused to pay the damages for unauthorized use of the Federal range and was cited to show cause why his 10-year grazing permit and annual license should not be reduced or revoked or renewal denied and satisfaction of damages made for violation of the Federal Range Code. At the hearing, he testified that he did not want to be labeled as a person who would willfully trespass. He said:

> I figure on holding this ranch the rest of my life and I didn't want to be in any bad light with the Bureau. That is the reason I fought that. It would have been much cheaper in dollars and cents for me to have paid this trespass and not to have gone to expense of fighting this, but I didn't want to be labeled as a trespasser. (Tr. 98, 99.)

He also said that he felt that he had a right to control his own land and that, accordingly, he asked that his fenced bull pasture be withdrawn from the grazing district. This was done and he was then charged for Federal forage of 31 percent within the decreased Lone Mountain allotment area. He was also taking steps to acquire the 2½ sections of public land out of 20 to 25 in the Berry pasture by exchange under section 8 of the Taylor Grazing Act in order to be able to control it completely. Likewise, he said he had not felt that the Bureau of Land Management required that the precise number of animals grazed upon an allotment area be limited at all times to the number stated in the license so long as the year-long or season-long use was not excessive. He was convinced at the time of the hearing that the Bureau did insist upon such limit and intended to abide by it.

As to the fact of trespass in 1957, this seems to be established by the record. The Bureau's evidence shows excessive numbers of grazing livestock in April, but it does not establish anything more than that

the numbers of cattle tallied were there on the days that the tallies were made. However, Neal did not contend that the cattle found at that time had not been there since January 1, 1957. At the hearing, he testified that he had run over a hundred head of cattle in the fenced bull pasture from the first of January (Tr. 96), and that he brought in cattle from the Cane Springs allotment in December in order to feed the calves because the cows were too thin and weak from the dry weather to feed the calves (Tr. 89, 90, 103). He attempted to discredit the manager's computation of the number of grazing cattle by explaining that the 1956 calf crop was very late because of the severe drought in 1955 (Tr. 97), but by taking credit for the 400 calves in the corrals on supplemental feed, he at least admitted that, within the standards used by the range manager in his tally, such calves were over 6 months of age. He did not show that the tally was wrong, although his son testified that the range manager incorrectly estimated that a particular calf known to be 5 months old was 10 or 12 months old (Tr. 76). This calf was one of those belonging to weak cows that had been kept in a corral for 3 months and fed on hay (Tr. 78) and could easily be identified because it was black with a white face (Tr. 79). The range manager did not recall the incident (Tr. 106). It seems necessary to conclude that the 400 calves were properly included within the cattle for which payment was required for Federal forage. It is not disputed that $1.50 is a reasonable charge for a month's forage for one animal under private arrangements in the vicinity. Accordingly, it appears that Neal was properly required to pay this charge.

It does not appear that Neal's assumption that he need not adhere strictly to the numbers of animals authorized to be grazed on the Federal range at all times so long as he did not exceed the authorized season-long use or inflict irreparable damage to the range by severe overgrazing for short periods of time is justified. As a former member of the advisory board, he was undoubtedly in a position to know the rules which govern use of the Federal range and the manner of their application to range practices. His position has been contradictory in that although he claims the right to graze more than the authorized number of livestock at any one time so long as the total season-long use is not exceeded, he first denied having more than the authorized stock in the allotment. Then he attempted to claim that the excess stock, or much of it, was on his private lands and not on the Federal range and that the Bureau cannot control his use of his privately owned lands. These shifts in position are not compatible with the notion of a good faith innocent mistake in the use of the range. Certainly it would seem that a reasonable user of the range would have consulted in advance with the range

manager on these matters. Accordingly, I believe that Neal is properly chargeable with willful trespass and penalized by reduction of his annual license by 200 animal units for one grazing season. (43 CFR, 1954 Rev., 161.13(e)(Supp.).)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the Acting Director's decision is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## INTERPRETATION OF SECTION 4 OF THE PITTMAN-ROBERTSON ACT (50 Stat. 918; 16 U.S.C. sec. 669c), AS AMENDED

**Fish and Wildlife Service—Funds: Generally—Statutory Construction: Administrative Construction**

In apportioning Federal funds for wildlife restoration purposes under section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C., 1952 ed., sec. 669c), as amended, the Secretary of the Interior should include as "license holders of each State" all individuals to whom a State has issued one or more licenses; he should not include all licenses issued by a State when, under State law, more than one license may be issued to a single individual.

**Fish and Wildlife Service—Funds: Generally—Statutory Construction: Administrative Construction**

In apportioning Federal funds for wildlife purposes under section 4 of the Pittman-Robertson Act the Secretary of the Interior, acting through such rules and regulations as he deems appropriate, is entitled to require from each State to which he apportions funds, a duly executed certificate of the number of license holders in the State before he determines the amount of the annual sums payable to that State under the act.

M-36560 JUNE 4, 1959.

TO THE ASSISTANT SECRETARY FOR FISH AND WILDLIFE.

This is in further reply to your memorandum of January 26, 1959, and confirms and enlarges on the advice given in our memorandum of March 11, 1959 [unpublished]. Your question follows:

> We are * * * requesting your formal opinion as to whether the term "paid hunting license holder" denotes one person regardless of the number of separate types of hunting licenses he may have purchased or whether each hunting license purchased denotes a holder for the purpose of apportionment regardless of duplication as to persons.

Section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C., 1952 ed., sec. 669c), as amended, hereinafter called "the act," provides for apportionment, after certain deductions are made, of the revenues

from the Federal tax on firearms, shells, and cartridges among the States on a fiscal-year basis for wildlife restoration purposes, as follows:

> * * * The Secretary of Agriculture [Secretary of the Interior] * * * shall apportion the remainder of the revenues in said fund for each fiscal year among the several States in the following manner, that is to say, one-half in the ratio which the area of each State bears to the total area of all the States and *one-half in the ratio which the number of paid hunting-license holders of each State* in the preceding fiscal year, *as certified to said Secretary by the State* fish and game departments, *bears to the total number of paid hunting-license holders of all the States* * * *. [Italics supplied.]

Thus it may be observed at the outset that Congress provided a commensurate basis for State certification and secretarial apportionment by stipulating that each be based on the "number of paid hunting-license holders."

Apportionment of the revenues according to the area of the States and the per capita holders of the paid hunting license provides a uniform and equitable formula. To classify States on the basis of area and persons is a common legislative practice and we believe that the Congress considered a population count of hunters as the logical complement of an apportionment on the basis of area. The legislative history of the act supports this view and use of that history to support this interpretation is proper. See *Northern Pacific Ry. Co.* v. *State of Washington*, 222 U.S. 370, 379–380 (1912), and *McLean* v. *United States*, 226 U.S. 374, 380 (1912). S. Rept. 868, 75th Cong., 1st sess., to accompany S. 2670, the bill which became the act, states:

> Each State conservation agency or Fish and Game Commission will, by the provisions of this bill, receive its quota for restoration projects from the Federal Government on the same general plan as Federal highway aid is distributed to State highway commissions.
>
> * * * * * * *
>
> The State's quota of allocations under the provisions of this bill is arrived at by allocating (a) * * * and one-half in the ratio which the number of paid hunting license holders of each State bears to the total number of paid hunting license holders of all the States. [p. 3.]

The reference to the "same general plan as Federal highway aid" appears to refer to section 21 of the Federal Highway Act of 1921 (42 Stat. 212, 217; 23 U.S.C., 1952 ed., sec. 21), as amended, which provides a statutory apportionment formula under which one-third of the funds are apportioned for each of the following:

(*1*) the ratio of the area of the State to that of all States,

(*2*) the ratio which the population of the State bears to total population, and

(*3*) the ratio of the State's rural delivery and star routes to all such routes.

Apportionment of revenues on the basis of area and hunting population is clearly consistent with the objectives sought to be accomplished by the legislation. H. Rept. 1572, 75th Cong., 1st sess., comments on the objectives of the legislation as follows:

> One of the major objectives of the National Wildlife Association is the passage of legislation to authorize Federal grants-in-aid to the States for conservation purposes. This bill carries out that objective and its provisions have been endorsed by virtually every conservation agency, public and private, in the United States.
>
> These conservationists fully recognize that restrictive laws alone will never replace our once abundant supply of wildlife. We must restore the environment of wildlife and its preservation for all time is essentially a problem of land and water management. * * *

Logically, those States having extensive areas of land and water, and those States whose large hunting populations exert heavy pressure on wildlife resources, should be, and, we think, were intended to be, the recipients of a larger share of the Federal aid funds. An apportionment of revenues on the basis of sales of hunting licenses would not, unless uniform in all States, result in an equitable distribution of funds and could, we believe, defeat the purposes of the legislation, since the multiplication of types of licenses could eventually destroy any semblance of a relationship between the need for assistance and a rational apportionment of the revenues. See *N.L.R.B.* v. *Hearst*, 322 U.S. 111, 123 (1944), on the need for uniformity in the meaning of terms to be applied on a national scale under Federal law. The consequences of an interpretation in favor of a license count rather than an individual count affords, in our opinion, a convincing argument against its adoption, as we will indicate *infra*.

Statutes should be construed so as to give effect to the intention of the Legislature. See *Fidelity and Deposit Co. of Maryland* v. *Arenz*, 290 U.S. 66, 69 (1933); *Ebert* v. *Poston*, 266 U.S. 548, 554 (1925); *Takao Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *Wolsey* v. *Chapman*, 101 U.S. 755, 769 (1879); *Pollard* v. *Bailey*, 87 U.S. 520, 525 (1874). That intent must be ascertained from the words used in the statute and the subject matter to which it relates. Congress, it is assumed, intends to use words in their natural sense. *Helvering* v. *Hutchings*, 312 U.S. 393, 396 (1941); *United States* v. *Stewart*, 311 U.S. 60, 63 (1940); *Miller* v. *Robertson*, 266 U.S. 243, 248 (1924).

If the Congress had intended to depart from the usual meaning of the words and to base the apportionment on the number of licenses instead of on the number of persons holding licenses it would have said so. The fact that it did not indicates that the words "license holder" are to be given their literal, grammatical interpretation. In *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, 33 (1895), the Supreme Court held that where the language of a statute is unam-

biguous, it is the duty of the Court to enforce it according to the obvious meaning of the words, without attempting to change it by adopting a different construction, based upon some supposed policy of Congress in regard to the subject of legislation, or upon considerations of injustice or inconvenience arising from the enforcement of the statute according to its terms. In *Helvering* v. *Hutchings*, *supra*, the Court held that a statutory construction dependent on artificial meaning of the words of the statute and out of harmony with the statutory scheme is not to be favored. This brings us to the matter of administrative interpretation.

Your memorandum of January 26, 1959, states that the Fish and Wildlife Service—

> * * * and its predecessor agencies have, since the inception of the Federal Aid program in 1938, construed the term "paid hunting license holder" to mean one person irrespective of the number of separate hunting licenses he may have purchased.

Our review of Solicitor's precedents reveals no decisions inconsistent with that statement. Indeed, on September 28, 1956, the Attorney General of Idaho requested an opinion from the Interior Department as to whether, in making the certification required by section 4 of the act, that State was entitled to include certain special licenses or permits for hunting deer, pronghorn antelope, mountain sheep, elk, or goats, required by State law in addition to the general hunting license or combination hunting or fishing license. In his reply, dated November 20, 1956, the Solicitor stated:

> You will note that the statute bases the distribution specifically on the number of individuals, or license "holders."
>
> We feel that it is clear from an examination of your State law, as quoted in your letter, (Section 36–404, Idaho Code) that those persons who purchase from the State a general fish and game license combined, or a fish or game license, or both, become license "holders" for purposes of the Federal statute. Such individual license "holders," if they choose, may acquire additional authorization or permits from the State to kill certain species by the acquisition of additional permits to kill deer, prong-horn antelope, mountain sheep, moose, elk, or goat in accordance with the laws of the State. This does not, in our judgment, however, expand the number of individual license "holders." The long established practice of this Department, as well as the intent of the statute require, in our opinion, that the apportionment be made, as prescribed by the statute, on the basis of the number of license "holders," or individuals, in the various States, as compared to the total number of such license "holders" in all of the States.

We note also that the first *Manual of Information*, issued July 25, 1938, for the purpose of the act, by the Bureau of Biological Survey of the Department of Agriculture which was then charged with administration of the act provides at section 1314:

> Special licenses issued only after a general license has been purchased should not be counted, as the law requires the number of license holders and not the number of individual licenses.

We are of the opinion that the above-recited administrative interpretation is sufficiently strong to bring that interpretation within the principle of law that a long continued 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, 127 (1952); *United States* v. *American Trucking Associations*, 310 U.S. 534, 549 (1940). See also Sutherland *Statutory Construction*, sec. 5108 and supp. (3d ed. 1943). Under this latter authority the 1938 Manual provision is particularly persuasive as it can be "given special consideration since it was made at a time when the circumstances leading up to the enactment of the statute * * * [were] * * * well known."

However, it is apparent the States have not been uniform in their licensing activities. They may be divided on the basis of the form of their hunting license structures into:

(*1*) Those requiring a general hunting or a combination hunting and fishing license entitling the holder to take all types of game;

(*2*) Those requiring a general or combination license for certain types of game and special permits or licenses for one or more species not covered by the general license; and

(*3*) Those issuing no general licenses, but requiring separate licenses for various types of game, such as deer, antelope, and sheep.

The number of general licenses sold by a State in the first classification would correspond with the number of persons holding paid hunting licenses. States in the second group could readily determine the extent of duplication as the number of general licenses would correspond with the number of license holders while the ancillary licenses sold would show the extent of duplication as to persons. A certification by a State in the third group as to license holders based on the number of licenses sold would result in duplication as to persons since it may be assumed that some individuals will purchase two or more of the separate licenses.

Under these varied hunting license structures, each State, in order to secure a larger share of the revenues or merely as a matter of self-defense, would, as stated to the Chairman of the Legal Committee of the International Association of Game, Fish and Conservation Commissioners recently, "follow the other States by multiplying licenses, so that it would have a small game license, big game license, archery license, antlerless deer license, and as many other licenses as its ingenuity could devise." See the letter of November 12, 1958, from the Deputy Attorney General, Commonwealth of Pennsylvania.

At present, some States have as many as eight licenses, and it is no more than wishful thinking to suppose that other States would not enter the race for the revenues. We cannot attribute to the Congress an intention to enact legislation which would lead to such absurd results when the statute can obviously be given a reasonable application consistent with its language and the legislative purpose.

From the foregoing we conclude that in apportioning Federal funds for wildlife restoration purposes under section 4 of the act the Secretary of the Interior should include as "license holders of each State" all individuals to whom a State has issued one or more licenses; he should not include all licenses issued by a State when, under State law, more than one license may be issued to a single individual. This brings us to the problem of State certification.

Section 4, as quoted earlier, provides that the Secretary of the Interior shall apportion one-half of the funds among the States "in the *ratio* which the number of paid hunting-license holders of each State in the preceding fiscal year, *as certified to said Secretary by the State fish and game departments*, bear to the total number of paid hunting-license holders of all the States * * *." [Italics supplied.] Neither the committee reports nor the congressional debates deal specifically with the method of certification even though it was obvious that the numbers certified were intended by Congress to be commensurate. It can be said that a literal interpretation of the statutory language, i.e., that the Secretary should base his determination on numbers "certified" by State officials is consistent with the *general* intent of the Congress as reflected in the legislative history.

In his basic explanation of the bill which became the act, Senator Pittman, its sponsor and floor leader, stated: "This is a bill to provide for cooperation and participation by the Federal Government, *through* the Department of Agriculture and the fish and game commissions of the various States * * *." 81 Cong. Rec. 8506. [Italics supplied.] This function later was transferred to the Secretary of the Interior. 1939 Reorg. Plan No. II; 53 Stat. 1431. Senator Pittman also said: "* * * No State has to participate in the program unless it wishes to do so * * *." 81 Cong. Rec. 8506. The Senate report on the bill states: "The Federal Government will * * * set aside funds to be allotted to any or all * * * States * * * which comply with the provisions of this act." Clearly the Federal function was to supply funds which would be apportioned on the basis of proper State certification.

While there is no special statutory or legislative history definition of the method to be used other than the language of the statute quoted above, some clarification may be gleaned from the interpretation placed on the terms "certified," "certificate," and "certify" by Federal courts. In *Merrell* v. *Tice*, 104 U.S. 557, 561 (1881), the Supreme

Court of the United States in holding inadequate and inadmissible in evidence a memorandum appended to a statutory certificate of the Librarian of Congress said:

> * * * The memorandum under the certificate had no validity as evidence. It might have been put there by any person. It would be unsafe to hold that a memorandum under a certificate, or indorsed upon it, is part of the certificate. A certificate under seal, when invested with legal force and effect, is a solemn instrument, and ought to be complete, certain, and final in itself, without any collateral addition or commentary. Its very form and character as a certificate presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contained in the body of the instrument, has not this verification and protection * * *.

In *United States* v. *Ambrose*, 108 U.S. 336, 340 (1883), the Court in construing the word "certificate" as used in Rev. Stat. 5392, held that the term had been used there in the "ordinary and popular sense," saying:

> We do not think the words *declaration* and *certificate*, as used in the section of the Revised Statutes on which this indictment is founded, are used as terms of art, or in any technical sense, but are used in the ordinary and popular sense to signify any statement of material matters of fact sworn to and subscribed by the party charged.

In *Doherty* v. *McDowell*, 276 Fed. 728, 730–731 (1921), the court defined the term "to certify" in connection with a dispute as to whether an "attested" copy was a "certified copy," saying:

> * * * it must be held that a copy duly attested by the court is a certified copy within the meaning of the court order. One of the dictionary meanings of "certify" is "to verify; to attest authoritatively." In 2 Words and Phrases, First Series, 1033, it is said:
>
> "The term 'to certify' as used with reference to legal documents, means to testify to a thing in writing; and in the absence of statutory provision declaring the particular form of certification, any form which affirms the fact in writing is sufficient."
>
> It appears clear that the intention of the court order was to provide for a true copy of the order to be served on the individual defendant. I think this intention of the court was substantially carried out.

We believe that the intent of the statute here was that the certificates of State officials be so complete, final, and formal as to be invested with legal force and effect. By using the term "certified * * * by State fish and game departments," we believe that the Congress, while not mandating a requirement as formal as might be needed for a judicial document, did anticipate that the Secretary would base his allocation on reasonably complete, final, and formal statements by responsible State officials.

The foregoing is, as previously indicated, consistent with both the act and its legislative history. A cooperative Federal-State program was being established. It was clear that State land areas and

license holders were the major factors to be used in apportioning Federal grants. The former is a geographical fact readily determinable by scientific method. While the latter might be variable depending on many factors all within the knowledge of State officials, it was intended by Congress that such holders be certified on a commensurate basis. Accordingly, the Congress provided that the Secretary apportion the funds on the basis of such reports as *certified to said Secretary by the State fish and game departments.* [Italics supplied.]

Section 10 of the Pittman-Robertson Act (16 U.S.C., 1952 ed., sec. 669i), as amended, authorized the Secretary "* * * to make rules and regulations for carrying out the provisions of this Act." This authorization, especially when read in the light of the problems and principles discussed herein, makes it clear that the Congress intended the Secretary to have and to exercise discretion in this matter. He was thus authorized to spell out in rules or regulations the manner and form in which paid hunting license holders of each State should be counted for purposes of State certification. Only through the issuance of such rules and regulations with accompanying forms and instructions can the Secretary be assured that the ratio he uses for apportioning available funds among all certifying States will be proper and equitable.

Accordingly, we hold that, in apportioning Federal funds for wildlife purposes under section 4 of the act, the Secretary of the Interior through such rules and regulations as he deems appropriate is entitled to require from each State to which he apportions funds, a duly executed certificate of the number of license holders in that State reported on a commensurate basis for purposes of equitably apportioning the annual sums payable to that State under the act.

GEORGE W. ABBOTT,
*Solicitor.*

## EFFECT OF KEATING AMENDMENT ON PROPOSED IOWA TRANSMISSION LINES

**Bureau of Reclamation: Construction**

The Bureau of Reclamation is not precluded by the Keating amendment provision in its annual appropriation acts from using available funds to initiate construction of electric transmission lines in Iowa as long as the area involved is not covered by an adequate wheeling service contract.

M-36569 JUNE 10, 1959.

TO THE COMMISSIONER OF RECLAMATION.

You have inquired whether the Keating amendment will preclude construction of the proposed Iowa transmission lines, in accordance

with the desires of the House Appropriations Committee as expressed at page 22 of its report on the Public Works Appropriation Bill, 1960 [H.R. 7509] assuming that the bill becomes law in its present form.

The answer to this question is that the Keating amendment would not preclude construction of the Iowa lines.

The reason for this conclusion is that the Iowa lines would be built in an area in which there is at present no wheeling service agreement.

The Keating amendment has been carried as a part of the Bureau of Reclamation's appropriation acts annually commencing with the Interior Department Appropriation Act for fiscal year 1952, Public Law 136, 82d Cong., 1st sess.; 65 Stat. 248). The amendment precludes the use of appropriated funds to initiate the construction of transmission facilities, with certain stated exceptions, "within those areas covered by power wheeling service contracts."

Thus from the language of the item itself it is clear on its face that it applies only in those instances where a wheeling contract is in existence.

That this is the intended scope of the Keating amendment is clear, not only from the face of the provision, but also from its legislative history.

The Keating amendment in its present form was drafted by the Senate Appropriations Committee in its consideration of what became the Interior Department Appropriation Act, 1952. As drafted on the floor of the House of Representatives, in its consideration of the 1952 Interior appropriation bill, the amendment simply precluded the initiation of construction of transmission facilities within areas covered by the power wheeling service contracts, with no exceptions stated. The Senate committee took the language of the House amendment and added to it certain exceptions. In explaining its draft of the Keating amendment, the Senate committee stated in part:

> The committee is of the opinion that the Keating amendment as passed by the House is too restrictive as applied within certain areas. Therefore, the committee has agreed to a substitute amendment which contains modifications providing for flexibility in application and clarity in interpretation.
>
> The modified amendment was adopted unanimously by the committee in order to implement the policy of Congress that, *within those areas where wheeling-service contracts have been executed,* use will be made of transmission facilities of the wheeling agencies wherever possible to avoid duplication and, at the same time, to provide for the integration of Federal projects and to provide an adequate and dependable supply of power to rural electric cooperatives, Federal establishments, and other preferred customers. [S. Rept. 499, 82d Cong., 1st sess., p. 23. Italics supplied.]

In originally offering the amendment in the House, Mr. Keating explained its purpose as follows:

* * * That intent is that the Government should not construct duplicating transmission lines where private utilities have agreed to wheel power over their lines to Government customers at a reasonable rate * * *.

* * * * * * *

I wish to make it plain that this amendment will not affect the bargaining power which may be given to Government agencies in the way of appropriations, past, present, or future, in the slightest degree. *This amendment applies only to those areas where wheeling contracts are in force.* [97 Cong. Rec. 4645–4646. Italics supplied.]

Since there is at this time no wheeling contract in effect covering the Iowa area, it is clear from the foregoing that the Keating amendment in its present form would not preclude the expenditure of otherwise available appropriations for the construction by the Bureau of Reclamation of transmission lines in Iowa. On the other hand consummation of an appropriate wheeling contract prior to the initiation of construction would, under the terms of the Keating amendment, preclude construction of the Iowa lines.

EDWARD W. FISHER,
*Associate Solicitor,*
*Division of Water and Power.*

Approved:
EDMUND T. FRITZ,
*Deputy Solicitor.*

## MENA MINING AND EXPLORATION COMPANY

A–27950 *Decided June 12, 1959*

**Mining Claims: Special Acts—Mining Claims: Surface Uses**

A statement filed by a mining claimant pursuant to section 5 of the act of July 23, 1955, for the purpose of asserting rights to the surface resources on its mining claim is properly rejected where the statement is filed more than 150 days from the first date of publication of notice to miners under section 5(a) of the act, and the statement is not verified.

**Mining Claims: Special Acts**

Personal service of a notice to miners that a statement asserting rights to the surface of their claims must be filed under the act of July 23, 1955, is not required where the department or agency requesting publication of the notice has complied with the terms of section 5(a) of the act.

**Mining Claims: Special Acts**

It is not the function of the Department of the Interior under the act of July 23, 1955, to go behind the statements contained in a request for publication, and if the request for publication on its face complies with requirements of the act, the Department's sole function is to order the publication as requested.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Mena Mining and Exploration Company has appealed to the Secretary from a decision of the Director, Bureau of Land Management, dated December 4, 1958, which affirmed a decision of the manager of the Santa Fe, New Mexico, land office, dated February 27, 1957, rejecting its statement filed under section 5 of the act of July 23, 1955 (30 U.S.C., 1952 ed., Supp. V, sec. 613), with respect to its mining claims. The statement was rejected for the reason that it was not notarized or verified and was not timely filed within 150 days from May 23, 1957, the date of first publication of notice that the filing of such a statement was required.

The act of July 23, 1955, provides in part that persons who made mining locations prior to passage of the act must, when called upon to do so by a published notice, assert their rights to the use of the surface of their claims. The assertion of rights takes the form of a verified statement as prescribed in section 5 of the act. The statement must be filed within 150 days from the first publication of notice. Failure to file the verified statement within the time allowed results in the limitations of section 4 (30 U.S.C., 1952 ed., Supp. V, sec. 612) being imposed upon the claim.

In his decision the Director pointed out that a notice pursuant to the provisions of the act was published on May 23, 1957; that the appellant submitted its statement to the land office on February 11, 1958, more than 150 days after the first publication of the notice; and that the statement was not verified as well as not timely filed and was subject to rejection for either of these reasons.

The appellant contends that it was never served with a copy of the published notice; that it was never notified in any manner that publication had been made; and that, because of the failure to notify the appellant as to the date and contents of the published notice, the appellant had no opportunity to file a verified statement in the time required. The appellant also contends that the Bureau did not comply with the statute and the Department's regulations pertaining to service of notice.

Section 5(a) of the act sets forth the procedure whereby Federal departments or agencies may file a request for publication of notice to mining claimants for the determination of surface rights. The section requires that the request for publication be accompanied by an affidavit setting forth that the affiant has examined the land involved in a reasonable effort to ascertain whether any person was in actual possession of the land or engaged in working the land, and, if no persons were found to be in actual possession of the land, to set forth this fact. The request for publication must also be accom-

panied by a certificate of a title or abstract company or of a title abstractor or an attorney, based upon the abstract company's or attorney's examination of "those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record." "Tract indexes," as used in the act, is defined as those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Section 5(a) further provides that—

> Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail addressed to each person in possession or engaged in the working of the land *whose name and address is shown by an affidavit filed as aforesaid*, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section 5[1] and shall cause a copy of such notice to be mailed by registered mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed. [Italics supplied.]

Subsection (e) of section 5 provides that if the department or agency requesting publication fails to comply with the requirements of subsection (a) as to personal delivery or mailing a copy of notice to any person, the publication of notice shall be deemed to be wholly ineffectual as to that person or as to the rights asserted by that person and the failure to file a verified statement as provided in the notice "shall in no manner affect, diminish, prejudice or bar any rights of that person."

In summary, the act requires that the department or agency requesting publication file an affidavit stating the land has been examined

[1] Subsection (d) provides:

> "Any person claiming any right under or by virtue of any unpatented mining claim heretofore located and desiring to receive a copy of any notice to mining claimants which may be published as above provided in subsection (a) of this section 5, and which may affect lands embraced in such mining claim, may cause to be filed for record in the county office of record where the notice or certificate of location of such mining claim shall have been recorded, a duly acknowledged request for a copy of any such notice. * * *."

for evidence of persons in possession of mining claims on the land, or that no such evidence could be found, and a certificate stating that the tract indexes of the county office of record were examined or that no such indexes are maintained in the county. There is no requirement that the department or agency must diligently search for any evidence of location of claims by monuments, stakes, etc., or that any records other than the tract indexes of the county office of record be examined. Therefore, if the department or agency requesting publication of notice is unable to find persons in possession of or engaged in working the lands involved through an examination of the land and information contained in the tract indexes, if any, it has done all that is required of it by the law, and it is not required to have personal service on any mining claimants not located by such examination, absent the filing of a request for service by the mining claimant under subsection (d) of section 5 of the act.

The record shows that the Forest Service, United States Department of Agriculture, first filed a request for publication of notice under the act on April 22, 1957. An affidavit accompanying the request states that the lands involved in this appeal (secs. 6 and 7, T. 19 N., R. 1 E., N.M.P.M., New Mexico) were examined at some time between November 5 and November 15, 1956, and indicates no evidence of persons in actual possession of or engaged in working those lands. An attorney's affidavit certifies that the County of Sandoval, New Mexico, where the lands are involved, has no tract index record as contemplated by the act. There is no indication in the record that the appellant filed a request for notice in the county office of record under subsection (d) of section 5 of the act, nor does it allege that any such statement was ever filed.

The Department has held that it is not its function to determine that land included in a request for publication has been examined, and that when a request is received, accompanied by the supporting papers required by subsection (a) of section 5 of the act, this Department is required to publish the notice. *Ford M. Converse*, A–27863 (April 20, 1959).

Consequently, since the supporting papers filed by the Forest Service failed to indicate any evidence of the appellant's possession or working of the land involved, personal service under the act was not required and the appellant must be considered to have been constructively served with notice by the publication under the provisions of the act of the notice published on May 23, 1957, and subsequently. Since the appellant failed to submit its statement within 150 days of that date, the statement was not timely filed and was properly rejected. *Hines Gilbert Gold Mines Company*, 65 I.D. 481 (1958).

Inasmuch as the appellant's statement was properly rejected because it was not timely filed, it is unnecessary to discuss at length the second ground in the Director's decision for rejecting the statement, i.e., that it was not a verified statement, except to say that in light of the specific requirement in the act that the statement be a "verified statement" this Department cannot accept anything less than a verified statement and would be compelled to reject the appellant's statement for this reason even if the statement had been timely filed (43 CFR, 1954 Rev., 185.130 (Supp.)).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Acting Solicitor.*

# APPEAL OF WILLIAM A. SMITH CONTRACTING COMPANY, INC.

IBCA–83 *Decided June 16, 1959*

## Contracts: Additional Compensation—Contracts: Specifications—Contracts: Interpretation—Contracts: Changes and Extras

A railroad construction contractor who was to rehabilitate mileage of The Alaska Railroad and, in so doing, was required by the terms of the specifications to effect two separate track lifts totaling six inches with new crushed ballast from a pit located at Spencer, Alaska, did not satisfy the requirement for one of these lifts when in the course of replacing and respacing the ties it gave the track an initial or out-of-face lift, and tamped the old ballast to achieve a sound roadbed for the replaced and respaced ties, even though when the track was lowered back to the roadbed it may have been higher than before the commencement of the operations. As the out-of-face lift was either work that necessarily had to be performed to carry out the purposes of the contract, or was performed for the convenience of the contractor, it cannot qualify as extra work entitling the contractor to additional compensation. There was also nothing in the correspondence and negotiations relating to the approval by the contracting officer of the contractor's progress schedule which could be said to have effected a practical interpretation of the requirements of the specifications with respect to the track lifting operations inconsistent with their literal terms.

## Contracts: Payments—Rules of Practice: Evidence

A railroad construction contractor who in connection with the rehabilitation of The Alaska Railroad was required to load, haul, and place ballast is entitled to additional payment therefor when it was misled by the specifications into believing that each carload of ballast would contain 42 cubic yards of ballast but the preponderance of the evidence shows that each car actually contained 48 cubic yards of ballast, notwithstanding that the foreman in charge of the contractor's ballast trains had certified in the course of the loading that each car contained 42 cubic yards of ballast, and the contractor's chief officer had not immediately challenged the erroneous certifications, since he did not learn the truth until after the loading of the ballast had been proceeding for a considerable time, and it was necessary to verify the capacity of the cars by checking with their manufacturer.

## Contracts: Changes and Extras—Contracts: Specifications

Under a contract for the rehabilitation of The Alaska Railroad which provides for an equitable adjustment in case of overruns of quantities of more than 25 percent, the contractor is nevertheless not entitled to an equitable adjustment in the unit price on account of such an overrun in the quantity of ballast loaded, hauled, and placed when the evidence fails to show, at the very least, that the contractor's actual costs for loading, hauling, and placing the ballast, together with a reasonable allowance for profit thereon, exceeded the bid price. This cannot be said to have been established merely by testimony of the contractor's chief officer that the bid would have been higher if he had known that the railroad would not supply ballast loading equipment, where there was nothing in the specifications which required the railroad to supply such equipment.



516715—59——1

BOARD OF CONTRACT APPEALS

William A. Smith Contracting Company, Inc., a Missouri corporation, with its principal office in Kansas City, Kansas, has filed timely appeals from findings of fact and decisions of the contracting officer denying two claims of the appellant for additional compensation under Contract No. 14–04–003–1044 with The Alaska Railroad.

The contract, which was dated September 23, 1955, was executed on U.S. Standard Form No. 23 (revised March 1953), and incorporated the General Provisions of U.S. Standard Form No. 23A (March 1953).

The contract provided for the rehabilitation of approximately 23.4 miles of main line track between Portage and Indian, Alaska, and 0.9 miles of sidings, and was only one segment of a program for rehabilitating the entire roadbed and trackage of the railroad which was substandard in many respects; the tracks, which contained many sags and humps, being out of alignment; the ballast, which had been in place for 35 years, being very old; the ties being deeply embedded in the ballast and the subgrade beneath the ballast; and grass and weeds growing in the tie cribs. Four separately listed items of work were to be performed under the contract, which, as set forth in the contract and in paragraph GR–12 of the specifications, were as follows:

| Item No. | Item | Bid quantity | Unit and unit price | Amount |
|---|---|---|---|---|
| 1 | Load, haul and place ballast* | 43,011 | Cu. yds. @ $1.00 | $43,011.00 |
| 2 | Ties respace | 128,152 | Trk. ft. @ 0.45 | 57,668.40 |
| 3 | Ties place | 8,262 | Each @ 3.95 | 32,634.90 |
| 4 | Raise, line and dress track | 128,636 | Trk. ft. @ 1.00 | 128,636.00 |
| | Total bid | | | $261,950.30 |

*The ballast was to be produced at a gravel pit located at Spencer, Alaska.

The completion date specified in the contract was October 31, 1955, but, since the season was too far advanced to permit the commencement of work during the autumn of 1955, the contract was actually entered into with the understanding that the work would begin in the late spring of 1956, and would be completed during the summer and fall of that year. Under the appellant's revised progress schedule, as finally approved by the contracting officer,[1] the work was to commence the week of May 20 with tie placing; was to be expanded the following week by tie respacing, and raising, lining, and dressing

[1] Paragraph GR–22 of the specifications required the contractor to submit a progress schedule to the contracting officer for his approval.

the track; and loading, hauling, and placing of ballast was to commence the week of June 24. The work proceeded as scheduled and by letter dated December 18, 1956, it was accepted as completed as of September 20, 1956.

The two claims involved in the appeal, which total $96,177.40, were duly excepted by the appellant from its release on contract, dated December 18, 1956. The first claim, which was in the amount of $63,721 will be denominated the extra track lifting claim, and the second claim, which was in the amount of $32,456, will be denominated the ballast claim.

The parties having requested a hearing for the purpose of taking testimony, the Board designated Leon Jourolmon, Esq., Assistant Regional Solicitor, Portland, Oregon, to conduct the hearing, which was held at Seattle, Washington, from December 2 to December 4, 1957, inclusive. Under date of February 12, 1959, the examiner filed a report with the Board in which he recommended that the extra track lifting claim be denied, and that the ballast claim be allowed in the amount of $7,362. Counsel for the appellant and Department counsel were afforded an opportunity to comment on the report, and filed exceptions to the examiner's findings and conclusions insofar as they were adverse to their interests. Having considered the whole record, the Board is of the opinion that the recommendations of the examiner should be accepted. Each claim will be separately considered by the Board.

### *1. The Extra Track Lifting Claim.*

The specifications governing the construction details for all four items of work to be performed under the contract in this case were very brief, covering no more than five mimeographed pages. Paragraph GR–5 (part of the General Requirements of the specifications), headed "Scope of Work" described the work in general terms as follows:

> SCOPE OF WORK—The work under the contract shall consist of the furnishing of all materials, equipment, tools, all labor, and all supplies and incidentals, except as otherwise listed or specified herein, for the loading, hauling and spreading[2] of approximately 41,418 cubic yards of crushed gravel ballast on 23.4 miles of main line track between Portage and Indian, together with the

[2] There is no discrepancy between this figure and the figure of 43,011 cubic yards which is indicated as the bid quantity in the contract and in paragraph GR–12 of the specifications which give the estimated bid quantity for each of the four items of work covered by the contract. The difference is accounted for by the 1,593 cubic yards necessary to provide ballast for the 0.9 miles of passing track. Paragraph GR–14 provided for the making of an equitable adjustment in the unit price bid for a particular item if, as a result of an alteration in the plans or in the quantities of the work, overruns or underruns of more than 25 percent occurred.

spacing of existing cross ties and regaging rails, plus the placing or replacing approximately 340 additional cross ties per mile. Also for raising, lining and dressing of track on the same section of line, together with incidental work as provided expressly or inferentially in the specifications and similar related documents made part of this contract. Passing tracks at Girdwood and Bird, totaling 0.9 miles, must also be rehabilitated and are included in this contract.

In addition, paragraph GR–17, headed "Omitted Details," included the express provision:

OMITTED DETAILS—The Contractor is to understand that any work not specifically mentioned in the specifications, but which is necessary either directly or indirectly for the proper carrying out of the intent thereof, shall be required and applied, and he shall perform all such work just as if it were particularly delineated and described. * * *

Thus, any details of construction not expressly covered by the specifications had, nevertheless, to be performed but the method of performance was left to the judgment of the contractor.

So far as details of construction that were prescribed are concerned, there were two that are of basic importance in the consideration of the merits of the extra track lifting claim. These are to be found in paragraphs CD–1 and CD–4 of the specifications. Paragraph CD–1 provided:

All ballast material shall be loaded from railroad stock pile of crushed ballast at *Spencer pit*,[3] hauled and unloaded by the Contractor by dumping as the means provided by the Railroad or the Contractor permits.

Paragraph CD–4 provided that the contractor should raise, line, and dress track at his bid price per track foot subject to conditions stated in 11 subparagraphs, designated as (a) to (j). Subparagraph (a), which was in two parts, provided:

Ballast to make an average 6" raise (*1,770 cubic yards per mile*) will be spread to make *two separate track lifts* between the north end of Bridge 64.7 and the south end of Bridge 88.1 (23.4 miles).

Ballast will also be spread to make *two separate track lifts* on Girdwood and Bird passing tracks. Kern siding will not be rehabilitated. The Contractor will be paid for this siding work at the same rate per track foot as his main line bid price. Pay measurements for raise, line and dress on siding work will be from switch point to switch point, main line measurements. Girdwood siding 2,227 feet. Bird siding 2,857 feet.

Subparagraph (b) provided:

Where engineer top of rail stakes are not set the track will be raised to elevations obtained by "spot-board" methods. The Contractor's track foreman will set the spot-board to a height and at a location approved by the Railroad's inspector or Engineer. *As an overall lift of six (6") inches is required, the first raise should be approximately four inches (4")* although considerable variation

[3] The italics are supplied throughout the subdivisions of this paragraph.

from this rule must be allowed to eliminate sags and humps in the existing grade line.

Subparagraph (d) included the provision:

Stakes or lining points will be set for the center line of track by the Engineer and the track lined to same *after the initial four inch (4") raise,* but a lining gang shall follow one or two days behind the finished lift and spot up and line places found not to be holding up under traffic.

In connection with the work of replacing and respacing the ties, the appellant gave the track an initial or out-of-face lift, and tamped the old ballast to achieve a sound roadbed for the replaced and respaced ties. When the track was lowered back to the roadbed, it was higher than it had been before the appellant had commenced its operations. However, in the course of performing these operations, the appellant did not eliminate sags and humps in the existing grade line, nor did it spread any new ballast.

In making its bid, the appellant contends, it had proceeded upon the assumption that the initial or out-of-face lift would constitute the first of the two track lifts obviously required by paragraph CD–4 of the specifications. Apparently, it was also under the impression that this assumption underlay its correspondence with the contracting officer occasioned by the requirement that its progress schedule be submitted to him.

The appellant first submitted a progress schedule to the contracting officer with its letter dated April 5, 1956. By letter dated April 13, the contracting officer asked the appellant to explain "just what work you intend to do between May 15 and June 11 on raise, line and dress track," the first mentioned date being the date for the commencement of operations under this schedule. This letter was received by the appellant on April 18 but on the previous day it had already written to the contracting officer as follows: "As you will note, this progress chart indicates our beginning to work on 15 May 1956. The work which we will do involves the initial raising and aligning of the track." The letters having crossed in the mails, D. M. Salm, the appellant's project manager, who was headquartered at Kansas City, wrote to the contracting officer under date of April 18, to inform him that he would come to Anchorage, Alaska, to discuss the matter of the progress schedule with him. When Salm arrived in Anchorage, he contacted one of the subordinates of the contracting officer, Tessendorf by name, who as manager of track for The Alaska Railroad was in charge of the project under the general supervision of the contracting officer. The day after his conversation with Tessendorf, which occurred on a Friday, Salm wrote a memorandum to L. W. Huncke, the president of the appellant, with which he

forwarded to the latter a revised progress schedule, and gave the following report with respect to his conversation with Tessendorf on the subject of the number of track raises which the appellant would be required to make:

> * * * They now advise that they want six inches of crushed ballast beneath the track and following our proposed schedule the raise and tie renewal and tie spacing would not constitute a first raise or if we just raised the track on existing ballast without any tie work would not be recognized by them as a first raise. In their way of thinking we will have to make three raises; one for tie spacing, one 4 inch raise, on crushed rock, and one 2 inch raise on crushed rock. I have asked Mr. Tessendorf to show me any such wording in the specifications, as according to them they would be getting an 8 to 10 inch total raise. I have pointed out that the specifications clearly state that an overall lift of 6 inches is required and that the first raise *should* be approximately 4 inches. There is no mention that the final raise *will be* a solid 2 inches or that the track will be raised to permit 6 inches of crushed ballast beneath the tracks.

Salm and Tessendorf resumed the discussion of the subject the following Monday, and on the same day Salm again sent a memorandum to Huncke in which he reported as follows:

> In a conversation this date with Mr. Tessendorf he agreed that the six inch raise was all that was required with the exception of the sag raises and he further stated that he did not care how the work was done as long as they got a full six inch raise; however, the specifications are clear enough so there should not be any further argument regarding this matter.

Two days later the contracting officer approved the revised progress schedule which the appellant had submitted. In his letter of approval, which was dated May 16, the contracting officer made the approval subject to three conditions, the third of which was: "All work shall be in accordance with the specifications * * *."

By July 2, 1956, the appellant had substantially completed the tie replacement and respacing operations of the contract, and on this day Salm met with the contracting officer to discuss the question whether the raising of the track which had been effected in the course of these operations would be counted as one of the two lifts required by the specifications but received a negative answer. Salm and the contracting officer then proceeded to exchange letters in which they stated their respective positions. Under date of July 3, Salm wrote a letter to the contracting officer, referring to their conversation the previous day, and stating:

> As you were advised it is our contention that we are making a first raise of the track with the tie spacing work and; therefore, the track will require one more additional raise. As discussed, the specifications do not state that the track will be given a four (4) inch raise and then a second raise of a firm two (2) inches. The contract specifications state only that an over all lift of six (6)

inches is required and that the first raise should be approximately four (4) inches.

We are agreeable to making the second raise a maximum of five (5) inches or any height under five (5) inches that you may desire, but we do not believe that a third raise is our contractual obligation under the terms of the contract.

To this letter, the contracting officer replied under date of July 6 as follows:

Paragraph CD–4 of the specifications states specifically that sufficient ballast to make an average six inch (6") raise will be spread to make two separate track lifts. Further, that the first raise shall be approximately four inches (4") although considerable variation from this rail[4] must be allowed to eliminate sags and humps in the existing grade line. This is interpreted to mean that the contractor is required to make a separate finish ballast lift of approximately two inches (2").

Paragraph CD–1, Page 21 of the specifications states that the crushed ballast will be obtained at the Spencer pit, hauled and unloaded by the contractor. From personal knowledge, none of this ballast was hauled and spread before making the tie raise, and therefore this cannot be considered as being the first lift.

In accordance with the instructions of the contracting officer, the appellant proceeded to make two more track raises, each with new ballast, and its claim for additional compensation is based on its extra costs in performing this work.

It now argues in support of its position that the least that can be said in its favor is that the specifications are ambiguous with respect to the number of track raises required, and, therefore, that the ambiguity should, in accordance with time-honored doctrine, be resolved against the Government, which drafted the specifications. The appellant's position is, however, clearly untenable. It would, indeed, be difficult to find specifications whose meaning is plainer, and the contracting officer's interpretation of their requirements was obviously correct.

Paragraph CD–4 of the specifications flatly said that ballast "will be spread to make two separate track lifts," and this can only mean that each of these lifts must include the spreading of ballast as one of its component procedures. Furthermore, the ballast so spread must be new ballast. Although there is no express reference to ballast "at Spencer pit" in paragraph CD–4—this phrase is, in other words, not expressly carried over from paragraph CD–1—the use of new ballast from that pit is necessarily implied not only in the reference to the spreading of the ballast but also in the parenthetical reference to the "1,770 cubic yards per mile," for this corresponds exactly with the 41,418 cubic yards of crushed gravel ballast which are mentioned in paragraph GR–5 of the specifications. Another requirement was

[4] Evidently, this represents a typographical error for "rule."

that the first lift average out at a height of approximately 4 inches, and it is not shown that this was true of the out-of-face lift made by the appellant. Finally, there is nothing in any of the construction details prescribed for the replacing and respacing of ties that in any way is in conflict with those prescribed for the track raising under item 4 of the contract.

In testifying at the hearing, the contracting officer expressed the opinion that the lift which the appellant had first effected had been for its own convenience in replacing and respacing the ties, and possibly also for the rough lining of the track, and such indeed appears to have been the case. If it be said that as a matter of practical necessity the specifications of the contract could be carried out only by deferring the spreading of ballast until after the track had been given an out-of-face lift, the ties replaced and respaced, the old ballast tamped, and the track lowered back on the improved foundation thus created, this practical necessity would not suffice to relieve the appellant from its duty of complying with the explicit directions of paragraphs CD–1 and CD–4 by thereafter effecting two track lifts with the use of new ballast. Rather, the making of the out-of-face lift, as a preliminary to the making of the two lifts for which the contract expressly provided, would have to be considered as a procedure so inherent in the performance of work of the nature of that described in the contract as to constitute one of those "omitted details" for which the contract incidentally provided. If, on the other hand, it be said that the job could have been accomplished without this preliminary lift, then it is plain that such lift was merely a procedure voluntarily adopted by the appellant for its own convenience. But whether this initial track raise was a matter of necessity or of convenience, it could not qualify as one of the two track lifts contemplated by paragraphs CD–1 and CD–4 of the specifications for the simple reason that these could be accomplished only with the new ballast from the Spencer pit.

The appellant, nevertheless, seeks to invoke its own understanding of what occurred in connection with the approval of the construction program by the contracting officer as support for its claim. It argues that in the course of approving its construction program the contracting officer gave a practical interpretation of the requirements of the specifications which in effect adopted the appellant's interpretation and hence amounted to a waiver of the requirements of the specifications. This contention is, however, no more convincing than the appellant's interpretation of the requirements of the specifications.

To be admissible, a practical interpretation must have been acted on by both parties before any controversy arose, and this was not

true in the present case.[5] Moreover, there is nothing to show that the appellant's understanding that the initial out-of-face lift would qualify as the first lift required by the specifications was not simply unilateral. All the expressions that occur in the relevant documents are highly equivocal, and emanate, moreover, entirely from the appellant's own project manager, Salm. Obviously, when Salm wrote to the contracting officer to tell him that the work they would do at first would involve "the initial raising and aligning of the track," the statement could have a different significance for each of them, and thus the issue would not be focused. Even the statement attributed to Tessendorf, in Salm's second memorandum to Huncke, that he would be content with a 6-inch raise, and that he did not care how the work was done so long as he obtained such a raise, cannot necessarily be taken as a commitment that he would regard an out-of-face lift of the kind actually made as satisfying the requirements of the specifications.

Due to illness, Tessendorf was unable to testify at the hearing but, even if it be assumed that his understanding was the same as Salm's, it would not help the appellant, for Tessendorf had no authority to interpret the specifications, or to waive any of their requirements.[6]

It would certainly be a novel doctrine if it were to be held that a contracting officer in approving a progress schedule, which, moreover, was not binding upon the contractor, necessarily effected a modification of the specifications. On the contrary, when the contracting officer himself came to approve the progress schedule in the present case, he expressly made his approval subject to the requirements of the specifications. It is clear, therefore, that he did not intend to waive any of their requirements.

As the extra track lifting claim is not supported by the language of the specifications, or by any cogent interpretation which can be given to those specifications, the claim must be, and, accordingly, is denied.

*2. The Ballast Claim.*

The contracting officer paid the appellant for loading, hauling, and placing ballast (Item 1) on the assumption that the quantity involved was 51,510 cubic yards. The appellant claims, however, that the correct quantity was 59,976.3 cubic yards, and also that, since this greater quantity represented an overrun of more than 25 percent

[5] See *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 118 (1913); *Union Paving Co.* v. *United States*, 126 Ct. Cl. 478, 489 (1953).

[6] These prerogatives were vested exclusively in the contracting officer by paragraph GR–16 of the specifications.

over the estimated quantity, it was entitled to be paid for the ballast, under the overrun provision of paragraph GR–14 of the specifications, at the rate of $1.37 per cubic yard rather than at the bid rate of $1 per cubic yard.

Under paragraph GR–36 of the specifications the railroad cars to be used for loading and hauling the ballast were to be rented to the appellant by The Alaska Railroad. The terms of the rental were stated to be as follows:

> "24 only side & center dump, Class 7100 to 7199 (42 Cu. Yds.) @ $1.15."

The cars so furnished bore on their exteriors a heavy stenciled line, beneath which were the words "Load Limit Line For Ballast." The evidence is to the effect that the capacity of a car, when filled exactly to the top of this line, was 48.18 cubic yards. Inside the cars there was another load line, this one drawn freehand with yellow chalk. Although the interior line varied somewhat in position in the different cars, in general its top was at or slightly below the top of the exterior line. The cars were loaded by a power shovel, the bucket of which had a rated capacity of 1¾ cubic yards. The evidence is to the effect that the actual capacity of the bucket, when heaping-full rather than level-full, was 2 cubic yards or more.

The appellant commenced loading and hauling ballast on June 26, 1956. Throughout this operation the representatives of appellant and of the railroad appear to have followed a rule-of-thumb that 24 bucket loads would fill a car to capacity, a figure obtained by dividing the 1¾ cubic yards rated capacity of the bucket into the 42 cubic yards mentioned in paragraph GR–36. In accordance with this rule-of-thumb, both Leo D. Gragg, the appellant's foreman on the ballast train, and the railroad's inspectors signed daily loading records certifying that each car had been loaded with 24 cubic yards of ballast. In all, 1,227 carloads of ballast were loaded, hauled and placed as ballast material.

Two misconceptions were reflected in the certifications, the first being that the capacity of the cars, when filled to the vicinity of the load lines, was 42 cubic yards, whereas in fact it was about 48 cubic yards, while the second was that the shovel bucket, when heaping full, had a capacity of 1¾ cubic yards, whereas in fact it was capable of carrying about 2 cubic yards. The first misconception would seem to stem directly from the reference to 42 cubic yards in paragraph GR–36, for it was only natural that the appellant should relate the figure there given to the "Load Limit Line For Ballast" marked on the cars. And the second misconception might well be said to be indirectly attributable to the same cause, for if the capacity of the

cars, when filled to the load lines, was taken to be 42 cubic yards, and if 24 heaping bucket loads sufficed to fill a car to those lines, then a heaping bucket load would necessarily have to contain no more than 1¾ cubic yards on average. Nor were the errors too readily susceptible of detection, for, unfortunately, each departed from the truth in the same ratio, that is, the assumed capacity of the cars was seven-eighths of their approximate actual capacity and the assumed capacity of the bucket was seven-eighths of its approximate actual capacity.

While the operations were still proceeding, L. W. Huncke, the president of the appellant, who happened to be present on the job when a ballast train pulled in,[7] inspected the cars and began to suspect that they were being loaded to a greater capacity than the 42 cubic yards mentioned in paragraph GR–36. He instituted an investigation, which included writing to the manufacturer of the cars, and this convinced him that the cars, when loaded to the stenciled exterior load line, contained 48.18 rather than 42 cubic yards of ballast. While his investigation was proceeding, he took no action to stop his foreman in charge of the ballast train from continuing to certify that there were 42 cubic yards of crushed ballast in each car that was being loaded. However, under date of September 11, 1956, he finally wrote to the contracting officer to assert his claim that payment should be made on the basis of 48.18 cubic yards per car. The contracting officer replied under date of September 19, stating that the specifications did not indicate to what line the cars should be loaded; that a check had revealed that "the forty-two cubic yards quantity would be reached when the cars were level at a line, 40 inches from the top of the car"; [8] and that the cars had been loaded accordingly, except for a few cars loaded on August 7 which had not been loaded to capacity. This shortage was 24 cubic yards and the contracting officer paid for the ballast at the rate of 42 cubic yards per car, except for this shortage, which the appellant accepts as correctly determined.

Ordinarily, when a party has given a receipt, or other certification of quantity, or payment, such documents may be disregarded only upon the most convincing proof that they are erroneous. In the present case, however, since it appears that the appellant's foreman was led to give the certifications by reason of misconceptions for which the Government was at least partly responsible, no great weight can be attached to these documents.

[7] The Government contends, and the examiner found, that Huncke's visit occurred late in June or early in July. The Board, however, considers that the evidence indicates a greater probability of the visit having occurred at a date sometime in the latter part of July.

[8] The top of the stenciled exterior load line was 37¼ inches from the car top.

Ordinarily, too, the failure of a party to repudiate a certification with reasonable promptness after the discovery that it is erroneous would count heavily against accepting the contention that the certification was incorrect. But, again, in the present case, the president of the appellant did not become aware of the true situation until the loading and hauling of the ballast was well under way, and the additional time which he spent in confirming his suspicions does not appear to have been beyond what was reasonably necessary under the circumstances of the case.

The Board believes, therefore, that there is no serious obstacle against attaching weight to the evidence which the appellant has offered to prove that the ballast cars carried in fact considerably more than the 42 cubic yards per car which were certified for payment. The examiner found that the preponderance of the evidence supported findings that the ballast cars were loaded approximately to the level of the yellow chalk lines inside the cars; that each bucket when loaded by moving upward through the loose ballast tended to form a heaping bucket load; that most of the buckets contained such heaping loads; and that the average car load contained, therefore, 48 rather than 42 cubic yards. The Board agrees with these findings, and since 1,227 cars were loaded, it concludes that the appellant is entitled to payment for loading, hauling, and spreading 58,896 cubic yards of ballast material, less the 24 cubic yards which, it is agreed, must be deducted because of shortages. The net figure is, therefore, 58,872 cubic yards, which represents an excess of 7,362 cubic yards over the amount for which payment was made by the contracting officer. At the unit price of $1 a cubic yard, the appellant is, therefore, entitled to an additional payment of $7,362, and the contracting officer is directed to take appropriate action for the allowance of additional compensation in this amount.

The 58,872 cubic yards for which payment is to be made represents an overrun of more than 25 percent over the estimated amount of 43,011 cubic yards set forth in the bidding schedule. The Board, however, shares the opinion of the examiner that the appellant has failed to prove that it is entitled to an increase in the unit price on account of such overrun, whether the calculation be made on the basis of the total quantity, as the appellant contends, or only on the amount of the overrun.

The appellant's president testified that in bidding a price of $1 per cubic yard for the ballast work he assumed that The Alaska Railroad would supply a belt loading apparatus for loading the cars because the specifications of the contract under which the ballast was produced required such an apparatus to be furnished to the railroad

by the contractor thereunder; and that the failure of the railroad to make the anticipated equipment available to the appellant had raised the latter's costs by $0.37 a cubic yard on all the ballast hauled. But there was nothing in the specifications of the instant contract which could have led the appellant's president to believe that the railroad would permit the appellant to use this equipment, if furnished by the contractor under the other contract, and the mere disappointment of the appellant's expectations in this regard could itself furnish no ground for an adjustment in the unit price.[9] That such an adjustment may not be used as a means for shifting to the railroad the burden of a loss, or inadequate profit margin, that would have been sustained even if no overrun at all had occurred is made doubly clear by the statement in paragraph GR–14 of the specifications that "In the event that unit bid items are increased or decreased more than twenty-five percent (25%) no allowance shall be made for anticipated profits or loss due to such changes."

Furthermore, while the appellant submitted a tabulation indicating how the $0.37 per cubic yard had been derived, the sole evidence to show what the remainder of the costs of loading, hauling, and placing ballast was is a statement by the appellant's president that $1 per cubic yard would have been a fair and reasonable price for this work had the railroad made a belt loading apparatus available. There is nothing to show how much of the $1 represents costs and how much represents an allowance for profit. Nor is there anything to show whether this figure is derived from records of the costs actually incurred, or is a mere estimate. Assuming, but without deciding, that compensation for the items of expense which the appellant erroneously omitted in computing its bid might be allowable in a unit price adjustment limited to the 15,861 cubic yards of overrun, it would certainly be necessary for the appellant to establish, at the very least, that its actual costs for loading, hauling, and placing ballast, together with a reasonable allowance for profit on this work, exceeded $1 per cubic yard. The evidence offered is, however, insufficient to admit of an informed judgment as to the existence of this essential fact, and, hence, there is no basis for an increase in the unit price.

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F.R. 9428), the findings of fact and deci-

[9] See *Great Lakes Dredge and Dock Co.* v. *United States*, 119 Ct. Cl. 504 (1951), *cert. denied* 342 U.S. 953 (1952).

sions of the contracting officer are affirmed with respect to Claim No. 1, and reversed with respect to Claim No. 2, and he is directed to proceed as outlined above.

WILLIAM SEAGLE, *Acting Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

## APPEAL OF AIR SURVEY CORPORATION

IBCA–152 *Decided June 30, 1959*

**Contracts: Damages: Liquidated Damages—Contracts: Delays of Contractor—Contracts: Specifications**

A contractor which was required to prepare and furnish aerial photographs and topographic maps for an irrigation project within a specified time and which under the terms of the specifications was subject to the imposition of liquidated damages for failure to make delivery of such materials on time cannot be said to have effected timely delivery when the materials delivered contained serious defects requiring an extended period for correction.

**Contracts: Delays of Government—Contracts: Delays of Contractor—Contracts: Damages: Liquidated Damages—Contracts: Acts of Government**

When the Government was required to inspect and accept the work of a contractor which was required to prepare and furnish aerial photographs and topographic maps, and the contractor contended that the inspection was unreasonably delayed by the Government, it had to establish not only that such delay was unreasonable in the circumstances of the case—which cannot be established merely by allegations in a brief—but also that, but for the duration of the Government's delay, it would have required less time to make the corrections. The recognition by the Government of its own responsibility for part of the delays by not imposing liquidated damages for periods required for inspection and transmission of material does not prevent the apportionment of the remainder of the delays to the contractor. The contract, by providing expressly for excusable causes of delay, including "acts of the Government," inferentially provided for the apportionment of delays.

BOARD OF CONTRACT APPEALS

The Air Survey Corporation, of Arlington, Virginia, has filed a timely appeal from findings of fact and decision of the contracting officer, dated January 9, 1958, denying appellant's request for the release of $1,860 withheld by the contracting officer as liquidated damages for a delay in completion of Supply Contract No. 14–06–500–230, with the Bureau of Reclamation (hereinafter denominated the Bureau).

The contract, which was awarded on March 23, 1956, was on U.S. Standard Form 33 (revised June 1955), and incorporated the General Provisions of U.S. Standard Form 32 (November 1949). It provided for the preparation and furnishing of aerial photographs and topographic maps for the Gulf Basin Project, Texas, under Schedule 1 of the contract. The contract price was $25,000.

Notice to proceed with the work was received by the appellant on March 26, 1956. As under paragraph B–6 of the specifications the work was to be completed within 120 days thereafter, the final date for completion was July 24, 1956. In a findings of fact and decision, dated June 28, 1956, the date for completion was extended 30 calendar days, or until August 23, 1956, because of delay due to adverse weather and ground conditions.

The appellant began delivery of scheduled items (and related nonscheduled materials)[1] on June 5, 1956, but the delivery of all the scheduled items was not completed until October 31, 1956, and the last of the nonscheduled items was not shipped until November 13, 1956. The most important of the items covered by the contract was item 5, "Furnishing and delivering one (1) complete set of topographic maps," which represented no less than $21,600 of the total contract price of $25,000. These topographic maps, which numbered 21, were shipped in separate sheets and received by the Bureau over a period extending from about October 1 to October 31, 1956.

The Bureau of Reclamation had made arrangements with the Topographic Division of the U.S. Geological Survey, at Denver, Colorado, to perform accuracy tests for all contracts made pursuant to Invitation No. 500S–39. In a letter dated March 29, 1956, the area engineer informed appellant's subcontractor of the arrangements that had been made for assumption by the Geological Survey of responsibility for checking the aerial mapping contracts and that he had forwarded to them for answer a series of questions regarding contract interpretations which had been requested by the subcontractor. The Survey's report on the contract work was received by the Bureau in Austin, Texas, on February 4, 1957, and the Bureau informed the appellant that the work did not meet specifications in certain respects in a letter dated February 5, 1957. A detailed report, requiring correction of the deficiencies, was mailed to appellant on February 12, 1957, and field photographs, returned at appellant's request, were received by it on February 28, 1957.

The appellant thereupon proceeded to revise the topographic maps. The revised maps were received by the Bureau on May 9. Three of

[1] These were field notes and other data needed by the U.S. Geological Survey in connection with the performance of accuracy tests.

them, however, were found still to be deficient and were returned again for correction. The appellant received these three maps on May 18, made the corrections, and transmitted them to the Bureau, which received them on June 10.

The contracting officer assessed liquidated damages against the appellant for all periods of time beyond the contractual delivery date, plus the extension of time allowed by him, that appellant had in its possession any unaccepted item of the schedule. Appellant was not charged with liquidated damages for time required to make inspection and accuracy tests or for time required to transmit material to it, the total assessment of liquidated damages being comprised of the following:

| | |
|---|---|
| (1) August 24 to October 31, inclusive: 69 days @ $20.00 | $1,380 |
| (2) March 1 through May 9, inclusive: 70 days @ $20.00 | 1,400 |
| (3) May 19 through June 10, inclusive: 23 days @ $20.00 | 460 |

In a letter dated July 2, 1957, appellant conceded that the assessment of $1,380 was justified, but complained that the charges made for the periods March 1 through May 9, and May 19 through June 10 were improper.

It was the position of the appellant that the sole contingency which could justify the assessment of liquidated damages would be delay in the *delivery* of all scheduled items by the required delivery date; and that it could not, therefore, be assessed liquidated damages for periods required to correct delivered items, which had been the basis for imposing liquidated damages. It also contended that the time consumed in making inspection and accuracy tests and returning material for correction was unreasonable, and not only caused a substantial increase in the time needed by the appellant to make the corrections but also increased its costs,[2] and hence that there should be applied the principle that in the absence of an express provision in a contract authorizing the apportionment of delays in the assessment of liquidated damages, the delays could not be apportioned, and liquidated damages could not be assessed.

As the appellant was in effect requesting a refund of $1,860 of the total of $3,240 withheld as liquidated damages, the certifying officer of the Bureau of Reclamation, under date of August 20, 1957, requested from the Comptroller General an advance decision as to the propriety of making the refund. This step appears to have been taken because of an opinion expressed by a field solicitor of the Department dated July 22, 1957, that the assessment of liquidated damages depended on the date of delivery of all the scheduled items. In

[2] Allegedly, this increase was due to the disbanding of field forces and the loss of key employees while the appellant was waiting to learn of the results of the inspections.

his decision of November 12, 1957 (B–134087), the Comptroller General, in commenting on this opinion of the field solicitor that liquidated damages were not chargeable beyond October 31, 1956,[3] observed that it was "sufficient to state that there is no showing that the deficiencies of the work were of a minor nature so that it might be concluded that the contract work had been substantially completed on October 31, 1956." The Comptroller General went on to point out, however, that the contractor was entitled to findings of fact by the contracting officer, subject to the right of appeal to the head of the Department or his authorized representative, with respect to delays in the performance of the work which may have been caused by the Government's delay, and he concluded: "If upon final determination it should be found that any or all delays were due to excusable causes liquidated damages may be refunded in accordance with such finding."

In the findings of fact made by the contracting officer under date of January 9, 1958, pursuant to the direction contained in the Comptroller General's opinion, he found that "some of the work completed by the contractor was not correct," and had to be rejected as unsatisfactory, which was done "83 days after the last of the necessary materials were received in the Austin office * * *."[4] He also found that "If the contractor had delivered all material in August (of 1956), it is very likely that tests would have been completed in substantially less than 83 days. The necessity of rescheduling the work into the Geological Survey's work program undoubtedly contributed to the elapsed time. However, there is no provision in the specification that would define 83 days as unreasonable."

Counsel for the appellant has filed an elaborate brief in support of its argument that the contingency on which liquidated damages was to turn was the delivery rather than the acceptance of the material. Of this there can be no doubt, since Paragraphs B–1, –3, –6, –7, and –8 of the Special Requirements of the specifications all speak in terms of the delivery of the material. Indeed, in Paragraph B–3, headed "Delivery—urgency of," it is declared that "Time of delivery is important * * * ," and in Paragraph B–7, the liquidated damages of $20 per day are expressly imposed "for failure to deliver the material or any part thereof." It is only in Paragraph B–8, which deals with payments, that any distinction is made between

[3] Apparently the date of the field solicitor's opinion was erroneously assumed to be August 20, 1957.

[4] Apparently the contracting officer arrived at this 83-day period by beginning his calculation with November 14, 1956, the day after all the nonscheduled materials were received from the appellant by the Bureau, and ending it with February 4, 1957, the day preceding the date of the Bureau's letter to the appellant, informing it in general terms that the materials comprising item 5 did not meet specifications.

delivery of the material to the Government and its acceptance, but it is obvious that payment under this provision would be made upon mere delivery without attempting to establish the correctness of the material delivered.

But, while the liquidated damages obviously turn on "delivery," the real question is what was intended to be meant by delivery. Could work be said to be delivered even though it was obviously defective and did not meet the requirements of the contract? If the Government ordered uniforms, for example, and the contractor, in order to meet the delivery schedule, delivered them to the Government without sleeves, would this be enough to save the contractor from having to pay liquidated damages? Similarly, if the Government ordered trucks, and the contractor delivered them without the engines, would this be enough to stop the running of liquidated damages? However, in the case of delivery of aerial photography and topographc maps, the situation conceivably could be said to be somewhat different. It is understandable that the defects in such material could be of a rather subtle nature and difficult to detect upon superficial examination, and that a contractor could in good faith deliver such material without being aware of the defects. Should such good-faith delivery be regarded as sufficient to stop the running of liquidated damages, and prevent the Government from imposing them for such time after delivery as is necessary to make corrections?

The appellant argues that if there is any doubt, it should be resolved in its favor, since the rule of interpretation is that provisions for liquidated damages are to be narrowly construed.[5] But, even if the provisions for liquidated damages were to be construed in terms of good-faith delivery, it would be necessary for the Board to be satisfied from the record that the appellant did not know or have reason to know that the material which was being delivered had serious defects. The record shows, however, that the rejected material did have serious defects—indeed, so much is apparent from the mere length of time which it took to effect the corrections—and, such being the case, the existence of facts, such as the maintenance of adequate internal inspection procedures, showing that appellant neither knew nor had reason to know of the defects would have to be affirmatively established.

[5] See, for instance, *Tobin* v. *United States*, 103 Ct. Cl. 480, 492 (1945), and *Climatic Rainwear Co.* v. *United States*, 115 Ct. Cl. 520, 558 (1950). The appellant also invokes the decision in the *Tobin* case, as well as in *Standard Transformer Co.* v. *United States*, 108 Ct. Cl. 214 (1947), as authorities supporting its view that delivery of the material was sufficient to toll the liquidated damages. But, while the former case involved a contract for aerial photography, the decision turned on the peculiar phraseology of the specifications in that case, and in the latter case, the defects in the transformers, which were latent, were not discovered until *after* they had been installed and placed in operation, and, consequently, might be said to have been accepted by the Government.

The difficulties inherent in resolving such a question is perhaps the reason for the view which the Comptroller General adopted in his decision of November 12, 1957, that liquidated damages could not be collected for the periods necessary to correct the defective material only if the defects were of a minor nature. As such, clearly, was not the case, the Board would not be warranted in coming to a contrary conclusion, whatever its own view, since it is bound by duly rendered decisions of the Comptroller General on questions of law,[6] and the question involved is solely a legal question. The Board must deny, therefore, the request of the appellant for the refund of any part of the liquidated damages, insofar as this request is based on the "delivery" provisions of the specifications.

The Comptroller General left open for consideration, to be sure, the second contention of the appellant, which is based on the alleged unreasonableness of the time taken by the Government in inspecting the material and returning the same for correction, and hence presents a question of fact. Clause 5 of the General Provisions of the contract, and Paragraphs C–12 and C–20 of the Technical Requirements of the specifications, gave the Government the right of inspecting the work, both while it was in progress, as well as after it had been delivered. However, Clause 5(c) of the General Provisions of the contract expressly required inspections to be performed "in such a manner as not to unduly delay the work," and Paragraph C–20 of the Technical Requirements of the specifications included the provision that "All inspections and checking of the work by the Government will be performed in such a manner as not to unnecessarily delay the work or interfere with the contractor's operations."

In considering the question of delays attributable to the inspection process, it must be borne in mind that in order to obtain a refund of liquidated damages, it would be necessary for the appellant to prove not only that the period of 120 days, running from November 1, 1956, to February 28, 1957, for which it was assessed no liquidated damages, was an unreasonably long time within which to make the accuracy tests, inform the appellant of their results, and return the material found to be in need of correction, but also that if the inspection process had been completed in a shorter period of time, the making of the required corrections would have taken less time than the 93 days (March 1 to May 9, and May 19 to June 10) actually consumed.

In considering this question, it is also necessary to keep in mind that the appellant has not requested a hearing, and that its contention that the performance of the corrective work was unreasonably de-

[6] See *Reid Contracting Co., Inc.*, 65 I.D. 500, 517 (1958), and other authorities there cited.

layed by the Government is supported almost exclusively by assertions in its brief, which are not in themselves evidence, and some of which are implausible in themselves, particularly in view of facts that are shown by the record. There is no universal standard for establishing what is reasonable or unreasonable but each case must be judged by its own facts.[7] A few days' delay might be unreasonable in emergent circumstances but perfectly reasonable when such circumstances were absent. A short delay in inspection of a particular type of work, which was of a simple nature, might be unreasonable, while a long delay in inspecting highly complex work might be perfectly reasonable. To assess the reasonableness of a delay in inspection, it would be necessary to know a good deal of the technology of the particular art but the record in the present case, although it would seem to indicate in a general way that the checking of aerial photography and topographic maps must involve fairly complex and delicate procedures, does not explain the nature of such procedures, or the amount of time which they would ordinarily require. Indeed, these are among the vaguest aspects of the record, and the lack of expert testimony of an objective nature is total.

The appellant challenges at the outset the finding of the contracting officer that the rejection of the unsatisfactory maps occurred 83 days after the last of the necessary material had been received. It points out that it did not receive the final report specifying the errors which needed correction until February 14, 1957 (which would be 2 days after it was dispatched), and argues that the Bureau's delay should be deemed to be, variously, 93, 106, or 136 days, depending on whether the time ran from November 13, 1956, the date of its return of all the nonscheduled material to the Government, or from October 31, 1956, the date it completed the delivery of the sheets for item 5, or from October 1, 1956,[8] the date it made its first delivery of sheets for item 5. The Board believes, however, that the contracting officer's finding that the inspection period was 83 days is substantially correct, and should be accepted. If extended to cover the time that elapsed between the receipt of the Geological Survey report by the Bureau and the receipt of the preliminary correction notice of February 5 by appellant, it would encompass only 2 or 3 days more.

The Board cannot say from the record that the preliminary notice was not sufficient to get the appellant started on the work of correction, nor can it say that it would have been feasible or practical for the accuracy tests to have been undertaken before the appellant had

[7] See *Michael H. Parish et al.* v. *United States*, 120 Ct. Cl. 100, 125 (1951): "But reasonableness is, in each instance, a question of fact."

[8] This date is somewhat questionable. Because of the loss of the shipping memorandum, the contracting officer found that this event occurred "about October 1."

delivered all the nonscheduled material and all of the 21 sheets of topographic maps included in item 5. Indeed, so far as it goes the record indicates the contrary. In a letter to the appellant, dated November 7, 1956, Harry B. Burleigh, the area engineer of the Bureau, who appears to have been in charge of the work, asserted that some of the nonscheduled items were "needed for inspection purposes," and in another letter to the appellant under date of December 10, 1956, the area engineer pointed out that "Since this area is remote from other activities, no accuracy tests were begun until all the materials required were received."

The Board also cannot accept as proven the appellant's contention that the Bureau's failure to give it more timely notice of the corrections that would be required caused the making of such corrections to be more expensive and to extend over a longer period of time than would otherwise have been the case. The statements in the briefs that, during the inspection period, field crews had been disbanded, key supervisory personnel had resigned or been transferred, and familiarity with the project lost by the appellant's technical employees are not proof that these things actually happened. The further statements that upon receipt of the correction notice it was necessary for the appellant to reassemble its supervisory personnel and forces, reassign work, and re-train technicians are subject to a like criticism. Moreover, even if the record substantiated all of these statements, it still would not necessarily follow that the appellant could have fitted the performance of the corrections into its work schedules more easily and quickly had it been officially advised of the need for them at some earlier date. The record shows affirmatively that the appellant was performing other contracts involving aerial photography concurrently with the contract involved in the appeal, and that it was experiencing difficulties in meeting all of its commitments. Indeed, it requested another extension of time for this very reason but subsequently withdrew its request. This situation conceivably might have led to greater difficulties in the performance of the corrective work, were the notice to have been issued in, say, November or December of 1956, than the need for rebuilding the project organization is said to have caused when the notice was actually given. Furthermore, the appellant does not state precisely when the alleged changes in its staff occurred, and they may have occurred considerably before the appellant could reasonably complain of delay.

Moreover, the record also shows that the appellant was not kept in the dark concerning the progress which the Geological Survey was making in getting out the inspection report, and it did not complain very persistently or vociferously of delay. It was not until Decem-

ber 6, 1956, that the appellant wrote to the area engineer to request that inspection be expedited, and under date of December 10 the latter replied that he expected accuracy tests to be completed by the Geological Survey by January 20, 1957. In a subsequent letter dated January 9, 1957, the area engineer informed the appellant, to be sure, that the accuracy tests would not be completed as expected and would extend into February but he explained that the reason for this was that the Geological Survey had discovered discrepancies between its own and the appellent's leveling. In the correspondence covering the months which followed the completion of the delivery of the materials by the appellant, there can be found nothing that can properly be characterized as a warning to the contracting officer that its organization would be disrupted or its ability to make corrections impaired if the inspection report was not forthcoming. Indeed, it was not until after liquidated damages had been imposed for the period of correction that the appellant asserted in a letter dated July 2, 1957, that this work had been slowed down and made more expensive because the sheets of topographic maps had not been returned "in a reasonable period of time."

It is in this letter of July 2, 1957, that there is to be found the only intimation of what the appellant regarded as a reasonable period of time for inspection before the appeal was actually taken. The appellant stated that revisions could have been accomplished expeditiously if the topographic sheets had been returned "in the customary period which is generally from 30 to 60 days." The qualifying adverb would seem to imply that in some instances a period of more than 60 days would be regarded in the industry as not unreasonable. Moreover, the industry standard which the appellant invokes would, presumably, be applicable if the contractor was *not* late in submitting the materials for inspection. Actually, the appellant itself was 69 days late in delivering all the scheduled materials required by the contract, quite apart from the nonscheduled materials which were delivered about 2 weeks later, and conceivably this could disrupt the work of inspection which the Geological Survey had to do, as the contracting officer inferred in his findings. The appellant stigmatizes this as a mere surmise but the trouble in the present case is that it consists largely of surmises. Moreover, it is necessary to emphasize also that a considerable portion of the appellant's work was defective, and presumably, again, the checking of such work would be more difficult and time consuming.

The Court of Claims has declared in a number of instances, to be sure, that when the Government has caused a long delay it owes the contractor some explanation of the delay. "Government delays,"

said the court in one case, "call for Government explanation."[9] Whether this dictum means that the Government bears the burden of proving the reasonableness of its own delays, or merely the burden of offering an explanation of such delays, need not be here considered in view of the failure of the appellant to prove that it could have completed the corrective work in a shorter time but for the Government's protraction of the inspection process.

Finally, the appellant is in error in contending that, since the Government recognized its own responsibility for a part of the delays by failing to impose liquidated damages for the periods which were required for inspection and the transmission of material, it was not permissible for the contracting officer to apportion the remainder of the delays to the appellant. Clause 11 of the General Provisions of the contract, as supplemented by Paragraph B–7 of the Special Requirements of the specifications, by providing for excusable delays, including delays due to "acts of the Government," inferentially provided for apportionment of delays.[10] The delays having been correctly apportioned, so far as it is possible to tell from the record, the Board cannot find that the appellant has just cause to complain.

CONCLUSION

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

WILLIAM SEAGLE, *Acting Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

## CELIA R. KAMMERMAN ET AL.

A–27768 *Decided July 17, 1959*

**Oil and Gas Leases: Applications—Oil and Gas Leases: Acquired Lands Leases**

A description in an acquired lands oil and gas lease offer for a tract of unsurveyed land which uses as part of the boundary a line drawn on a map prepared by the acquiring agency, but which does not give the course or distance for such line, is incomplete and is not a complete and accurate description of the land applied for.

[9] See *The Kehm Corporation* v. *United States*, 119 Ct. Cl. 454, 470 (1950).

[10] See *Robert E. Dineen* v. *United States*, 109 Ct. Cl. 18, 32 (1947); 34 Comp. Gen. 230, 234 (1954).

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications**

An acquired lands oil and gas lease offer which described a tract of unsurveyed land in terms of the tract number given it when it was acquired by the United States, the outside boundary of the tract, as surveyed by the acquiring agency, and lines run from points on the outside boundary to other points on the outside boundary by courses and distances, and which had, as part of the description, a map used by the agency administering the land on which the parts of the tracts desired are marked out, complied with the regulation in effect at the time the offer was filed.

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Future and Fractional Interest Leases**

An acquired lands lease offer for lands in which the United States owns only a fractional interest in the minerals must be rejected if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States.

**Oil and Gas Leases: Applications**

An oil and gas lease offer must be rejected with loss of priority when it fails to comply with a mandatory requirement of the regulations unless such failure is specifically excused by the regulations.

**Oil and Gas Leases: Consent of Agency—Mineral Leasing Act for Acquired Lands: Consent of Agency**

An applicant for a noncompetitive lease of acquired lands being administered by the Forest Service is properly required to file written consent to stipulations imposed by that agency as a condition precedent to issuance of the lease, or face rejection of his offer.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Celia R. Kammerman, Albert Lewis, and Merwin E. Liss have appealed to the Secretary of the Interior from a decision dated May 16, 1958, of the Acting Director of the Bureau of Land Management which affirmed the rejection in whole or in part of their respective noncompetitive offers to lease for oil and gas federally owned lands pursuant to the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1952 ed., secs. 351–359).

Because several of the appeals raise similar problems, they have been divided into two groups and each group of related appeals has been considered separately.

I

The Acting Director rejected noncompetitive offers to lease for oil and gas, BLM–A 037293, 037319, 037320,[1] 039618, and 039619, on the grounds that the descriptions of the tracts applied for were not sufficient to identify them. Each offer described several parcels of land within the Monongahela National Forest, West Virginia.

It appears that prior to the acquisition of the area composing the forest, the lands held by each private owner were surveyed and a tract number assigned to each privately held tract. The tract numbers and their boundaries are shown upon status maps of the Forest Service on file in the forest supervisor's office at Elkins, West Virginia.

Each offer was accompanied by a copy of part of the status map on which the tracts, their numbers and boundaries were shown and the lands desired were depicted in color.

In general, each offer described the lands it covered by reference to the tract number. If the offer covered all of a tract, the offer gave no other description. If it covered only part of a tract, the description began with a corner of the survey shown upon the map and then limited the portion of the tract applied for in terms of the outside boundaries and a line running through the tract from one point on the outside boundary to another. The courses and distances for intervening corners on the outside boundary and, in some cases, for a line dividing the tract, were not given.[2] In several descriptions a line of longitude was used to partition a tract. In others, a county line and the course of a stream were used.

The Eastern States land office held, as to each offer, that the descriptions of portions of the tracts are insufficient to describe the lands and compute the areas thereof and allowed the applicant 30 days within which to furnish adequate metes and bounds descriptions. In the case of offer BLM-A 039618, which includes three tracts in their entirety as well as parts of four other tracts, the offer was held insufficient only as to the latter.

[1] The Eastern States land office gave as an additional reason for rejecting these three offers the fact that the offeror had failed to submit a separate statement of his interests pursuant to 43 CFR, 1949 ed., 200.5. For a holding that this was not a proper reason to reject these offers, see *Nettie M. Lewis et al.*, A–27848 (March 3, 1959). The Acting Director did not rely upon this ground as a reason for rejecting these offers.

[2] For example, one parcel in BLM-A 037293 is described as follows:

> "Part of Tract 54, consisting of approximately 1110 acres, as follows: Beginning at a point on the line of the outside boundary between corners 19 and 20 of said tract, 1600 feet distant from corner 19 on said line, and thence, following such outside boundary, to corner 20, and thence, following along such outside boundary, to where it intersects the outside boundary of Tract 27, and thence, along the outside boundary, common to both Tract 27 and Tract 54, to a point 43.50 chains from corner 3 of said Tract 54, and thence, leaving said outside boundary and proceeding through Tract 54 in a straight line, to the point of beginning."

On appeal the Acting Director held that the offers were properly rejected. However, since his decision affirmed the Eastern States land office's decisions, it is assumed that the Acting Director did not intend to reject BLM-A 039618 as to the three tracts applied for in their entirety to which the manager had raised no objection.

In their appeal to the Secretary, the appellants contend that each description, including the map, is sufficient to identify the tract applied for and that the regulations do not require that the description be sufficient to compute acreage on pain of losing priority.

At the time three of the applications were filed, the pertinent regulation (43 CFR, 1949 ed., 200.5) provided:

> * * * 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.

Of the several alternative methods for describing the parcels applied for, the only pertinent one is the last, that is, "any other method of description best suited to identify the land" which must also be "a complete and accurate description of the lands for which a lease or permit is desired." *Columbian Carbon Company, Merwin E. Liss*, 63 I.D. 166, 169–171 (1956).

When offers BLM-A 039618 and 039619 were filed this regulation had been amended to read 43 CFR 200.5(a):

> Each offer or 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. * * * and if not so surveyed, by metes and bounds connected with a corner of the public surveys by courses and distances, or described in a manner consistent with the description in the deed of the United States. * * *

The second alternative is the only applicable one and it, too, must be "a complete and accurate description."

In the *Columbian Carbon Company* case,[3] the Department carefully considered the sufficiency of other applications for land in the same area and found the descriptions not sufficient to identify the land

[3] Action in the nature of mandamus dismissed by United States District Court for the District of Columbia. *Liss* v. *Seaton*, Civil No. 3233–56, January 9, 1958. Appeal dismissed by United States Court of Appeals for the District of Columbia Circuit, No. 14647, September 18, 1958.

applied for. There the applications described the land in terms of tract numbers plus corner numbers on two outside boundaries and lines connecting one outside boundary with the other. In one application the courses and distances were given between corners along the boundary lines, but neither gave courses or distances for the lines connecting one boundary line with the other. The Department held:

> 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]
>
> [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.
>
> 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 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)). [Pp. 170–171.]

A careful reading of this decision reveals that it held the applications of both Columbian Carbon and Liss defective specifically because they failed to give courses and distances for lines running from one point of the surveyed boundary of a tract across it to another point on the boundary.

Applying this criterion to the descriptions in the several offers on appeal, I find that the following descriptions are deficient for this reason:

BLM-A 037293—All
BLM-A 037319—Parcels 1 and 2 (two parts of Tract 39)
BLM-A 037320—All
BLM-A 037618—Parcels 4, 5, and 6 (part of Tracts 579, 620, and 411)
BLM-A 039619—Parcels 2 and 3 (part of Parcels 516 and 380)

There remains for consideration one tract each in applications BLM-A 037319, 039618, and 039619 which are described in terms of the outside boundary of the tract and a line or lines across the tract described by courses and distances and whose location is shown in the Forest Service Status map.

Such a description meets the requirement of the regulation. The purpose of a description of unsurveyed land is to identify it so that the Department may process the application and that other persons may know that an application for the land has been filed. *Columbian Carbon Co., Liss (supra)*, p. 170; *Henry W. Morgan et al.*, 65 I.D. 369, 378 (1958); *Layton A. Bennett et al.*, A–27659 (November 3, 1958).

Even where a metes and bounds description was required by the pertinent regulation, the Department has held that an application which described the land applied for, an island, solely by reference to its name and names of the surrounding waters as shown on a Coast and Geodetic chart, was sufficient. *Layton A. Bennett et al., supra.* Similarly, in *Henry Morgan et al., supra*, the Department accepted a description by courses and distances using in part lines of an unofficial survey shown on a map prepared by the United States Army Corps of Engineers.

Under the applicable regulations, the appellants were required only to use a method of description best suited to identify the land or one that was consistent with the deed to the United States. As to each of these three parcels the offeror referred to the map prepared by the agency administering the land and to the tract numbers by which the parcels were acquired, described the land in terms of the boundary of the tract and lines through it by courses and distance, and showed on the pertinent portion of the status map, the area for which he was applying. In my opinion, these tracts are adequately identified for the purposes of the Department and other prospective applicants.

Accordingly, the applications were improperly rejected as to these three tracts.

The appellants contend that the Department's recent decision in *Henry S. Morgan et al., supra*, supports their argument that the maps they submitted with their applications and which were made a part

thereof can be relied upon to complete any deficiencies in their verbal descriptions. In that case one offeror attacked the description of another offeror on the grounds that the metes and bounds description of the latter did not rely entirely upon references to natural or artificial monuments. The Department held that a metes and bounds description in terms of lines of an unofficial survey shown upon an accompanying map is sufficient to identify a tract of land. It did not hold that lines drawn upon the map by an applicant for which either course or distance is omitted is sufficient to identify a parcel of land. It is for this reason that the descriptions held defective here are deemed insufficient to identify the land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management as to BLM–A 037293, 037319, 037320, 039618, and 039619 is affirmed, except as herein modified, and the cases are remanded for further proceedings in accordance herewith.

## II

The Acting Director affirmed the rejection in part of two of three other noncompetitive offers to lease for oil and gas federally owned lands, BLM–A 041889, 041890, and 041891, filed on January 30, 1956, by Merwin E. Liss, and required consent to special stipulations as to all three offers.

The manager rejected offer BLM-A 041890 as to one of the tracts listed in it, numbered 778, because the tract was not owned by the United States. The appellant does not discuss this point in his appeal. In its report to the land office, the United States Forest Service, Department of Agriculture, the agency having jurisdiction over the land, stated that tract No. 778 is not owned by the United States. There being no evidence that the United States does own it, it was proper to reject the application as to it.

The land office also rejected offer BLM-A 041889 as to tract No. 252 on the ground that it was acquired by the United States subject to an undivided one-half mineral interest vested in third parties and that the applicant had not furnished a statement showing the ownership of the operating rights to such interest as required by the pertinent regulation and the instructions on the lease form. In affirming the land office, the Acting Director held that the regulation was mandatory and that an offer that did not comply with it must be rejected and would earn the offeror no priority.[4]

[4] The Acting Director mistakenly stated that the land office had rejected offer BLM-A 041889 in whole for this reason.

The pertinent regulation reads:

(d) *Offers for fractional interest oil and gas leases other than future fractional interests.* An offer for a fractional present interest noncompetitive lease must be executed on Form 4–1196 and must be accompanied by a statement showing whether the offeror owns the entire operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease, and if not, the extent of the offeror's ownership in the operating rights in each tract, and the names of other parties who own operating rights in such fractional interests. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than a majority interest of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such result will be rejected. (43 CFR 200.7(d).)

In addition, special instruction 2 on the reverse side of Form 4–1196, which the appellant filed, states:

* * * In instances where the United States does not own a 100-percent interest in the oil and gas deposits in any particular tract, the offeror should indicate the percentage of government ownership. In such cases the offeror must also furnish the information required by 43 CFR 200.7(d).

The requirement made by 200.7(d) is mandatory, not directory. See *Henry Morgan*, A–27621 (September 17, 1958).

It is well established that the failure by an oil and gas offeror to comply with a mandatory requirement of a regulation furnishes a basis for rejecting the offer and earns the offeror no priority until he has satisfied the regulation. *Pearl C. Baggett, W. M. Vaughey*, A–27188 (December 13, 1955); *W. M. Vaughey, George W. May*, A–27389 (October 31, 1956).

The appellant contends, however, that his failure to comply with the regulation should not deprive him of his priority, but that he should be required only to file the necessary information before a lease is issued to him. First, he argues that the last sentence in 200.7(d) shows that the statement as to ownership of the operating rights not owned by the United States need be submitted only where the United States owns less than 50 percent of the mineral interest.

This argument is without merit. The regulation, of course, clearly requires the information whatever is the amount of the United States interest. Furthermore, the appellant, on his own terms, confuses a 50 percent interest with a majority interest.

Next, the appellant urges that an offer can be rejected with loss of priority only for the reasons set forth in the subparagraph of the regulations (43 CFR 200.8(g)(1)), which lists certain deficiencies in an offer which will require such action, and that failure to comply with 200.7(d) is not one of them.

Paragraph 200.8(g)(1) provides:

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: * * *.

This is followed by seven subparagraphs describing various ways in which an offer can be defective.

There is nothing in the regulation to indicate that if a requirement is not listed under paragraph (g) (1) it can be violated without loss of priority. There is no language of limitation in the regulation purporting to state that the enumeration of categories of defects resulting in loss of priority is all inclusive.

The rule imposing loss of priority on an offeror who does not comply with a mandatory requirement of the regulation is based upon the proposition that the Department, if it determines to issue an oil and gas lease for land not within the known geological structure of a producing oil and gas field, is under a mandatory duty imposed by statute to issue a lease to the first qualified person who files a proper application. An offeror who does not comply with a mandatory requirement of the regulation is not a qualified applicant and is not entitled to priority until the defect is cured. *Cf. McKay v. Wahlenmaier*, 226 F. 2d 35 (C.A.D.C. 1955); *Madison Oils, Inc., et al.*, 62 I.D. 478 (1955).

This rule applies to all mandatory requirements, not only to those listed in paragraph 200.8(g)(1). Furthermore, in paragraph 200.8 (g) (2) the regulation sets out the circumstances under which failure to comply with a mandatory requirement of the regulation will not result in loss of priority. Failure to comply with paragraph 200.7(d) is not one of the defects for which an exception is granted.

Accordingly, offer BLM–A 041889 was defective as to tract No. 252 and could earn the offeror no priority as to that tract until he met the requirements of paragraph 200.7(d).

Finally, as to all three applications the land office required the offeror to agree to some stipulations prescribed by the Forest Service. In objecting to the Acting Director's affirmance of this requirement, the appellant says that there are inconsistencies between the stipulations required by the Forest Service and those required by the lease form and that he should only be required to sign one set of stipulations. He agrees that under the statute (30 U.S.C., 1952 ed., sec. 352) and the regulation (43 CFR 200.3), he must execute stipulations required by the head of the agency having jurisdiction of the land.

This same contention was considered by the Department in a recent decision, *Merwin E. Liss*, A–27888 (April 13, 1959), in which it held that the law requires that any lease issued be subject to the conditions prescribed by the administering agency (30 U.S.C., 1952 ed., sec. 352), that the act does not give the Department the function of passing upon the nature of the condition that agency seeks to impose on any lease to be issued with its consent, and that the applicant was properly

required to submit consent to the stipulations required by the Forest Service or face final rejection of his application.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, as modified as to offer BLM–A 041889, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## PACIFIC GAS AND ELECTRIC COMPANY ET AL.

A–27934 *Decided July 20, 1959*

**Mining Claims: Special Acts—Mining Claims: Surface Uses—Withdrawals and Reservations: Power Sites—Mining Claims: Withdrawn Land**

The dismissal of a protest against the conditional allowance of a placer mining claim under the act of August 11, 1955, is proper where the evidence supports the conclusion that placer mining operations would not substantially interfere with other uses of the land included within the placer claim.

**Mining Claims: Special Acts**

Where a riverbed is included within the limits of a mining claim, query whether the effect of mining operations on the use of the riverbed as a watercourse may be properly considered in determining, under section 2(b) of the act of August 11, 1955, whether mining operations substantially interfere with other uses of the land included within the claim.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Pacific Gas and Electric Company has appealed to the Secretary of the Interior from a decision of October 24, 1958, by the Acting Director of the Bureau of Land Management which affirmed a hearing examiner's decision dismissing the appellant's protest against the allowance of placer mining operations, subject to certain conditions, on 80 acres of land in sec. 22, T. 28 S., R. 30 E., M. D. M., California. The land is within a powersite withdrawal and subject to location under the provisions of the act of August 11, 1955, which authorizes the mineral development of certain lands withdrawn for power development (30 U.S.C., 1952 ed., Supp. V, sec. 621–625). The land here involved is also within the boundaries of the Sequoia National Forest.

The act of August 11, 1955, opens land withdrawn or reserved for power development or powersites to entry for location of mining claims under circumstances specified in the act. Section 4 of the act (30 U.S.C., 1952 ed., Supp. V, sec. 623) requires that the owner of

an unpatented mining claim on land within the scope of the act file notice of the location of the claim in the land office of the land district in which the claim is situated within a required time. Section 2(b) of the act (30 U.S.C., 1952 ed., Supp. V, sec. 621(b)) authorizes the Secretary of the Interior to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of land included within a placer claim which is located on land opened to mineral development under the act. The section provides that no mining operations shall be conducted for 60 days after filing the location notice, and if within that time the locator is notified of the Secretary's intention to hold a public hearing, mining operations on the claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary shall provide for one of the following: (*1*) a complete prohibition of placer mining; (*2*) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (*3*) a general permission to engage in placer mining.

On January 9, 1956, notice of the location of the Surprise placer mining claim on lands described above was timely filed in the Sacramento land office by David H. Kenison for himself and Dolly C. Kenison, Eugene M. Kenison, and Cloanne Kenison. In a letter dated February 10, 1956, the Forest Service, Department of Agriculture, requested that a public hearing pursuant to section 2(b) of the act of August 11, 1955, be held since recreational facilities of the Forest Service were adjacent to or within the area covered by the Surprise placer, and since mining operations might also interfere with a crossing for livestock permitted to graze in the forest. On February 16, 1956, the State supervisor notified the mineral locators that a hearing would be held. On May 13, 1957, the Pacific Gas and Electric Company, the appellant herein, filed a protest against the unconditional allowance of mining operations on the Surprise placer, alleging, in effect, that such operations would cause mining debris to enter the Kern River upstream from a place where the protestant diverts water for power purposes for protestant's Kern Canyon power plant and that mining debris in the stream would interfere with the safe and efficient operation of the power plant. The appellant's protest requested that mining operations not be permitted without requiring that special measures be taken to prevent mining debris from entering the appellant's structures and equipment.

A hearing on the protests was held on May 22, 1957, before an examiner at Bakersfield, California. At the outset of the hearing, the

examiner summarily dismissed the appellant's protest on the ground that it did not allege interference with other uses of the land included within the claim, but alleged rather that the operations of the mining claimants might interfere with use of the waters of a stream at a distance of 4½ miles from the claim itself. Despite this ruling by the examiner, a representative for the appellant participated in the hearing (Transcript of the hearing in the matter of David H. Kenison *et al.*, on May 22, 1957, at Bakersfield, California, pp. 43–50).

Evidence at the hearing established that the mining locators had filed an amended location notice which eliminated any conflict with improvements of the Forest Service in the vicinity of the claim. David H. Kenison testified for the locators that a portion of the Kern River was included in the mining claim in order to have water for operating the mining machinery; that special methods will be used to prevent any detrimental effect from mining operations on fishing in the area; that water used will be only temporarily detoured and returned to the stream at a distance of less than 200 yards; and that the mining locators intend to use the best known methods to keep the water clean in accordance with all State and Federal laws.

In a decision of July 18, 1957, the examiner dismissed the protests, holding that the placer mining operations would not substantially interfere with other uses of the land. The examiner found, however, that it would be detrimental to the scenic beauty of the area if mining operations should leave the land in a barren and destitute condition. Accordingly, the examiner issued an order of July 18, 1957, granting permission to the locators, their heirs and assigns, to engage in placer mining operations on condition (*1*) that the locators, their heirs and assigns, following placer operations, shall restore the surface of the claim to the condition in which it was immediately prior to those operations; and (*2*) that prior to commencement of operations they furnish a good and sufficient bond in the penal sum of $10,000 and thereafter maintain such bond in good standing to assure faithful performance by the locators, their heirs and assigns, in the restoration of the surface of the claim.

The Acting Director's decision affirmed the examiner's ruling on the ground that placer operations would not substantially interfere with the other uses of the land covered by the claim.

On this appeal it is contended that one use of the land within the mining claim is its use for the purpose of conveying water downstream, that a burden is imposed on the upper land through which the stream flows restricting the uses to which the land covered by the mining claim may be put, that the appellant, as a prior appropriator of waters on public land of the United States, has a property right restricting the uses to which the land covered by the mining

claim may be put. It is asserted further that interference with the appellant's prior appropriative rights is an interference with "other uses of the land included within the placer claim," within the meaning of section 2(b) of the act of August 11, 1955.

It may be that use of land as a watercourse, a watershed, or other uses in connection with water supply, development, and conservation projects should be regarded as within the scope of the phrase "other uses of the land" in section 2(b) of the act of August 11, 1955. Particularly where, as here, a portion of a riverbed is included in a mining location, uses of part of the land within the location include use as a watercourse and as a part of a watershed. Since the banks and beds of nonnavigable,[1] unmeandered streams, on lands belonging to the United States, containing valuable mineral deposits, may be included in locations and entries under the mining laws,[2] there may be situations where, for example, mining operations on such a placer might adversely affect the use of the riverbed or watercourse in conveying water. Thus, operations on a placer claim covering a part of a riverbed might substantially interfere with another use of the riverbed within the purview of section 2(b) of the act of August 11, 1955. Consequently, the fact that a protest alleges that placer operations would interfere with another use of waters of a stream, the bed of which is included within the limits of the placer, may not automatically require summary dismissal of the protest, and to the extent that the examiner's dismissal of the appellant's protest may so imply, it is open to doubt.

However, it is not necessary to resolve this doubt at this time since the real substance of the appellant's protest is not that mining operations will interfere with use of the riverbed within the claim to convey water downstream, but that the water may be impure because of mining operations. The examiner's ruling seemed to be based primarily on the fact that the appellant has a remedy under State law if mining debris in the stream resulting from placer operations causes damage to the appellant's structures. No objection is made on appeal to this basis for dismissing the protest. In any event, the appellant has submitted nothing to support a conclusion that placer operations would substantially interfere with other uses of the riverbed included within the claim. The Acting Director's decision that placer operations would not substantially interfere with other uses of the land covered by the claim presumably includes a determination that placer operations would not substantially interfere with other uses of that portion of the riverbed within the mining

[1] The record does not indicate whether the Kern River is nonnavigable.
[2] *Cataract Gold Mining Co. et al.*, 43 L.D. 248 (1914).

claim, such as its use for conveying water. A review of the record, including the evidence submitted at the hearing and on appeal, discloses no error in the Acting Director's decision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision dismissing the appellant's protest against the allowance of mining operations on the Surprise placer claim consistently with the examiner's order of July 18, 1957, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## WILLIAM KUHN

A-27963 *Decided July 20, 1959*

**Mining Claims: Surface Uses—Mining Claims: Special Acts**

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant when such statement is filed prior to the publication of any notice for the land covered by the claim, returned to the claimant prior to publication, and then refiled after the end of the 150-day period following publication.

**Mining Claims: Surface Uses—Mining Claims: Special Acts—Notice**

Where notice of publication is required by section 5 of the act of July 23, 1955, to be personally delivered to or to be mailed by registered mail to a mining claimant, the requirement is satisfied by mailing the notice by registered mail to the proper address and it is immaterial that the mail is returned unclaimed.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William Kuhn has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated December 5, 1958, which affirmed a decision of the manager of the Boise, Idaho, land office, dated May 22, 1958, which rejected verified statements filed by him pursuant to the act of July 23, 1955 (30 U.S.C., 1952 ed., Supp. V, sec. 601 *et seq.*), and held that his mining claims, the Lucky Mike, Bolder Placer Claim Assn., Erie Association Placer, Erie #1, Erie Flat #2, Erie Flat Claim, Erie #4, and Erie Flat #3, were subject to the limitations and restrictions specified in section 4 of the act (30 U.S.C., 1952 ed., Supp. V, sec. 612).

The act of July 23, 1955, limits the uses which holders of mining claims located after that date may make of the surface resources of the claims and requires holders of claims previously located to respond to a published notice requiring such action by filing a verified

statement within 150 days from the date of the first publication of such notice setting forth certain information with respect to their claims. If the verified statement is not filed as required, the failure operates to subject the claims to the same restrictions as to surface rights as apply to claims located after the date of the act.

The appellant first filed his verified statements on August 17, 1956. They were returned to him because the claims were not in an area as to which a notice had been published. Subsequently, at the request of the Forest Service, Department of Agriculture, two notices were published affecting two adjoining areas. One, referred to as the Eldorado-Fish Creek area, covered land in Idaho County; the other, referred to as the Pierce-Bungalow area, covered land in Clearwater County. The first publication was made on May 2, 1957. Subsequently, on May 19, 1958, over a year later, the appellant refiled his verified statements. These statements show that seven claims were recorded in Clearwater County and one in Idaho County.

The manager rejected the statements as being late. He stated that the record showed that copies of the notices published were received by the appellant by registered mail, return receipt Nos. 40443 and 40715. On appeal to the Director, the appellant denied receipt of the notices. He conceded that the first filing of the verified statements was before any legal notice had been given but contended that, because the Forest Service knew of his claims and negotiated with him about them during the period of publication and his claims were active claims, the situation should be regarded as if the verified statements had been timely filed.

The Director affirmed the manager on the ground that the first filings were not pursuant to any notice of publication and that, after the appellant received notice of the publication, he was bound to file verified statements within the 150-day period. Since he did not do so, his filings were late and were properly rejected.

On his present appeal, the appellant does not make clear his principal argument. He concedes that the verified statements were not filed during the 150-day period but states that they were filed before and after the period. He also states that prior to and during the period of publication the Forest Service was well aware of his presence and of the existence of his claims. From this he somehow concludes that his late filing should be accepted as complying with the statute.

I am unable to follow this argument in view of the admittedly plain language of section 5(a) of the 1955 act (30 U.S.C., 1952 ed., Supp. V, sec. 613(a)) which requires a mining claimant to file his verified statement "within one hundred and fifty days from the date

of the first publication of such notice." The statute does not contemplate the filing of verified statements indiscriminately but only in response to a published notice. Otherwise land office records would be cluttered with verified statements unrelated to any request for publication. In any event, the appellant's verified statements were returned to him after his first filing and he accepted their return without demurrer. Obviously he acquiesced in their return as having been prematurely filed.

Appellant advances another contention of more substance. He contends that the published notice was ineffective as to him because the notice was not personally served or served by registered mail on him as a known mineral claimant.

Section 5(a) of the 1955 act provides that within 15 days after the date of first publication of notice the agency or department requesting publication "shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail addressed to each person in possession or engaged in the working of the land * * * " whose name and address are shown on certain documents required by the act to be filed with the request for publication.

Section 5(e) provides:

> (e) If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section 5 as to the personal delivery *or mailing* of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person * * * and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person. [Italics supplied.]

Recently supplied evidence from the Forest Service shows that the existence of the appellant's claims was known to that agency. The affidavits of the respective examiners of the Eldorado-Fish Creek and Pierce-Bungalow areas, required by section 5(a) of the act, list the appellant as having an interest in certain claims and give his address as Pierce, Idaho. The certificate of examination of tract indexes for Idaho County (Eldorado-Fish Creek area), also required by section 5(a) of the act, lists the appellant as having an interest in claims but gives his address as Orofino, Idaho. The certificate for Clearwater County (Pierce-Bungalow area) does not list the appellant. According to the evidence furnished by the Forest Service, the notice relating to the Eldorado-Fish Creek area was sent by registered mail to the appellant at both Pierce and Orofino, Idaho (registry Nos. 40685 and 40715). The notice pertaining to the Pierce-Bungalow area was sent by registered mail (No. 40443) to the appellant at Pierce, Idaho. The notices were sent on May 7, 1957, and returned unclaimed on June 3, 1957.

It thus appears that the manager and the Director were incorrect in their decisions in stating that the appellant had received notice of the publication by registered mail. However, section 5(a) requires only personal delivery of a copy of the notice of publication or that a notice "be mailed by registered mail." Similarly, section 5(e) refers to personal delivery "or mailing" of a copy of notice. Nothing in the act requires anything more than the mailing of the notice by registered mail to the mining claimant's address as shown, in this case, in the affidavits of examination of the land and the certificates of examination of the tract indexes. Therefore, it is concluded that the requirements of the act were complied with in this case and that the notices of publication first published on May 2, 1957, were effective as to the appellant's claims.

The Department has held that a verified statement filed under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant where the statement is filed after termination of the 150-day period prescribed by the statute. *Hines Gilbert Gold Mines Company*, 65 I.D. 481 (1958). As the appellant did not file his verified statements within the period of time allowed and thereby failed to meet the requirements of the law, the Secretary is without authority to save him from the consequences of his failure.[1]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## B. L. HAVISIDE, JR.

A–27932 *Decided July 21, 1959*

**Oil and Gas Leases: Lands Subject to**

Land withdrawn for military purposes by means of a public land order which specifically withdraws the land from mineral leasing but permits the Secretary of the Interior to authorize surface uses and removal of materials thereon is not thereby subjected to oil and gas leasing.

[1] The rejection of the verified statements, of course, does not result in the appellant's mining claims being declared invalid. It simply means that he can use the claims only for mining purposes and that the United States has authority to manage and dispose of the vegetative surface resources and to manage other surface resources. The mining claimant can use the vegetative and other surface resources for mining purposes. The mining claimant can also apply for a patent to his claim and, if a patent is issued, he secures title free from any restrictions or reservations as to use or disposal of surface resources.

**Oil and Gas Leases: Discretion to Lease—Oil and Gas Leases: Lands Subject to—Withdrawals and Reservations: Effect of**

Section 6 of the act of February 28, 1958, does not give the Secretary of the Interior authority to issue oil and gas leases, with the concurrence of the Secretary of Defense, on lands in existing withdrawals which expressly prohibit mineral leasing.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

B. L. Haviside, Jr., has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated October 24, 1958, which affirmed decisions of the manager of the land office at Anchorage, Alaska, dated May 14, 1958, applicable to lease offer Anchorage 036282, and May 15, 1958, applicable to Anchorage 036272, 036274 through 036281, and 036283, insofar as those decisions rejected his offers on the ground that the lands applied for have been withdrawn for military purposes by Public Land Order 861, dated September 3, 1952 (17 F.R. 8158–8159).

The appellant acknowledges the withdrawal, but contends that the lands are subject to oil and gas leasing subject to reasonable stipulations which he is willing to make (*1*) because the withdrawal order specifically provides for issuance of leases or permits for surface use of the land, sale of timber and other materials thereon, and other administration of the lands; (*2*) because the act of February 28, 1958 (72 Stat. 27, 30), provides that military withdrawals shall be subject to oil and gas leasing unless the Secretary of Defense determines that leasing is inconsistent with the military use of the lands; and (*3*) because the use of land having potentialities for petroleum production for the military purposes to which it is now devoted seems difficult to justify.

The appellant's first contention is predicated upon the language of Public Land Order 861 that the public lands described therein—

> * * * are hereby withdrawn, except as hereinafter provided, from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the Department of the Army as an impact area and safety zone for antiaircraft artillery firing, such operations to be conducted only for two six-week periods commencing April 15th and October 16th, respectively, of each year:
>
> * * * * * * * *
>
> The Bureau of Land Management, Department of the Interior, *may* issue leases or permits for the *surface* use of such lands, and conduct sales of timber or other materials thereon, under applicable laws, and otherwise administer the lands, provided that all documents authorizing the use of, or access to, the lands shall provide that every person occupying the lands under authority thereof shall vacate them during the periods of firing and use by the Department of the Army, without compensation for loss of use of the lands or for damages caused by Army use. [Italics added.]

It is apparent that the language quoted above was intended to authorize and does authorize the Secretary of the Interior, in his discretion, to permit such *surface* use of the lands in the impact area and safety zone as may be subject to complete withdrawal by such users during the periods of firing. The removal of surface resources, such as timber, falls within the category of permissible uses, but it is not possible to suppose that drilling for oil and gas is included. In the first place, such drilling is not a surface use of the land, but is intended to exploit the subsurface resources of the land. In the second place, reading the second paragraph of the withdrawal order, quoted above, as contended by the appellant, would completely vitiate the first paragraph of the order so far as it expressly bars mineral leasing. In the third place, an oil well and storage tanks could not be removed during the periods of firing and would not be desirable additions to the land during such periods despite the oil lessee's willingness to forego damages for resulting loss because of the inflammatory and explosive risks thus created. Accordingly, the only reasonable interpretation of the public land order is that it closes the lands within the firing range to oil and gas leasing.

The appellant's second contention is predicated upon section 6 of the act of February 28, 1958, *supra*, which provides:

> All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: *Provided*, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

The appellant assumes that this provision enlarged the authority of the Secretary of the Interior to lease withdrawn lands, i.e., that it gave him authority to issue mineral leases on withdrawn lands which previously were withdrawn from mineral leasing. Specifically, he assumes that the 1958 act authorizes the Secretary to issue oil and gas leases on lands theretofore withdrawn from mineral leasing by Public Land Order 861. The appellant is mistaken. The statutory provision quoted above simply states that public lands withdrawn or reserved for use by the Department of Defense, with the exceptions specified, remain under the jurisdiction of the Department of the Interior so far as minerals are concerned and such minerals are not to be developed or disposed of except under the public land mining

and mineral leasing laws administered by the Department of the Interior. It does not state that lands specifically withdrawn *from mineral leasing* shall thenceforth be open to mineral leasing.

The legislative history of section 6 makes it clear that no such broad purpose was intended by the provision. In the report of the House Committee on Interior and Insular Affairs on H.R. 5538, 85th Congress, which became the act of February 28, 1958, the following explanation is given of section 6:

> Read together with the committee findings above respecting the Defense position on petroleum resources, the object and purpose of this section are clear. Until the presentation by Defense witnesses on petroleum reserves, and the effect of the prospective airspace withdrawal on pending applications for restriction of outer Continental Shelf lands, committee members had believed there was universal agreement that responsibility for disposition of minerals in withdrawn or reserved public lands was exclusively vested in the Secretary of the Interior.
>
> Enactment of this section into law *actually constitutes a restatement of the law as it is today*, in the view of the committee and the Department of the Interior. In short, as declared above, the provisions of section 6 of the reported bill will serve to remove whatever doubts may exist, if any, as to the laws which govern the disposal of or exploration for, any and all minerals, including oil and gas, in public lands of the United States heretofore or hereafter withdrawn or reserved by the United States for the use of defense agencies. (H. Rept. 215, 85th Cong., 1st sess., p. 67; italics added.)

In his testimony before the House Committee on Interior and Insular Affairs on substantially the same provision in other bills, Assistant Secretary of the Interior Hatfield Chilson said:

> It would continue to be a matter of discretion whether the minerals in the lands in question would be made subject to disposal, and deposits would not be opened to disposition, if it would be contrary to the public interest (including national security). Under long-established procedures of the Department of the Interior, no disposition is made of minerals within withdrawn or reserved areas without the concurrence of the head of the agency administering the withdrawn or reserved lands.
>
> It is assumed that the withdrawals made under the provisions of this legislation could not be amended except by enactment of subsequent and specific legislation. Therefore, the Secretary of the Interior could not [t]ake such actions in mineral disposals inconsistent with the enabling legislation.
>
> *It is also assumed that under present and existing withdrawal orders, the Secretary of the Interior cannot unilaterally dispose of the minerals if such is prohibited by the order of withdrawal.* Therefore, it appears that the intent of section 6 is that if minerals are to be disposed of in presently military withdrawn areas, they can only be disposed of by the Secretary of the Interior under the mining and mineral-leasing laws or other applicable laws. *Such disposals, of course, relate to the terms of the original withdrawal order or amendments thereto.* (Hearings before House Committee on Interior and Insular Affairs on H.R. 627, H.R. 575, H.R. 608, H.R.931, H.R. 1148, H.R. 3403, H.R. 3661, H.R. 3788, H.R. 3799, and H.R. 3860, 85th Cong., 1st sess. (1957), pp. 236, 237; italics added.)

The limited scope of section 6 is also indicated in a colloquy which occurred in the debate in the House of Representatives on section 6. Congressman Engle, sponsor of the bill, was asked whether the legislation would empower the Secretary of the Interior to authorize drilling on the Barksdale Air Force Base, a tract given to the United States for military purpose. Congressman Engle replied:

> This bill does not add to any authority that they already have in that respect. In other words, if they do not have the power now, this bill does not give it to them. (103 Cong. Rec. 5522.)

It is thus clear beyond doubt that Congress had no intention other than to affirm the fact that mineral leasing of areas withdrawn for defense purposes, with certain exceptions, was under the jurisdiction of the Secretary of the Interior and that such leasing was to be in accordance with the mineral leasing acts. There is no evidence that Congress intended to strip the President, or his delegate, of his power to withdraw lands absolutely from mineral leasing.

In this case, the withdrawal order specifically provides that the land is withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws. Thus the Secretary of the Interior has no authority to lease for oil and gas purposes, entirely without regard to the attitude of the Secretary of Defense on the question whether such leasing would be inconsistent with the military use of the land. Accordingly, the appellant's contention that the Secretary of the Interior must accept offers unless the Secretary of Defense objects is without substance.

The appellant has presented no evidence which tends to show that the need for development of petroleum resources is so great as to require discontinuance of the military use of the land included in his lease offers. In any event, his offers cannot be considered while the land is still unavailable for leasing because of the withdrawal. Thus his third contention has no merit.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## ALFRED DONALDSON TROTTER, SR.

A–27981 *Decided July 21, 1959*

**Desert Land Entry: Applications—Applications and Entries: Generally**

Where successive applications for desert land entry on the same land are filed and an entry is allowed on the first application but is subsequently canceled because the entryman was not entitled to make the entry, it is er-

roneous to reject the second application for entry on the ground that the second applicant lost his rights under his application upon the allowance of the first application; he loses such rights only if the allowance of the entry on the first application was proper.

*Ohmer V. Hensel, 45 L.D. 557 (1916), and James R. Gwyn, A-26806 (December 17, 1953), distinguished.*

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred Donaldson Trotter, Sr., has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated December 15, 1958, which held that his desert land application, Los Angeles 0138802, should be rejected. The decision in which this ruling was made was entitled *George L. Wright*, Los Angeles 019833, 0138307, and was concerned with an appeal by Wright to the Director from the rejection of his application for the reinstatement of his relinquished homestead entry Los Angeles 091833.

The facts are that Wright, after a series of applications, cancellations, and amendments, filed a desert land application (Los Angeles 0138307) on February 7, 1956, for the land involved, which is described as the SW¼ sec. 14, T. 10 N., R. 3 E., S.B.M., California. On February 23, 1956, the appellant filed a desert land application for the same land. On March 1, 1956, Wright's desert land application was allowed, but on April 9, 1956, the entry was canceled on the ground that Wright had exhausted his right of entry under the desert land laws. Subsequent to the issuance of the decision of cancellation but before it was served on him (on April 23, 1956), Wright filed a relinquishment of his entry on April 16, 1956. Thereafter, on June 18, 1956, Wright filed an application for the reinstatement of the homestead entry, Los Angeles 091833, which he had previously had on the land and which he had relinquished on February 6, 1956, the day before he filed desert land application Los Angeles 0138307. The manager denied reinstatement and inasmuch as Wright filed an appeal to the Director no action was taken on Trotter's application by the land office until the Director's decision of December 15, 1958.

In his decision the Director held that the appellant's application should have been rejected on March 1, 1956, when Wright's desert land application was allowed, but the fact that it was not and Wright's entry was subsequently canceled did not create any new right in Trotter to the land under his application since allowance of Wright's entry on March 1, 1956, was an appropriation of the land which terminated all rights under the appellant's application. *Ohmer V. Hensel*, 45 L.D. 557 (1916); *James R. Gwyn*, A-26806 (December 17, 1953).

The appellant argues on appeal that Wright was not qualified to hold an entry at the time his application was filed on February 7,

1956; that since he was not eligible to hold an entry the entry allowed on March 1, 1956, was void *ab initio;* and that the effect of the Director's decision is to recognize Wright's entry solely for the purpose of defeating his application, but to refuse to recognize it for any other purpose.

I think the Director erred in his decision. The mere act of allowing Wright's entry on March 1, 1956, did not in itself terminate all rights under the appellant's application. It is true, as the Director said, that as soon as Wright's entry was allowed the next step should have been the rejection of the appellant's application. However, as soon as the appellant's application was rejected, he would have the right of appeal from the rejection. Suppose that on his appeal it was established that Wright's entry had been improperly allowed, obviously the result would be the cancellation of Wright's entry and the allowance of the appellant's application, provided he met all requirements for an entry. If the appellant failed on appeal to demonstrate the impropriety of allowing Wright's entry, the rejection of the appellant's application would stand. This clearly demonstrates that it is not the mere act of allowing the first application that warrants the rejection of the junior application. It is only the *proper* allowance of the first application that justifies rejection of the junior application.

The Director seems to have extended to this case the well-established rule that an application cannot be filed for land in an outstanding entry, regardless of whether the entry is valid, void, or voidable. See *Joyce A. Cabot et al.*, 63 I.D. 122 (1956). This rule is not applicable to a situation where at the time the application is filed the land is not embraced in an outstanding *entry* but only in prior *applications* for the land.

The *Hensel* and *Gwyn* cases, *supra*, cited by the Director, do not support his position. They were cases where senior and junior applications were filed for land, the senior application was allowed, and then subsequently the entry was relinquished by the senior applicant. The junior applicant then sought to take advantage of the relinquishment, claiming that his application should now be allowed. The Department held that he lost his rights when the senior application was allowed. In these cases there was nothing to indicate that the senior application had been improperly allowed. The entries were not canceled but were relinquished. The decisions therefore must be considered as having been based on the premise that the entries were properly allowed, which is not the case here.

It follows that the appellant's application was improperly rejected for the reason assigned in the Director's decision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental

Manual; 24 F.R. 1348), the Director's decision is reversed and the case is remanded for further appropriate action on the appellant's application.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## HENRY S. MORGAN
## EDWIN W. STOCKMEYER

A–28004 *Decided July 30, 1959*

**Oil and Gas Leases: Applications—Applications and Entries: Priority**

A regulation providing that, to determine the order in which simultaneously filed applications will be processed, all such applications which conflict in whole or in part will be included in a drawing, does not authorize a drawing of simultaneously filed oil and gas lease offers, some of which are and some of which are not in conflict in whole or in part as to the lands described in the applications.

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

A drawing is properly set aside where it included simultaneously filed offers for oil and gas leases some of which were and some of which were not in conflict in whole or in part.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henry S. Morgan has appealed to the Secretary of the Interior from a decision of January 16, 1959, by the Acting Director of the Bureau of Land Management setting aside a drawing to determine the order of processing simultaneously filed applications for oil and gas leases on acquired lands in the DeSoto National Forest, Mississippi. The Acting Director's decision reversed a decision by the manager of the Eastern States land office dismissing a protest against the drawing filed by Edwin W. Stockmeyer, one of the applicants whose offer was included in the drawing. Stockmeyer filed a brief in support of the Acting Director's decision in this proceeding.

The drawing involved in the instant appeal was held on May 16, 1958, in the Eastern States land office and included eight noncompetitive acquired lands lease applications which were filed at the same time on May 1, 1958. The eight offers were not mutually conflicting as to the lands applied for, but consisted, instead, of three separate groups of applications. The several applications within each separate group conflicted only as to the lands described in the other applications within the group but did not conflict with each of the other applications included in the drawing. Thus, the appellant's application conflicted with only two of the seven other applications included in the drawing, namely, with BLM-A 046743, filed by Stockmeyer, and with BLM–A 046748, filed by Bruce Anderson. None of the five other offers in the drawing covered any of the land described

in the appellant's offer.[1] The serial number of the appellant's offer was drawn first of the three conflicting offers in the appellant's group in the drawing on May 16, 1958. On May 28, 1958, Anderson withdrew his offer, and on April 3, 1959, he requested a refund of the advance rental he paid when he filed the offer. On April 8, 1959, refund of the advance rental was authorized. Consequently, of the eight offers included in the drawing on May 16, 1958, only Stockmeyer's application is in conflict with the appellant's application.

Stockmeyer's protest, filed on May 26, 1958, asserted that the drawing was invalid because it should have been confined to applications which conflicted in whole or in part as to the lands described therein, and that the inclusion in the drawing of offers which did not so conflict violated the regulatory provision that all simultaneously filed offers which conflict in whole or in part will be included in a drawing to determine the order of processing the offers. By decision of July 25, 1958, the manager of the Eastern States land office dismissed the protest on the ground that the combined drawing was impartial and did not affect the protestant's chances since priority within each of the three groups of conflicting offers would be separately determined and each offer would be regarded as competing only with those with which it conflicted. Stockmeyer appealed from this decision to the Director.

The departmental regulation (43 CFR 191.10) governing the disposition of simultaneously filed applications for leases provides that:

> Where applications or offers received by mail or filed over the counter at the same time are in conflict, the right of priority of filing will be determined by public drawing in the manner provided in § 295.8(b) of this chapter.

43 CFR 295.8(b) provides that:

> All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

The Acting Director held that these provisions have reference only to applications for the same lands, that no drawings are necessary except where offers describe the same lands, and that the drawing in this case erroneously included offers which did not so conflict. The decision directed that new drawings be held for each of the three groups of applications included in the drawing of May 16, 1958, in order to determine the sequence in which the offers would be processed.

The appellant contends that the regulations quoted above do not require that only applications which conflict with one another be included in a drawing to determine priority, but require only that

[1] BLM-A 046747 and 046749 conflict only with each other and 046744, 046745, and 046750 conflict only with each other.

each offer in the drawing be filed simultaneously and conflict with at least one other offer included in the drawing. The contention is not persuasive. Applications which conflict are those which are incompatible or mutually inconsistent because some or all of the same lands are applied for by more than one applicant, and where applicants are not competing with one another for a lease on all or part of the same land, their applications are not in conflict within the meaning of the above-quoted regulations. 43 CFR 191.10 and 295.8(b) authorize a drawing which includes all simultaneously filed applications which conflict in whole or in part, and not a drawing which includes applications, some of which do, and some of which do not so conflict. It follows that the inclusion in this drawing of applications which did not conflict is not authorized by the regulation.

The purpose of a drawing in cases of conflicting offers to lease is to fix the order in which the several applications will be examined for determining which of the competing applicants is entitled to the preference granted by section 17 of the Mineral Leasing Act, as amended, to the person first filing an application for a noncompetitive lease who is qualified to hold a lease, and the Department tries scrupulously to observe its regulations related to determining this preference. Consequently, regardless of whether a drawing combining separate groups of conflicting offers gives each applicant the same chance of being first as would a separate drawing—if the sequence of processing is determined separately for each group in the combined drawing—such a combined drawing is not authorized by the regulations. As the regulations have the force of law, the Acting Director's decision requiring new drawings which comply with the regulations was correct (*McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C. 1955)).

The only other matter raised on appeal which needs to be determined here is the contention that Stockmeyer's protest against the drawing was filed too late. The protest was filed 10 days after the drawing was held. In the circumstances of this case, the filing of the protest was timely and did not amount to acquiescence in the drawing (see *McKay* v. *Wahlenmaier*, *supra*; *Edith M. Kasper*, *Blanche V. White*, A–27821 (February 4, 1959)).

For the reasons mentioned herein and in the Acting Director's decision, the requirement that new drawings be held for each group of applications included in the drawing of May 16, 1958, was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

U.S. GOVERNMENT PRINTING OFFICE: 1959

*June 12, 1959*

# APPLICABILITY OF THE HATCH ACT TO THE GOVERNOR OF THE TERRITORY OF HAWAII

**Federal Employees and Officers: Political Activities**

Section 2 of the Hatch Act prohibiting participation in or interference with the election of certain officers is applicable to the Governor and secretary of the Territory of Hawaii as well as other individuals similarly situated.

**Federal Employees and Officers: Political Activities**

Section 9 of the Hatch Act is not applicable to the Governor of the Territory of Hawaii.

**Hawaii: Generally**

In the Hawaii Statehood Act, Congress specifically authorized persons holding Territorial legislative, executive, and judicial offices, as well as the Delegate in Congress, to continue to discharge the duties of their respective offices.

**Hawaii: Governor**

The Territorial Governor of Hawaii is a "Territorial officer," "a person holding executive office in the Government of said Territory," and "an officer of said Territory."

**Hawaii: Governor**

The Territorial Governor of Hawaii is eligible to continue in that position while seeking an elective office under the new State government.

**Statutory Construction: Legislative History**

The legislative history of the Hawaii Statehood Act clearly shows that Congress authorized the Territorial Governor to continue to discharge the duties of his Territorial office while seeking elective office in the new State government.

**M–36576** JUNE 12, 1959.*

TO THE SECRETARY OF THE INTERIOR.

By referral from your office on June 9, 1959, this office has been asked to advise you regarding the eligibility of Governor Quinn of Hawaii to continue in his position as Territorial Governor at the same time he is officially a candidate for elective office as Governor of the new State of Hawaii. The request for advice on this question, it appears, is in response to a letter dated June 9, 1959, from Senator James E. Murray, Chairman of the Senate Committee on Interior and Insular Affairs, a copy of which your office transmitted on the same date.

For the reasons hereinafter set out, it is my opinion: that the Territorial Governor of Hawaii is eligible to continue in that posi-

*Not released in time for inclusion chronologically.

tion at the same time he is officially a candidate for an elective office in the new State of Hawaii; that section 9 of the Hatch Act[1] is not applicable to the Governor of the Territory of Hawaii; that the Governor of the Territory of Hawaii is a "Territorial officer," "a person holding executive office in the Government of said Territory," and an "officer of said Territory"; that the Congress, by enactment of the Hawaii Statehood Act[2] provided without qualification that all of the officers of the Territory of Hawaii shall continue to discharge the duties of their respective offices until the Territory is admitted into the Union; that, in thus providing that all of the officers of the Territory—including the Governor—could seek election to State or Federal office without relinquishing their then offices, the Congress acted in a manner which directly parallels action taken by the people of Hawaii in adopting their own State constitution; and that, notwithstanding the provisions of the Hawaii Statehood Act, both the Governor and secretary of Hawaii, as well as other individuals similarly situated, are subject to the provisions of section 2 of the Hatch Act.[3]

By letter of May 7, 1959, to Senator Murray, this office pointed out that on at least four occasions in the past 16 years, my predecessors have had occasion to consider the applicability of section 9 of the Hatch Act to, among others, the Governor and secretary of the Territory of Hawaii. In each instance, and without exception, it was concluded that this provision is inapplicable to the political activities of the Governors of the Territories, including Hawaii.

In concluding my letter to Senator Murray, I stated that in light of these longstanding precedents I would hesitate either to affirm or upset their holdings without giving most careful independent consideration to the subject matter. I have now had an opportunity to thoroughly and carefully review these precedents.

[1] Act of August 2, 1939 (53 Stat. 1147, 1148; 5 U.S.C. 118i), as amended. "(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof * * * shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws. * * *"

[2] Act of March 18, 1959 (73 Stat. 4, sec. 7(c)) [Public Law 86-3].

[3] Sec. 2 as codified and reenacted prohibits the use of "* * * official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or Possession * * *" 18 U.S.C. sec. 595.

I concur in the views expressed in the opinions dated April 3[4] and April 5, 1943,[5] and in the letters of February 18, 1952,[6] May 9, 1958,[7] and June 16, 1959,[8] to which reference is made in my letter to Senator Murray. While other arguments may be advanced reaching the same conclusion, it does not appear to be necessary or desirable to expand on the reasoning expressed in this line of harmonious decisions directly in point. Indeed, the letter from Senator Murray of June 9, 1959, contains a concession in its third paragraph, in effect, that the Governor of Hawaii may well be excluded from the letter of the law in question, i.e., section 9 of the Hatch Act.

In my letter to Senator Murray on this subject, it was also observed that independent consideration by this office of the basic question raised would also involve relating of the Hatch Act provisions and those of section 7(c) of the Hawaii Statehood Act[9] to a formal filing of a declaration of candidacy. We turn then to that provision. The third sentence of section 7(c) reads:

> Until the said State is so admitted into the Union, the persons holding legislative, executive, and judicial office in, under, or by authority of the government of said Territory, and the Delegate in Congress thereof, shall continue to discharge the duties of their respective offices.

A plain reading makes it clear that this language was intended to apply to the Governor of the Territory, among others. It would seem to be axiomatic that the Governor of the Territory, in the language of the quoted section is a person "* * * holding * * * executive * * * office *in* * * * the government of said Territory." The laws governing the creation, establishment, and continuance of the Government of the Territory of Hawaii are embodied in the Hawaiian Organic Act, as amended.[10] Section 66 of that act[11] provides in part:

> * * * the executive power of the government of the Territory of Hawaii shall be vested in a governor, who shall be appointed by the President * * *.

One of my predecessors, without equivocation, classed the Governor and secretary of Hawaii as "Territorial officers";[12] referred to the Governor and secretary and immediately thereafter referred to "*other*

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[4] Applicability of Hatch Act to Officers and Employees of the Territory of Hawaii, 58 I.D. 390 (1943).
[5] Applicability of the Hatch Act to Officers and Employees of the Territory of Alaska, 58 I.D. 407 (1943).
[6] Letter of the Chief Counsel, Office of Territories, to the Acting Governor of Alaska.
[7] Letter of the Solicitor, Department of the Interior, to the Delegate from Alaska.
[8] Letter of the Solicitor, Department of the Interior, to the Delegate from Alaska.
[9] Act of March 18, 1959, *supra*.
[10] Act of April 30, 1900 (31 Stat. 141), as amended.
[11] *Ibid.* (48 U.S.C. sec. 531).
[12] 58 I.D. 390, 393 ff. (1943).

Territorial officers and employees";[13] he then concluded that the Governor and secretary "are not employed in the executive branch of the *Federal* government."[14] Any doubt as to such classification is removed by reference to the last syllabus point in this pilot opinion on political activities of a Territorial Governor. It reads in part:[15]

> No officers or employees of the Territory of Hawaii, other than the Governor, the Secretary * * *.

To quarrel with the proposition that the "Governor of the Territory" or the "Territorial Governor" is an "officer of the Territory," a conclusion reached in this pilot decision and undisturbed since, would be, in our view, to quarrel with the unarguable.

And, in light of the quoted Organic Act provision, *supra*, it is clear that the Governor of the Territory is, in the language of section 7(c) a "person holding executive office in the government of said Territory."

The legislative history of the bill,[16] which became the Hawaii Statehood Act, fully supports the proposition that the Congress intended to include the Governor of the Territory among the persons who, until admission of the Territory into the Union "* * * shall continue to discharge the duties of their respective offices." As reported by the Senate Committee on Interior and Insular Affairs this section[17] applied to:

> * * * the persons holding legislative, executive, and judicial office in, under, or by authority of the government of said Territory, and *all of the officers of said Territory*, including the Delegate in Congress * * *. (Italics supplied.)

The record of proceedings for March 11, 1959, in the Senate carry the committee proposed amendments including those touching section 7(c)[18] as well as this section of the bill as it would read upon adoption of the committee amendments.[19] Thereafter, and most significantly, the subcommittee chairman in charge of the bill—Senator Jackson of Washington—declared:[20]

> Mr. JACKSON. Mr. President, I should like to call up some technical amendments which I have sent to the desk, and ask that they be considered en bloc. *These amendments are intended to correct grammatical and typographical errors* which have been discovered * * *. (Italics supplied.)

Included in these amendments, adopted en bloc[21] was:

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[13] *Ibid.*, p. 395.
[14] *Ibid.*, p. 394.
[15] *Ibid.*, p. 391.
[16] S. 50, 86th Cong., 1st sess.
[17] *Ibid.*, as reported by Senate March 5, 1959, p. 14, lines 7 through 11. [S. Rept. 80, 86th Cong.]
[18] Cong. Record, p. 3412 [vol. 105]. [Daily Ed.]
[19] *Ibid.*, pp. 3413 and 3414.
[20] *Ibid.*, p. 3429.
[21] *Ibid.*, p. 3429.

> Section 7(c), p. 14, line 9, strike out the following words: "all of the officers of said territory including."

With this change identified as technical—thus not affecting the intent or substance of what remained of the third sentence of section 7(c)—we have the only clue I have been able to discover in the floor proceedings as to what was intended by the amendments to section 7(c). And, whatever else can be said of the section and its interpretation, and no more need be said for our purposes here, it is clear that the persons Congress intended to continue in office were "all of the officers of said Territory." That this action by the Senate comports with the intent of the reporting committee is readily ascertained by reference to the committee report where, respecting the language in question, it is declared: [22]

> The subsection also provides that *Territorial officers*, including the Delegate in Congress, shall continue in their offices until the new State is admitted. * * * (Italics supplied.)

The House Interior Committee report [23] is to the same effect:

> * * * The subsection also provides that all officers of the Territory and its delegate in Congress shall continue in their offices until the new State is admitted.

If the Territorial Governor is not an "officer of the Territory," then, in my view, the Territory has none.

Here, it should perhaps be pointed out that the repetition of certain phrases—as is done in the incoming letter—purporting to describe the position of the Governor of the Territory of Hawaii as a "Federal post," "Federal office," "job in the Executive branch of the United States Government," and a "Federal post in the Executive branch" does not, *ipse dixit*, convert this Territorial Governorship into that which it is not.

As one additional aid in construing legislative enactments, we may examine the consequences of alternative constructions placed on the language used.

Inquiry made of the Office of Territories has resulted in advice that there appear to be some 14,083 positions for employees who make up the "Government of the Territory of Hawaii," i.e., the persons holding legislative, executive, and judicial office. This figure includes the Governor and secretary of Hawaii, as well as the Delegate in the Congress, in view of section 7(c) of the Statehood Act.

To ask us to hold that section 7(c) does not include the Governor of the Territory as one who shall continue in office is to ask that we reach this conclusion: Congress intended to provide that 14,082 of

[22] S. Rept. 80, 86th Cong., 1st sess., p. 18.
[23] H. Rept. 32, 86th Cong., 1st sess., p. 20.

the persons holding legislative, executive, and judicial offices in the Territory of Hawaii—including judges, teachers, and professors, Territorial Senators and Representatives, and the Delegate from Hawaii—*shall* continue in office (and whether they do or do not seek office), but that the 14,083d one, Territorial Governor Quinn, *shall not* continue in his present office if he seeks other elective office. To saddle Congress with an intent to achieve such an illogical result would be to arrive at a manifestly unsound conclusion.

Because of the contents of the letter upon which you have asked my advice, and in connection with the foregoing, one other point compels our attention. The letter can only be read as standing for this proposition: that one "accepting substantial Federal pay for fulfilling the duties of that Federal post, while at the same time devoting his time and energies and office to active political campaigning in his own behalf," [24] is *ipso facto* a wrongdoer, either "legally" or "morally" or "technically."

But this does not, of course, follow. If it did, then Congress by adoption of section 7(c), for example, with its clear and direct reference to continuance in office of the Delegate from Hawaii would have directed a "Federally-paid, Federally-posted" official to remain in office while, or even though, he sought other elective office and engaged in active political campaigning. In short, if the argument advanced is sound, Congress directed an act *malum in se*—wrong in itself.

That Congress did not and would not have directed such an act—and that such a temporary dual assignment is neither unusual, nor a wrong in itself—is suggested not only by the foregoing but, in the press of time here involved, by briefly resorting to and leaning upon the maxim *argumentum a communiter accidentibus in jure frequens est.* [25]

Campaigns involving a sitting State governor running for a United States Senate seat while continuing in office, or *vice versa*, have been fairly frequent and have attracted widespread publicity, not because wrong—but, probably, because interesting. Recently, with attendant nationwide publicity, amendments to controlling law of one of our States were affected so as to permit a well-known sitting Member and leader of the United States Senate to continue in his Senate position even though during that continuance he might become a candidate for, and campaign actively to achieve, the office of President of the United States.

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[24] Letter of June 9, 1959, from Senator Murray to the Secretary, p. 1, par. 2.

[25] "An argument drawn from things commonly happening is frequent in law. Broom Max, 44." (Black, *Law Dictionary*, p. 137 (4th ed. 1951).)

To impose an "ineligibility to continue in Territorial office if a candidate for State elective office" rule would be, incidentally, to prohibit the Territorial Governor from engaging in activities which the people of Hawaii, in adopting their constitution, clearly intended should not be denied the Governor of the new State. The office of the highest legal authority in the government of the Territory of Hawaii in support of this point needed only to quote the Report of the Committee of the Whole explaining the applicable provision of Hawaii's constitution in these words: [26]

> Your Committee likewise recommends adoption of the fifth paragraph without change, with the understanding that a public office-holder or employee could seek election to the governorship without first relinquishing his then office or employment. Likewise it is understood that the governor could, without relinquishing the governorship, run for a Federal elective office, such as United States Senator * * *.

The Congress, by approval of the Hawaii Statehood Act, found the constitution adopted by the people of Hawaii to be in proper form and "accepted, ratified, and confirmed" it.[27] Thus neither the people of Hawaii in adopting this provision, nor the Congress in accepting, ratifying, and confirming it, saw fit to condemn the practice at which the letter giving rise to this opinion strikes.

Senator Murray has attached some importance to the fact that there is provision in existing law for continuity in the office of the Territorial Governor whereas there is "no such provision for a successor to the Delegateship, short of a special * * * election * * *." [28] The short response is that the distinction in this instance lacks any significance. Provisions for continuity in executive offices, national and State, in contrast to provisions for filling vacancies in the most numerous branch of the legislative bodies by election are commonplace in our constitutional systems. This generally accepted practice simply was incorporated in the 1900 Hawaiian Organic Act.[29]

In light of the foregoing, one additional observation regarding the main point in issue would seem in order. While I have been unable to discover in the record the reason for writing into the Hawaii Statehood Act language providing that all of the officers of the Territory shall continue to discharge the respective duties of their respective offices until admission of the new State, it is evident that Congress may have intended two obvious results which flow from

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[26] Memorandum to the Governor of Hawaii of April 29, 1959, from Hidehiko Uyenoyama, Assistant Attorney General, approved by Jack H. Mizuha, Attorney General, at pp. 2–3.
[27] Act of March 18, 1959, *supra*, p. 1, sec. 1.
[28] Letter of June 9, 1939, *supra*, p. 3.
[29] Act of April 30, 1900, *supra*, as amended, 48 U.S.C. secs. 535 and 651.

such action: first, to assure that the people of Hawaii would not, in the critical Territory-to-State transition period, be deprived of proper functioning of the legislative, executive, and judicial processes, the Congress provided for continuance in office of those experienced in and qualified to discharge those functions; and second, to assure that the people of Hawaii would not be deprived of an opportunity to draw upon all citizens of Hawaii to fill elective positions prescribed for the government of the new State, the Congress provided for eligibility of all present "officials of the Territory."

In summary, and for the reasons set out above, it is my opinion that the Territorial Governor of Hawaii is eligible to continue in that position at the same time he is officially a candidate for elective office in the new State of Hawaii. His activities while so engaged would by the reasoning above adopted continue to be subject—as would be true of any other individual similarly situated—to the provisions of section 2 of the Hatch Act.[30]

GEORGE W. ABBOTT,
*Solicitor.*

## MALCOLM C. PETRIE

A-28006 *Decided July 31, 1959*

**Applications and Entries: Filing—Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to**

The regulation which provides that a document required to be filed within a stated period, the last day of which falls on a nonbusiness day, is timely filed if it is filed on the next business day the office is open to the public, permits additional time for filing an application for extension of a noncompetitive oil and gas lease when the expiration of the primary term of the lease falls on a nonbusiness day, but during that additional time, the land formerly covered by the lease is not segregated solely because an application for extension may be filed; if an application for extension is not timely filed, the land is available for new offers on the first day following the expiration date of the primary term of the lease even though the expiration date fell on a nonbusiness day.

**Oil and Gas Leases: Cancellation—Oil and Gas Leases: First Qualified Applicant**

A noncompetitive lease erroneously issued to a junior applicant is properly canceled where the prior offer of a qualified applicant was improperly rejected.

[30] 18 U.S.C. sec. 595, *supra*.

*July 31, 1959*

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Malcolm C. Petrie has appealed to the Secretary of the Interior from a decision of December 23, 1958, by the Director of the Bureau of Land Management, which modified and affirmed a decision by the manager of the Salt Lake City land office canceling oil and gas lease Utah 022827, which was issued to the appellant effective July 1, 1957. The Director's decision also reversed separate decisions by the manager rejecting three lease offers filed by Mrs. Estelle Wolf. Only one of these offers, Utah 022769, is in issue on this appeal.

The land covered by the appellant's lease is the same land as that for which Mrs. Wolf applied under application Utah 022769, being 640 acres described as the E½ sec. 13 and E½ sec. 24, T. 24 S., R. 17 E., S.L.M. The land was included in oil and gas lease Utah 06087, issued April 1, 1952. The expiration date of the primary term of this lease was Sunday, March 31, 1957, a nonbusiness day in the Utah land office. Under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226), the record titleholder of a noncompetitive oil and gas lease is entitled to apply for a single extension of the lease, but an application therefor must be filed within 90 days prior to the expiration date of the lease. The provision has been interpreted to mean that in the event the primary term of a noncompetitive lease terminates on a nonbusiness day, an application for extension is timely filed if it is received in the appropriate office on the next day the office is open to the public. *John J. Farrelly et al.* v. *Douglas McKay*, Civil No. 3037–55 (D.D.C.), decided October 11, 1955, overturning *John J. Farrelly et al.*, 62 I.D. 1 (1955). In accordance therewith, a departmental regulation (43 CFR, 1954 Rev., 101.20(c) (Supp.)) provides that:

> Any document required by law, regulation or decision to be filed within a stated period, the last day of which falls on a day the land office or the Washington Office is officially closed, shall be deemed to be timely filed if it is received in the appropriate office on the next day the office in open to the public.

Thus, an application for extension of the former lease, Utah 06087, covering the land here in dispute would have been timely filed if it had been received before the close of business on Monday, April 1, 1957. However, no application for extension of that lease was filed at any time.

Mrs. Wolf's application for the land here involved was filed on April 1, 1957, the last day on which an application for extension of the former lease could have been filed. The appellant's application was filed on April 2, 1957. In a decision of May 13, 1957, the man-

ager of the Salt Lake land office rejected Mrs. Wolf's application, holding that the land was not available for lease offers on April 1, 1957, apparently on the ground that the land was segregated by reason of the fact that the former lessee was entitled to file an application for an extension until the close of business on April 1, 1957. Mrs. Wolf appealed to the Director from this decision by the manager. Thereafter, effective July 1, 1957, a lease on the lands was issued on June 6, 1957, to the appellant pursuant to his application which was filed the second day after the termination of the former lease on these lands. However, in a decision of December 24, 1957, the acting manager held that the appellant's lease had been issued in error pending final disposition of Mrs. Wolf's prior oil and gas lease offer. The acting manager canceled the appellant's lease, and reinstated his offer pending disposition of Mrs. Wolf's conflicting lease offer. Petrie appealed to the Director from this decision by the acting manager.

The Director's decision of December 23, 1958, combined the appeals by Mrs. Wolf and Petrie. The decision held that the rejection of Mrs. Wolf's lease offer was erroneous, that 43 CFR, 1954 Rev., 101.20(c) (Supp.) does not segregate land from further lease offers during the additional time allowed for filing an application for extension if the last day for filing falls on a day when the land office is officially closed, and that Mrs. Wolf's application should have been allowed in accordance with the provisions of 43 CFR, 1954 Rev., 192.120(g) (Supp.). The latter regulation provides that:

> Upon failure of the lessee or the other persons enumerated in paragraph (a) of this section to file an application for extension within the specified period, the lease will expire at the expiration of its primary term without notice to the lessee. The lands will thereupon become subject to new filings of offers to lease.

With respect to Petrie's appeal, the Director held that the decision canceling the appellant's lease and reinstating his lease offer pending final disposition of Mrs. Wolf's appeal from the rejection of her conflicting offer was premature and incorrect as a finding should have been made that the prior offeror was entitled to receive a lease on the land before the appellant's lease was canceled, citing *Sidney A. Martin et al.*, 64 I.D. 81 (1957). Nevertheless, the Director affirmed the cancellation of the appellant's lease after having determined that the prior lease offeror is entitled to the lease.

On this appeal it is asserted that the decision in the *Farrelly* case (*supra*) and the provision in 101.20(c), in effect, segregated the land here involved during the additional time allowed for filing an application for extension of a lease, the primary term of which expired on a

nonbusiness day. However, the decision in the *Farrelly* case makes no ruling about the segregative effect of filing or failing to file an extension application, and 101.20(c), which provides that a document required to be filed within a stated period the last day of which falls on a nonbusiness day is timely filed if it is filed on the next day the office is open to the public, plainly does not provide that land shall be segregated if the document referred to is not filed, but only permits additional time for filing beyond a required period in certain instances. There is no apparent reason, and the appellant suggests none, for holding that the fact that an application for extension might be filed should preclude the filing of new lease offers in view of the express provisions in 192.120(g) that upon failure to timely file an application for extension, a lease will expire at the expiration of its primary term and the lands will thereupon become subject to new lease offers. On the contrary, 192.120(f) specifically provides that the "timely filing of an application for extension shall have the effect of segregating the leased lands" until final action taken on the application is noted on the tract book. Reading paragraphs (f) and (g) together makes it plain that there is no segregation of land in an expired lease from the time of expiration of the lease until a timely application for extension is filed. Accordingly, the Director's decision that the lands here involved were open for new lease offers on April 1, 1957, when Mrs. Wolf's offer was filed was correct.

The appellant's further contention that his lease should not be canceled cannot be sustained. When lands are made available for noncompetitive leasing, the Department is required by statute to issue the lease to the first qualified applicant therefor (*C. T. Hegwer*, 62 I.D. 77 (1955)). And if a noncompetitive lease is erroneously issued to a junior applicant, such a lease is subject to cancellation (43 CFR 192.42(m); *Transco Gas and Oil Corporation et al.*, 61 I.D. 85 (1952); *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (1955)). In the instant case, Mrs. Wolf appears to have been the first qualified applicant for the land under consideration. Consistently with the regulation and decisions just cited, the issuance of a lease to the appellant was erroneous, and the decision remanding the case for issuance of a lease on the lands here involved to Mrs. Wolf and allowing the cancellation of appellant's lease to stand was correct, all else being regular.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental

Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## RICHFIELD OIL CORPORATION

A-27954 *Decided August 12, 1959*

**Oil and Gas Leases: Exchange Leases—Oil and Gas Leases: Extensions—Oil and Gas Leases: Noncompetitive Leases**

A noncompetitive oil and gas lease issued under section 17(a) of the Mineral Leasing Act, as amended, is entitled to the single extension afforded by the third paragraph of section 17 of the act, as amended.

**Statutory Construction: Generally**

Where the plain language of a statute does not limit the benefit conferred thereby and where to give effect to such language would not lead to absurd or unfair results, there is no basis for departing from that language even though it seems to be broader than the probable intent of the Congress.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Richfield Oil Corporation has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated November 20, 1958, which affirmed the action of the manager of the Los Angeles land office in rejecting Richfield's application for an extension of its oil and gas lease Los Angeles 033379(a) under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

The appellant has held a lease on the 170 acres of land covered by Los Angeles 033379(a) since June 8, 1938, when the Department approved an assignment to it of a consolidated 20-year lease covering, at least in part, land originally leased on August 23, 1920, under section 18 of the Mineral Leasing Act (30 U.S.C., 1952 ed., sec. 227). Richfield and its predecessor sought and obtained suspensions of the drilling, producing, and rental requirements of the lease, which suspensions, under section 39 of the act (30 U.S.C., 1952 ed., sec. 209), extended the term of the original lease. As of May 1, 1942, an exchange lease under section 2(a) of the amendatory act of August 21, 1935 (49 Stat. 674, 679), was issued to Richfield. That lease, bearing the same serial number, was for a period of 10 years. On January 24, 1952, Richfield applied for a new lease in exchange for its outstanding lease and, as of April 1, 1952, a new lease "for a period of five years,

and so long thereafter as oil or gas is produced in paying quantities" was issued to Richfield under section 17(a) of the Mineral Leasing Act as added on August 8, 1946 (30 U.S.C., 1952 ed., sec. 226d). On January 18, 1957, the corporation applied for an extension of that lease under section 17 of the Mineral Leasing Act, as amended, and it is the refusal of the Director to grant the extension of the new lease issued as of April 1, 1952, which brings the matter before the Secretary.

The Director held that because Richfield's lease had been issued as an exchange lease under section 17(a) of the act, *supra*, the lease is not entitled to an extension. He held that the right to extension of noncompetitive leases granted by section 17 is applicable only to those leases issued under section 17 in recognition of the preference right afforded to "the person first making application for the lease who is qualified to hold a lease."

There can be no doubt that the lease issued in 1952 was issued noncompetitively and I find nothing in the language of section 17, as amended, which would limit its application to leases which were acquired by "first qualified" applicants.

As originally enacted, the Mineral Leasing Act provided for the issuance of noncompetitive or preference-right leases in a number of situations (see secs. 14, 18, 19, and 20). It was only with respect to lands situated within the known geologic structure of a producing oil or gas field, and which were not subject to preferential leasing under other provisions of the act, that competitive bidding was required. Leases issued under section 17 as the result of such bidding were to be 20-year leases with the preferential right in the lessee to renew for successive periods of 10 years.

The amendatory act of 1935 materially changed the method of acquiring the right to prospect for oil and gas. The permit system, provided for in section 13 of the original act, was discontinued and those holding such permits at the date of the amendatory act were given the right, prior to the expiration of their permits, to exchange the same for leases under the conditions fixed by section 17 as there amended. Discovery under outstanding permits continued to entitle holders of permits to preferential leases. As amended, section 17 provided that thereafter all lands subject to the provisions of the act should be disposed of through leases. It provided for the competitive leasing of those lands on known geologic structures of producing oil or gas fields, the terms of such leases to be for 10 years, and that "the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act * * * shall be entitled to a

preference right over others to a lease of such lands without competitive bidding * * *." Such noncompetitive leases were to be for a period of 5 years. No provision was made for the extension of the fixed terms of either competitive or noncompetitive leases issued thereafter under that section as amended.

However, section 2(a) of the 1935 act authorized the Secretary of the Interior—

> to issue new leases to lessees holding oil or gas leases under any of the provisions of this Act at the time this amendatory Act becomes effective, such new leases to be in lieu of the leases then held by such lessees and to be at a royalty rate of not less than 12½ per centum in amount or value of the production and upon such other terms and conditions as the Secretary of the Interior shall by general rule prescribe: *Provided*, That no limitation of acreage not provided for under the law or regulations upon which any such old lease was issued shall be applicable to any such new lease.

Section 2(b) provided that nothing in the amendatory act should be construed to affect the validity of permits or leases previously issued under the original act as amended and in existence at the time the 1935 act took effect or to impair any rights or privileges which had accrued under such permits or leases.

By regulation (43 CFR, 1940 ed., 192.29), the fixed terms of all leases issued under section 2(a) were to be for 10 years.

Thus the 1935 act, in authorizing the exchange of leases previously issued for new leases, made no distinction between those leases issued as the result of the preferences accorded by the 1920 act and those leases issued as the result of competitive bidding. Those who held leases under the 1920 act were given the opportunity to acquire new leases, whether or not their leases had been issued in the first instance as noncompetitive preference-right leases or as the result of competitive bidding.

After a series of temporary measures beginning with section 1 of the act of July 29, 1942,[1] under which the holders of noncompetitive 5-year leases issued under the act of August 21, 1935, were granted preference rights over others to new leases for so much of the land embraced in their present leases as was not, on the expiration date of their present leases, within the known geologic structure of a producing oil and gas field and under which 5-year leases not entitled to such preference right to a new lease were extended,[2] the Mineral

[1] 56 Stat. 726; as amended by the acts of December 22, 1943 (57 Stat. 608), September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587).

[2] Holders of 10-year noncompetitive leases were not entitled to the benefits of those acts. *Grace Gantz Lewis and S. W. Holman*, A–25669 (July 5, 1949); *L. E. McLaughlin et al.*, A–25957 (January 23, 1951).

Leasing Act was materially amended by the act of August 8, 1946 (60 Stat. 950).

Under section 17, as amended in 1946, lands within any known geologic structure of a producing oil or gas field were to be leased competitively and lands not within any such structure were to be leased to "the person first making application for the lease who is qualified to hold a lease under this Act" without competitive bidding. All leases issued under that section were to be for a primary term of 5 years. The third paragraph of section 17, as amended in 1946, provided that upon the expiration of the primary term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder, upon timely application, "shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease within the known geologic structure of a producing oil or gas field or withdrawn from leasing * * *." The extension provided for under the 1946 amendment was to be for a period of 5 years and so long thereafter as oil or gas is produced in paying quantities. Any noncompetitive lease not subject to such extension in whole or in part, because the lands covered thereby were within the known geologic structure of a producing oil or gas field at the date of expiration of the primary term of the lease, was to continue in effect for a period of 2 years and so long thereafter as oil or gas was produced in paying quantities if drilling operations were being diligently prosecuted on such expiration date.

A new section of the Mineral Leasing Act, designated as sec. 17(a) was added, which, so far as pertinent, provides:

> The Secretary of the Interior shall, upon timely application therefor, issue a new lease in exchange for any lease issued for a term of twenty years, or any renewal thereof, or any lease heretofore issued in exchange for a twenty-year lease, such new lease to be for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities * * *.

The 1946 act repealed section 2 of the act of August 21, 1935, and section 1 of the act of July 29, 1942, as amended.

That part of section 17 which provided for the extension of noncompetitive leases was amended by the act of July 29, 1954 (68 Stat. 583, 584). The amended third paragraph, so far as pertinent to the present appeal, provides:

> 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, 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. Any noncompetitive lease extended under this paragraph shall be subject to the rules and regulations in force at the expiration of the initial five-year term of the lease.

While it is true that since 1935 the Mineral Leasing Act has required that leases to be issued noncompetitively are to be awarded to "first qualified" applicants, it does not necessarily follow that only leases issued to "first qualified" applicants are entitled to the extension granted by the third paragraph of section 17 as amended. The Congress has in amending the Mineral Leasing Act recognized other noncompetitive leases and provided for their extension in certain situations. See, for example, section 17(b). It has also limited the benefits of its acts to certain classes of noncompetitive leases, as where it gave preference rights to new leases to holders of 5-year noncompetitive leases under the act of July 29, 1942, as amended. Twice it has authorized the issuance of new leases in exchange for outstanding noncompetitive leases and on neither occasion did it withdraw the new leases from the application of other provisions of the act.

By the 1946 amendment, under which the appellant holds its present lease, all holders of outstanding 20-year leases, renewals of such leases, or exchange leases issued for such 20-year leases were entitled to new leases "for a primary term of five years." Under the 1954 amendment of the third paragraph of section 17 "any noncompetitive lease" issued for an initial term of 5 years is entitled to a single extension. The paragraph does not provide that the extension shall be limited to those who acquired their leases in the first instance by being "first qualified" applicants. The appellant's lease, issued in 1952, clearly comes within the language of the statute.

The situation is not unlike that considered in Solicitor's opinion M–35082 (December 2, 1948). There the question was whether the holder of a noncompetitive lease obtained by exercising a preference right under section 1 of the act of July 29, 1942, had a preference right to obtain, upon the expiration of the current term of his lease, another lease on the same land. The Solicitor found that no distinction had been made in the language of the section between the attachment of this preferential right to noncompetitive leases initially issued during the period between July 29, 1942, and August 8, 1946, when the provision was repealed, and leases issued during that period to persons taking advantage of their preference rights under section 1 of the 1942

act. The Solicitor held that an exercise during the period from July 29, 1942, to August 8, 1946, of the preference right granted in section 1 of the 1942 act did not exhaust the right and prevent it from attaching to the new lease issued during that period for the same land upon the basis of the exercise of the right.

So with the right attempted to be exercised by the appellant in this case. The fact that the appellant exercised the right afforded to it by section 17(a) to obtain a new lease in exchange for its previous lease does not prevent the appellant from obtaining an extension of that new lease where its new lease meets the requirement for an extension.

Whether or not the Congress intended that the new leases issued in exchange for outstanding leases should be entitled to the benefit of the extension accorded by the third paragraph of section 17, certainly there is nothing in the language of the act itself which would deny such holders of new leases the extension granted. The Department has on other occasions in construing the provisions of the Mineral Leasing Act found the language of a particular provision of the act to be broader than what the Department felt the Congress intended to accomplish by the provision. Nevertheless, it has held that where the plain language of the act did not limit the benefit conferred and where the giving effect to such language would not produce an absurd or patently unjust result, there was no basis for departing from the plain language of the statute. Solicitor's opinion, 60 I.D. 260 (1948); *H. Leslie Parker, M. N. Wheeler*, 62 I.D. 88 (1955).

It cannot be said that to hold that a new lease issued under section 17(a) of the act is entitled to a single extension would produce an absurd or unjust result. While it is true the appellant in this case has held the land embraced in its new lease for many years, yet the Congress has provided the means under which the appellant has been able to keep the land under lease. It may be that the Congress, in limiting the fixed terms of the new leases to "a primary term of five years," thus putting such new leases on a par with all other leases to be issued under the act, intended to wipe out any distinction which had theretofore existed between leases which had been issued noncompetitively under the provisions of the original act and those issued noncompetitively under the act of August 21, 1935, and to be issued under section 17 as amended by the 1946 act.

Therefore it must be held that, all else being regular, the appellant in this case is entitled to a single 5-year extension of its lease as to so much of the land covered thereby as was not, on March 31, 1957, within the known geologic structure of a producing oil or gas field.

The appellant states that 60 acres of the land covered by its lease is within the known geologic structure of the Sunset field as revised effective March 10, 1949. If such is the fact, the appellant was entitled to an extension of its lease for 2 years on that land. However, since that 2-year period has already expired, the lease must be considered as terminated as to that land unless oil or gas is being produced in paying quantities from that acreage.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management dated November 20, 1958, is reversed and the case is remanded to the Bureau of Land Management with instructions to grant a 5-year extension on so much of the land covered by Los Angeles 033379(a) as was not on March 31, 1957, within the known geologic structure of a producing oil or gas field, all else being regular.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEAL OF COMMERCIAL METALS COMPANY

IBCA-99 *Decided August 27, 1959*

**Contracts: Appeals**

Upon an appeal from a decision of a contracting officer under a contract for the sale of scrap iron and steel by The Alaska Railroad, the Board of Contract Appeals has jurisdiction to determine the respective obligations of the Government and the purchaser, and hence may construe the terms governing the shipment of the purchased property in order to decide what its destination was and at what point the railroad could apply its tariffs to the shipment.

**Contracts: Interpretation**

Under a contract which provided for the sale of scrap iron and steel by The Alaska Railroad to a purchaser contemplating its export from Alaska, and which also provided that the scrap was to be sold "F.O.B. Cars, The Alaska Railroad, Anchorage or Seward, Alaska," and that the purchaser was to arrange for berthing of ship, wharfage, and handling at dockside, the railroad, when the purchaser elected to take delivery at Seward, Alaska, where the Railroad owned the dock, was obligated only to effect delivery of the scrap in the general receiving yards of the railroad at Seward, and the purchaser was obligated to pay wharfage, unloading, switching, and other terminal charges under the applicable tariffs of the railroad.

### BOARD OF CONTRACT APPEALS

Commercial Metals Company, of Dallas, Texas (hereinafter referred to as "Cometals"), has filed a timely appeal from a letter deci-

sion of the contracting officer dated December 7, 1956, assessing various terminal charges against the appellant in connection with its purchase of scrap iron and steel under a contract with The Alaska Railroad (hereinafter referred to as "the railroad"), which was entered into on August 27, 1956, pursuant to Invitation No. 56–11, issued July 30, 1956.

The contract, which was executed on U.S. Standard Form 114 for the sale of Government property, provided for the sale by the railroad to Cometals of the following property:

| | *Description* | *Approximate Quantities* | *Bid Price* |
|---|---|---|---|
| 1. | Scrap Steel Rail 13031 Section with Angle Bars | 1,300 tons | $46.75 per ton |
| 2. | Scrap Steel Rail, Various Sections | 1,500 tons | $46.75 per ton |
| 3. | Scrap Iron and Steel Railroad Scrap | 8,000 tons | $39.76 per ton |

The sale was made subject to 16 paragraphs of General Sale Terms and Conditions. The second paragraph included the provision: "All property listed herein is offered for sale 'as is' and 'where is' and without recourse against the Government. If it is provided herein that the Government shall load, then 'where is' means f.o.b. conveyance at the point specified in the Invitation." The fifth paragraph, which dealt with the method of payment for the property sold, provided that payment was to be made "prior to delivery of any property." The sixth paragraph, which dealt with the transfer of title, included the provision: "Title to the items of property sold hereunder shall vest in the Purchaser as and when full and final payment is made, unless otherwise specified by the Government, and except that if the contract provides that loading will be performed by the Government, title shall not vest until such loading and such payment are completed." The seventh paragraph, which dealt with delivery and removal of the property, included the provision: "The Purchaser shall be entitled to obtain the property upon vesting of title of the property in him, unless otherwise specified in the Invitation to Bid. Delivery shall be at the designated location, and the Purchaser shall remove the property at his expense." The 12th paragraph provided that "Any oral statement by any representative of the Government, modifying or changing any conditions of the contract, is an expression of opinion only and confers no right upon the Purchaser." The 15th paragraph provided that all questions of fact involved in disputes arising under the contract should be decided by the contracting officer, subject to appeal to the head of the Department or his duly authorized representative.

The General Sale Terms and Conditions were, however, supplemented by a series of nine paragraphs of Special Sale Terms and Conditions of which the first two read as follows:

1. Scrap is located in the Alaska Railroad Birchwood Yards. To be sold F.O.B. Cars, The Alaska Railroad, Anchorage or Seward, Alaska. All subject to export in compliance with existing Federal regulations.

2. Berthing of ship, wharfage and handling at dockside to be arranged for by purchaser.

In addition, it was provided in the third of these paragraphs that full payment of the purchase price, based on the estimated tonnage, was to be made within 15 days of the date of award of the contract; in the fourth that the successful bidder was to notify The Alaska Railroad at least 20 days in advance of the loading of the scrap on a vessel that the scrap should be loaded in cars, and that the railroad should make delivery of the scrap within 15 days thereafter; in the seventh that if the bidder failed to remove the scrap within 60 calendar days from the date of the award of the contract, the Government might "in its discretion, assess a demurrage charge for any cars under load;" and, finally, in the ninth that the "disputes" provision of the contract should be subject to the act of May 11, 1954 (68 Stat. 81; 41 U.S.C., Supp. III, sec. 321), relating to judicial review of decisions under that provision.

Cometals paid a total purchase price for the scrap of $448,980, consisting of its bid deposit of $90,000 and a check of $358,980, which was received by the railroad on September 12, 1956. It elected to ship the scrap from the port of Seward rather than Anchorage, Alaska, because of what it regarded as the superior facilities of the former port, and made arrangements to charter for this purpose two vessels, the SS FANA and the SS JAMES LICK. Under date of August 30, 1956, Cometals sent a telegram to the railroad notifying it that the SS FANA had been chartered to move up to 3,100 gross tons of the scrap, and that the vessel was expected to be ready to load at Seward on September 17. Under date of September 6, 1956, Cometals sent another telegram to the railroad informing it that one Dave Levinson, of the Pacific Iron and Metal Company of Seattle, Washington (which had an interest in the purchase of the scrap) would act as its agent in connection with the loading of the SS FANA. Similarly, under date of October 5, 1956, Cometals notified the railroad that the SS JAMES LICK was expected about October 16 to load the remaining scrap.[1] Cometals also made arrangements for the berthing of the vessels at the railroad's Seward

[1] This notice, as well as that of August 30, was given pursuant to the fourth paragraph of the Special Sale Terms and Conditions.

dock, and for the loading of the vessels by the Northern Stevedoring & Handling Corporation, a stevedoring concern which had a contract with the railroad for the performance on its behalf of certain terminal services which the railroad in its tariffs undertook to provide at the dock, but made no arrangement for wharfage because it assumed that the contract required the scrap to be delivered alongside the ship on the dock at Seward.

Having received the required notice that Cometals was in a position to begin loading the scrap, the railroad began loading it into cars at its Birchwood Yards, north of Anchorage. One R. G. Deede, who was connected with the General Services Administration, but whose exact role and authority in the sale of the scrap by the railroad is not satisfactorily established by the record, appears to have been involved in the assembly of the scrap. After loading, the scrap moved towards Seward on "non-revenue waybills," which are documents used in the movement of railroad-owned property. En route, the carloads of scrap were weighed at Mile Post 114, and scale tickets, on which the weights were recorded, were also prepared; these scale tickets indicated the consignee to be the railroad's dock agent at Seward. No bills of lading were issued, which was contrary to the practice followed when the railroad was merely acting as a carrier.

When the cars containing the scrap arrived in Seward, they were so numerous [2] that they created a problem of congestion, and a siding known as the Jesse Lee siding, which is regarded as a Seward team track,[3] as well as any available spur tracks, were used to hold the cars, while they were waiting to be moved alongside the vessels. In Alaska Railroad parlance, the term "yard" is rather loosely used to denote any portion of the station area within switching limits, and the Jesse Lee siding, as well as spur tracks beyond that siding, would thus be a part of the Seward yards. A spur track ran from the Seward yards to the dock or pier, so that it was possible to switch freight cars from the yards to the dock but no train of cars was ever run directly onto the dock, for it first had to be broken up. Moreover, to move freight cars on the dock itself use was made of jitneys or "clee tracks" operated by stevedores rather than the railroad's employees. The dock or pier at Seward, although owned by the railroad, was operated by it as a public dock, which is to say that it handled freight for any party, including the railroad's competitors.

[2] The scale tickets indicated that no less than 363 carloads of scrap were hauled.

[3] The term "team track," which is a relic of the horse age, denotes the track at which consignees may call for their goods. The team track proper at Seward was in the area of the Jesse Lee siding but there was another track—Track 9—that doubled as a team track.

Since cars could be switched from the Seward yards to the Seward dock or pier, it is obvious that the dock was within the Seward switching limits. However, the Seward dock or pier was not regarded as part of the Seward yards.[4]

The scrap purchased by Cometals was loaded on the SS FANA between the dates of September 19 and September 26, 1956, and on the SS JAMES LICK between the dates of October 28 and November 20, 1956. The loading of the FANA was supervised by Dave Levinson, the Cometals agent already mentioned, and the loading of the JAMES LICK was supervised by one Richard Concannon, one of Cometals' buyers of scrap iron who had been sent to Alaska for this purpose. At the time of his arrival the FANA had already completed its loading and sailed.

Only rail was shipped on the FANA, while both rail and scrap iron were shipped on the JAMES LICK. All the scrap purchased from the railroad was shipped on one or the other of the vessels, except approximately 800 tons, which was stored at Seward under a leasing arrangement with the railroad, and subsequently disposed of by Cometals. In addition to the railroad scrap, Cometals had also purchased scrap from two private concerns, and some of this scrap was also loaded on either the FANA or the JAMES LICK. A bill of lading had been issued by the railroad in connection with the movement of this scrap, and the charges in connection therewith were assessed under Railroad Tariff 16–E, under which the freight rate absorbed all wharfage, handling, and switching charges.

The loading of the vessels with the scrap was supervised and directed by Levinson and Concannon, the agents of Cometals. To get the cars loaded with the scrap spotted at the dock, the agent would examine the cars in the yards, and determine which ones should be moved. He then gave instructions to the conductor of the switch engine as to which cars were to be switched. These instructions, in accordance with the custom followed on the railroad, were given informally by handing the conductor a list of the cars which were to be switched. This list also indicated the order in which the cars were to be switched. This procedure was followed by Cometals' agents in order to effect proper stowage of the vessels. To accomplish this, cooperation by the railroad was necessary, and it cooperated by furnishing lists of the cars which had arrived in the yards, and by switch-

[4] The contention of the appellant that there is a contradiction in the testimony of the railroad's witnesses with respect to whether the pier was within the Seward switching limits is based upon a misunderstanding of their testimony. Both Ervin Dyer, the railroad's freight and dock agent at Seward, and Edward R. Sanders, its assistant general traffic manager, stationed at Anchorage, testified that, although the pier was not part of the yards, it was within the Seward switching limits.

ing the cars in accordance with the requests of the Cometals agents. Sometimes cars were only partially emptied in the course of stowage, and this involved the return of the partially unloaded cars to the yards. In order to assist primarily in unloading the cars on the dock, Cometals rented a crane from the railroad, and on one day at least this crane was also used for consolidating scrap in the cars in the yard.

The loading of the vessels involved a dual operation: the scrap not only had to be unloaded from the cars but loaded on the vessels. One was "dockside" work and the other "shipside" work, and the line of demarcation between the two was the ship's hook. Under union contracts men from both shipside and shoreside were required in connection with the unloading of each railroad car, and the transfer of its contents to the vessel, and the wages of each class of men had to be paid by the Northern Stevedoring and Handling Corporation, which in turn billed the railroad for the dockside work, notwithstanding the fact that it was being paid by Cometals for loading the vessels. The railroad's charges for dockside work were covered by Tariff 37–D, which pertained to the operation of the dock.

On October 18, 1956, which was after the FANA had been loaded, the railroad billed Cometals for various charges in connection with the handling of the scrap for the vessel [5] and by letter dated November 2, 1956, Cometals protested against the making of these charges. While the JAMES LICK was being loaded the railroad insisted that unless the charges for the FANA were paid, the loading of the second vessel would be discontinued. To remove this impasse, the parties executed an escrow agreement on November 23, 1956, under which $65,000 was placed in escrow with the First National City Bank of New York, pending resolution of the dispute by the contracting officer, subject to appeals to the Secretary of the Interior or his authorized representative, and the appropriate judicial forum.

The charges made by the railroad in connection with the loading of the FANA and JAMES LICK totaled $81,938.47, distributed as follows:

| SS FANA | | SS JAMES LICK | |
|---|---|---|---|
| Wharfage and Unloading | $21,385.73 | Wharfage and Unloading | $40,285.88 |
| Service Charges | 3,042.83 | Service Charges | 8,771.19 |
| Crane Rental | *220.00 | Equipment Rental | *3,460.00 |
| Switching | 1,131.15 | Switching | 3,410.07 |
| | | Equipment Rental | *200.00 |
| Total | 25,779.71 | Extra Labor | *31.62 |
| | | Total | 56,158.76 |

[5] This was the formal billing. On September 25, 1956, the railroad's dock and freight agent and Cometals' agent had already exchanged telegrams about the charges.

The nature of the charges made by the railroad is, for the most part, self-explanatory. "Wharfage" was, of course, the charge for the use of the dock premises involved in the movement of the freight across the dock. "Unloading" was the spotting of the cars at the ship's side, and the preparation of their contents for picking up by the ship's hook. The service charges appear to have consisted of charges assessed against the two vessels under the railroad's tariffs to cover such services as: (*a*) the calling in of cars as required by the respective vessels; (*b*) the maintenance of daily progress reports of freight loaded aboard them; and (*c*) the preparation of the dock manifests, or abstracts of the cargo loaded.

The starred items among the charges, which total $3,911.62, are all charges for the rental of a crane from the railroad, and they are, apparently, listed separately because the crane was used for somewhat different purposes, namely, to load the vessels, as well as to consolidate the scrap in the yards. The propriety of these charges for the use of the railroad's crane are no longer contested by Cometals. Thus, the appellant's claim is now reduced to $78,026.85.

In its letter of protest dated November 2, 1956, Cometals took the position that the charges made by the railroad were improper, since the invitation to bid had "clearly specified the price to be paid would be f.o.b. cars, *Alaska Railroad tracks at*[6] Anchorage or Seward, Alaska"; it had elected to take delivery of the scrap at Seward where the railroad's tracks extended to shipside; and the scrap had been loaded aboard the ships at its own expense "without any handling costs accruing to the Alaska Railroad." In his letter decision of December 7, 1956, which was rendered shortly after the execution of the escrow agreement, the contracting officer, however, took the position that the contract had been fulfilled "on delivery of the cars on siding in the Seward yards awaiting transshipment and your company under the F.O.B. Seward provision automatically received the cars at that time and such cars became subject to the provision of the tariff governing storage and demurrage." The contracting officer pointed out particularly that Cometals had failed to take cognizance of the provisions of Tariff 37–D under which his charges had been made and of the provisions of Paragraph 2 of the Special Sale Terms and Conditions, providing that the purchaser should arrange for berthing, wharfage, and handling at dockside. In this connection, he explained that this provision had been included in the invitation to bidders "in order to spell out requirements that the

[6] It should be noted that the last two of the emphasized words are not to be found in Paragraph 1 of the Special Sale Terms and Conditions but were interpolated by the writer of the letter.

purchaser will arrange for berthing and dockside charges and therefore this paragraph clearly states the railroad's position in this regard. This clause would have been superfluous if the wharf to be used had been the property of another company, as the seller would have no concern in the interchange or transfer to a vessel." The appeal of Cometals followed under date of January 4, 1957.

A hearing for the purpose of taking testimony with respect to the issues involved in the appeal was held at Washington, D.C., on February 27 and 28, 1958, before the full membership of the Board. Two witnesses testified on each side. Richard Concannon, one of the appellant's agents,[7] and Walter J. Kelly, a retired vice president of the Association of American Railroads,[8] testified on behalf of the appellant. Ervin Dyer, the dock and freight agent of the railroad at Seward, and Edward R. Sanders, the assistant traffic manager of the railroad, stationed at Anchorage, testified on behalf of the railroad.

Subsequent to the hearing counsel for the respective parties filed elaborate posthearing briefs in which, in addition to the substantive question involved in the appeal, there is also discussed at considerable length the question whether the Board has jurisdiction over the appeal. This has been discussed in terms of whether the question involved in the appeal is one of law or fact, and whether the claim of the appellant is one for breach of contract.

The Board does not deem it necessary to determine whether the appeal presents solely a question of law or a mixed question of law and fact, since it has always taken the position that it has jurisdiction over either type of controversy.[9] Moreover, in the present case the escrow agreement explicitly provided for the determination of the dispute between the parties, although it did not refer, as does the "disputes" clause of the standard form for the sale of Government property to

[7] The appellant's other agent, Dave Levinson, was deceased at the time of the hearing.

[8] Kelly had long experience in railroad operations in the United States but none with respect to the Alaska Railroad. Also, while he was familiar with general railroad practices, and his testimony with respect to such practices is of some value, he had had no experience in any vendor-vendee relationship, which is, of course, the type of relationship which is involved in the present appeal. All too often, moreover, the questions put to him were legal questions which he was in no position to answer rather than questions designed to elicit information concerning relevant railroad practices.

[9] Basically, this is because 43 CFR, (1954 Rev.) 4.4, defining the jurisdiction of the Board, confers on it jurisdiction to entertain appeals not only from findings of fact but also from decisions of contracting officers "of any bureau or office of the Department of the Interior, wherever situated, or any field installation thereof", and in so doing states: "The Board may, in its discretion, decide questions which are deemed necessary for the complete decision on the issue or issues involved in the appeal, including questions of law." Appeals under the "disputes" clauses of the standard forms of Government contracts are not expressly mentioned therein, and hence the Board has jurisdiction over appeals for which special provision is made in other Government contracts. See, for example *Georgia Power Company*, IBCA–31 (April 22, 1955).

"questions of fact." Under this standard "disputes" clause, it has been held that there is administrative jurisdiction to determine the respective obligations of the Government and the purchaser under the contract, and to provide the forms of relief which are contemplated by the contract but that there is no administrative jurisdiction to allow claims for consequential damages for breach of contract or for rescission of the contract.[10] This doctrine has specifically been applied in a case which is essentially similar to the present appeal, since it involved the question who was to pay a handling charge in connection with the loading of property, which consisted of a heavy-duty lathe weighing 35,000 pounds, for an F.O.B. shipment.[11] The Board must conclude that it has jurisdiction over the present appeal because it involves only the enforcement of the obligations of the contract. However, the Board's jurisdiction does not extend to determining which tariff or tariffs were applicable to the movement and handling of the subject of the sale, or to interpreting the terms or conditions of any particular tariff, for such questions would not be ones arising under the terms of the contract of sale. Indeed, counsel for the appellant expressly concedes as much.

The contentions of the appellant in arguing that the railroad was obligated to deliver and unload the carloads of scrap on the dock at a point where their contents could be picked up by the ships' hooks are untenable. Indeed, they represent a position that is unreasonable. A railroad by becoming a seller does not cease to be a common carrier,[12] and it does not debar itself from collecting its charges as such, unless it has expressly done so by the terms of the contract of sale. Originally, the appellant contended that it was being charged by The Alaska

[10] See *A. Dubin Machinery*, ASBCA No. 2811, September 28, 1956, 56–2 BCA par. 1056; *Times Industrial Supply Corp.*, ASBCA No. 3343, September 20, 1956, 56–2 BCA par. 1064; *Williamsburg Auto Wrecking Co., Inc.*, ASBCA No. 3611, September 6, 1956, 56–2 BCA par. 1078; *Bertner Thread Co.*, ASBCA No. 3846, February 6, 1957, 57–1 BCA par. 1193; *Forbes Motor Co.*, ASBCA No. 3995, March 21, 1957, 57–1 BCA par. 1217; *Dadourian Export Corp.*, ASBCA No. 4222, January 15, 1958, 58–1 BCA par. 1603; *Feliciano Frizzi*, ASBCA No. 4740, May 6, 1958, 58–1 BCA par. 1776.

[11] See *Harry C. Lewis*, ASBCA No. 3075, July 24, 1957, 57–2 BCA par. 1390. This case is also relevant to the consideration of the substantive question involved in the present appeal. In addition to the provision for loading "f.o.b. carrier at the holding activity," it was expressly provided that any expenses "over and above those customarily required for loading f.o.b." were to be for the account of the purchaser.

[12] Indeed, this is implicit in *Southern Pacific Co.* v. *Hyman-Michaels Co.*, 147 P. 2d 692 (Calif. 1944), upon which heavy reliance is placed by the appellant. This case, too, involved a sale of scrap iron by a railroad which was seeking to impose demurrage charges on the shipment but failed. The case is, however, not in point because the railroad could not do so by reason of one of the express terms of the contract. See also *Standard Oil Company of California* v. *Johnson*, 147 P. 2d 577 (Calif. 1944), in which it is recognized that a railroad can be both a carrier and buyer of oil sold, and *Choctaw, O. & G.R. Co.* v. *Colorado Fuel & Iron Co.*, 93 Fed. 742 (3d Cir. 1899), involving the purchase of rails by a railroad.

Railroad for services which had not been rendered but the record now firmly negatives this contention. The record shows, moreover, that these services were not only valuable to the appellant but burdensome and expensive for the railroad. The appellant is, indeed, in the position of insisting that the railroad was obligated not only to deliver the carloads of scrap on the dock in Seward but also to keep switching the cars around after their arrival in the Seward yards, and even to switch them back from the dock into the yards, in order to serve the convenience of the appellant for the period of more than a month which it took to load the FANA and JAMES LICK.[13] Of course, if the railroad undertook any such obligation it was bound to perform it but surely convincing proof should be produced of the existence of such an onerous obligation.

It must be remembered that in general the burden of proving a contention is on the party making it—in this case the appellant. In the law of sales, moreover, the presumptions are generally in favor of the seller rather than the buyer. As a transaction, a sale merely involves a transfer of goods from the seller to the buyer, and the buyer must explicitly bargain for any desired terms or conditions. For example, it is presumed in the absence of any expression of a contrary intention that delivery of goods sold will be made at the seller's place of business or residence, or, if the goods are somewhere else that the buyer will take them from such location;[14] that an f.o.b. sale without further designation means free on board at the point of shipment rather than at the point of destination;[15] that a mere sale of goods f.o.b. at the point of shipment does not import an obligation on the part of the seller to furnish the cars;[16] and that the seller satisfies his obligation in such a case by delivery to any carrier, at the point of shipment, whether its cars are on a regularly used spur or side track of the carrier, or on the main line, or at the depot of the carrier.[17] It is also presumed that, when a contract for the sale of goods is silent as to who is to pay the freight, the purchaser is to pay it,[18] and that in general the burden of proving that the seller is to bear any particular charges is on the buyer.[19]

[13] Of particular interest in this connection is *Jarka Corporation of Baltimore* v. *Pennsylvania R. Co.*, 130 F. 2d 804 (4th Cir. 1942). The tariff applicable in this case was applicable to shipments "delivered to vessels direct from railroad owned pier" and to shipments "delivered to rail carrier direct from the ship's side." Nevertheless, the court held that the railroad was under no obligation to re-spot cars which had once been spotted.

[14] Williston, *Sales*, sec. 450, p. 681.

[15] Ibid., sec. 280a, p. 98.

[16] Ibid., sec. 280a, p. 96.

[17] See *Farmers Cotton Oil Co.* v. *T. H. Brooke & Co.*, 82 S.E. 372 (Ga. 1914).

[18] See 77 *Corpus Juris Secundum*, sec. 81, p. 765, and authorities there cited.

[19] See *Texas Cotton Growers Ass'n* v. *McGuffey*, 131 S.W. 2d 771 (Texas 1939).

It would be unreasonable to assume in the case of a contract under which the buyer was given a choice between shipment from two ports, Anchorage or Seward, Alaska, that the seller intended to give the buyer a price advantage, depending on his choice of the port, of over $80,000. It is true that the Birchwood Yards were considerably nearer to Anchorage than to Seward but the main expense to the railroad must have been in the cost of assembling and loading the scrap rather than in the cost of hauling it. But if a rough equivalence is to be assumed to have been the basis of the transaction, then the ultimate choice of the port of Seward by the appellant should not eliminate the implications which would have to be drawn if the choice had been the port of Anchorage. The record shows that if the appellant had chosen to ship from Anchorage, where the railroad did not own the dock, it would have subjected itself to the very type of tariffs to which it subsequently objected.

Having chosen Seward as the port from which to ship the scrap, the appellant seems to contend that inasmuch as the expression "F.O.B. cars, The Alaska Railroad * * * Seward, Alaska" is ambiguous, and the railroad was the author of the expression, it should be interpreted against the railroad in accordance with the doctrine *contra proferentem*. Apart from all the presumptions of the law of sales favoring the seller, the doctrine itself, which is designed to prevent hardship, would seem to be inapplicable.[20] There is no ambiguity in an expression just because it is general or inclusive in its scope. What the appellant is really contending is that the general expression be given a particular interpretation but no good reason appears why the expression should be rewritten by the Board. Neither the other terms of the contract nor the circumstances of the case, as revealed by the testimony, manifest an intention to give the term "Seward, Alaska" a restricted meaning under which the dock would constitute the only permissible point of delivery. As for the reference to The Alaska Railroad, it could import no more, certainly, than that delivery should be made on the tracks of The Alaska Railroad. If the appellant desired that delivery be made on the dock,[21] it should have specified in bidding that delivery be made f.o.b. the dock, or "f.o.b. vessel," or

[20] See Corbin, *Contracts*, vol. III, sec. 559, pp. 154–55: "It is frequently said that this rule is to be applied only as a last resort. It should not be applied until all other rules of interpretation have been exhausted, nor should it be applied unless there remain two possible and reasonable interpretations."

[21] See *Haynes et al.* v. *Douglas Fir Exploitation & Export Co.*, 90 P. 2d 207 (Oreg. 1939), in which the court held that even a contract providing for delivery of carloads of ties "at" a particular dock did not require that they be delivered "on" that dock, namely that they be spotted there to effect delivery.

f.a.s.[22] vessel. Although the purchase of the scrap in the present case had been made in contemplation of export, it was not a condition of the sale that it be exported,[23] and in any event the mere fact that export was contemplated could not in itself be reasonably regarded as a substitute for a provision indicating that the goods were to be put free alongside the vessels on which they were to be exported. Not having used more meaningful terms, the appellant cannot argue the case as if use had been made of them. In their absence, there can be applied only the general rule that when goods are to be delivered on railroad cars at a particular place, they may be delivered in the general receiving yards of the railroad at such place.[24] The record shows that such delivery was effected in the present case.

The appellant puts considerable stress upon the minimum of paper work that was involved in the sale and movement of the scrap to the vessels, and upon the nature of the paper work to which resort was had. But such factors are entitled to little if any weight. The issuances of bills of lading would not have been appropriate in connection with the shipment by the railroad of its own property, and greater informality in other respects was either to be expected, or was customary in connection with the operations of The Alaska Railroad. The mere fact that the shipment of the scrap was made by the railroad to its dock and freight agent in Seward is hardly of great significance, for it is hard to perceive how it could have been made to anyone else. In general, the internal operations of the railroad cannot have any direct bearing on the terms of the sale which had been made with the appellant.

When attention is turned from the problem of the destination of the shipment to the charges which the railroad could legitimately collect under the terms of the contract, even if the destination be assumed to be the dock, the flimsiness of the appellant's case becomes readily apparent. A shipment of goods f.o.b. the point of destination, as in the present case, means merely that the seller is obligated to transport the goods free of any expense to the buyer, and this includes,

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[22] This expression means "free along side." See Williston, *Sales*, sec. 280, p. 94, and sec. 280h, p. 120.

[23] This is apparent alone from the fact that approximately 800 tons of the scrap were not exported—at least immediately—by the appellant.

[24] See Williston, *Sales*, sec. 450a, p. 684, and cases there cited. See also *Applegate* v. *Hogan*, 48 Ky. 69 (1848); *Bloyd* v. *Pollock*, 27 W. Va. 75 (1885); *A. Westman Mercantile Co.* v. *Park*, 31 Pac. 945 (Colo. 1892); *Detroit Southern R. Co.* v. *Malcolmson*, 107 N.W. 915 (Mich. 1906); *Robinson et al.* v. *La Marsh et al.*, 167 N.Y.S. 233 (1917); *Heyman* v. *De Christopero*, 155 N.E. 657 (Mass. 1927).

of course, the payment of the freight to the point of destination.[25] But this does not also mean that the seller is to perform any services for the buyer after the point of destination has been reached. The principal charges made by The Alaska Railroad were for "Wharfage and Unloading," and these charges alone, which total $61,671.61, account for almost 80 percent of the appellant's claim. The appellant was expressly required by Paragraph 2 of the Special Sale Terms and Conditions to pay the wharfage charges. Even if the provisions of Paragraph 1 of the Special Sale Terms and Conditions would ordinarily have required that the scrap be delivered alongside the ships at the dock at Seward, as the appellant unconvincingly contends, these provisions could not be construed to exempt the appellant from the wharfage charges in view of the express provision that the appellant pay such charges. There is, of course, no such thing as a standard f.o.b. provision, and there is nothing to prevent the parties to a sale from making provisions which will rebut the ordinary presumptions from an f.o.b. shipment, for, like all the rules of the law of sales, they yield to expressions of contrary intention.[26] As for the unloading charges, quite apart from the express provision for "handling at dockside" to be found in the Special Provisions and the provision for removal of the property at the expense of the buyer to be found in the General Provisions,[27] even if it were to be unreasonably assumed that the contract required the scrap to be delivered on the dock, the railroad would not have been required to unload the cars, since this would not have been a part of the delivery but a service performed after delivery.[28] If the railroad did not have to unload the cars, neither did it have to perform any other service after the cars had been once spotted at the dock, such as switching partially unloaded cars off the dock and back again in order to admit of the

[25] See Williston, *Sales,* sec. 280a, p. 98: 77 *Corpus Juris Secundum,* sec. 75(c), pp. 748–49; 46 *American Jurisprudence,* sec. 188, p. 369, and sec. 442, p. 609; *United States* v. *Andrews,* 207 U.S. 229 (1907); *Alderman Bros. Co.* v. *Westinghouse Air Brake Co.,* 103 Atl. 267 (Conn. 1918); *Barnett & Record Co.* v. *Fall,* 131 S.W. 644 (Texas 1910); *Partin & Fugate* v. *Hawkins,* 257 S.W. 571 (Texas 1923); *Hardinge Co.* v. *Eimco Corp.,* 266 P. 2d 494 (Utah 1954).

[26] See Williston, *Sales,* secs. 280, 280a and 280b, especially at pages 94, 96 and 99.

[27] This provision certainly rebuts any implication that the enumeration of the charges which Cometals was to bear was intended to exempt it from the payment of any other charges. The maxim *expressio unius est exclusio alterius,* which in any event is only an aid to construction, is not applicable when there are general words to show that it was the intention to include other subjects of the class enumerated (Corbin, *Contracts,* vol. III, sec. 552, p. 113). The contracting officer's findings adequately explain the reason for the enumeration.

[28] In the *Republic of Indonesia* v. *J. R. Simplot Company,* 220 F. 2d 321 (9th Cir. 1955), the court held that when potatoes had been sold "f.o.b. Docks, Portland, Oregon," the term "docks" meant a railway platform, and the words "on board" did not mean lying on the railway platform but were "confined to the instruments of conveyance, here the railway cars." Consequently, the court concluded, the seller was not bound to unload the potatoes onto the railway platform.

scrap being stowed on the vessels in the manner and sequence desired by the appellant. The charges made by the railroad for switching the cars in the yards were also proper, since it must be held that delivery had been effected when the cars came to rest in the Seward yards. As for the service charges, they comprehended services of types which were not essential to the performance of the railroad's obligation to transport the scrap to the point of delivery free of charge, and there is no language in the contract from which an intent that they shall be borne by the railroad could be inferred.

Finally, the appellant contends that it was advised by representatives of the railroad "who drew the contract" that "the original intention of the contract was to move the scrap right to shipside without assessing the questioned charges in order to attract buyers from the states" and that "Internal conflicts in the Railroad accounted for the later attempts to collect the charges." It is extremely questionable, to say the least, whether the evidence on which these contentions are based, which consists of the testimony of Concannon, was admissible,[29] but if it may be considered at all, it is too vague and uncertain to warrant a finding that any of the officials concerned with the making or administration of the contract interpreted its provisions as meaning that the railroad would absorb the charges in controversy. Concannon testified (Tr., p. 48–49) that Deede told him that it was "the original intention of the contract" to make the charges that were later assessed but that he had persuaded "the managing officer of the railroad" not to do so, and that subsequently, after a change had occurred in management of the railroad, a conflict had developed between the storage and traffic departments of the railroad, with the result that the charges had been made. Concannon also testified that he "talked with Mr. Miles (the contracting officer) and he was in accord with Mr. Dede (sic) on the intent of this sale." The record shows that these alleged conversations could not have taken place until after the railroad had imposed the charges, and they could very well be typical

[29] In the first place, the evidence is mostly hearsay, consisting of Concannon's report of what Deede, who did not actually testify at the hearing, is supposed to have told him about the intentions of the railroad's executives. In the second place, while extrinsic evidence may be introduced to establish trade usages in connection with a sale, and to show the circumstances surrounding the execution of a contract, especially when provisions of the contract are ambiguous, evidence may not be received which will have the effect of varying the written terms of the contract. This is as applicable to the contracting officer as to Deede but, in the case of the statements attributed to the latter, there is the further circumstance that there is no showing that he was authorized to make the statements attributed to him. Indeed, any oral statements made by Deede would have to be disregarded in view of the provisions of Paragraph 12 of the General Sale Terms and Conditions, relating to oral statements purporting to modify or change any condition of the contract.

pieces of misunderstood gossip which were in any event meaningless, for the question is not what the railroad originally may have intended but what in fact it finally decided to embody in the contract. Sanders, who, as assistant traffic manager of the railroad, was certainly in a position to know, was emphatic in his testimony that there had never been any conflict between the storage and traffic departments of the railroad. Sanders testified, moreover, that *prior to the bid opening* the appellant's agent Levinson had inquired from him what tariffs would be applicable to the sale of the scrap, and that he had explained to the agent what tariffs would be applicable. There is also in evidence a deposition made by Miles, the contracting officer, to the effect that prior to bid opening Levinson had inquired of him what tariffs would be applicable and that he had referred the agent to the traffic branch of the railroad for this information. There is, to be sure, also in evidence a letter dated October 14, 1957, in which Levinson in response to an inquiry from appellant's counsel, stated: "I do not recall any reference made by E. R. Saunders (sic) to Tariff 37–D prior to the actual sale of scrap to Commercial by the Alaska Railroad." But this statement can hardly be regarded as a positive denial. On the basis of the record the Board can only find that the appellant was informed prior to the bid opening that the sale of the scrap would be made subject to all applicable railroad tariff charges.

## Conclusion

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

William Seagle, *Acting Chairman.*

I concur:

Herbert J. Slaughter, *Member.*

## APPEALS OF INTER-CITY SAND AND GRAVEL CO. AND JOHN KOVTYNOVICH

IBCA-128 *Decided August 27, 1959*

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

Under the rules governing procedure before the Board of Contract Appeals a request for reconsideration that is mailed within the period allowed for the filing of such requests, but that is not delivered until after the end of that period, is not timely.

**Contracts: Appeals**

A request for reconsideration will be denied where it concedes the existence of a fact that would preclude allowance of the claim for which reconsideration is sought.

BOARD OF CONTRACT APPEALS

The appellant has filed a petition for reconsideration of the decision of the Board, dated May 29, 1959 [p. 179], denying, except as modified, its claims for additional compensation, arising out of its contract for the construction and completion of the Crescent Lake Dam, part of the Crescent Lake Dam Project, Oregon.

43 CFR, 1954 Rev., 4.15, relating to the making of requests for reconsideration of decisions of the Board, provides:

> A request for reconsideration may be filed within 30 days after the date of the decision. Reconsideration of a decision, which may include a hearing or rehearing, may be granted if, in the judgment of the Board, sufficient reason therefor appears.

This requirement of the rule is not satisfied merely by mailing requests for reconsideration to the Board prior to the expiration of the 30-day period from the date of the Board's decision. The rule requires that the request for reconsideration actually be delivered to and be on file with the Board prior to the expiration of the period specified. See, for instance, *Ernst Henry Schultz, Jr., et al.* v. *United States*, 132 Ct. Cl. 618, 622 (1955).

As the date of the decision of the Board is May 29, 1959, and as the 30th day from that date was a Sunday, the time for filing a request for reconsideration expired on the 31st day, that is, June 29, 1959. The appellant's petition for reconsideration in the present case was mailed by the appellant and did not reach the Board until July 1, 1959. It was, therefore, filed too late.

Although the appellant's petition for reconsideration was filed too late, the Board should add that it also appears to be without merit. As originally presented, appellant's main claim, based on the "changed conditions" clause of the contract, appeared to be that it had encountered large quantities of hard material in both the upper and lower levels of the excavations, which increased its difficulties and

costs.[1] In paragraph 12 of its petition for reconsideration, however, the appellant concedes that it "was able to 'excavate' the material down to a depth of from 10 to 12 feet in the manner that the Contractor reasonably anticipated the entire excavation could be performed and that below that depth the excavation became increasingly difficult." As the appellant did not experience greater difficulties than it anticipated in the upper levels of the excavation, and the logs of exploration clearly indicated that hard material of the kind the appellant encountered was to be expected at the lower levels in large volume, it obviously has no case under the "changed conditions" clause. As the appellant's request for reconsideration of its other claim, which is for extra work, is made to depend upon its encountering "changed conditions," it is also apparent that this request too would have to 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 petition for reconsideration is denied.

WILLIAM SEAGLE, *Acting Chairman.*

HERBERT J. SLAUGHTER, *Member.*

## ESTATE OF KA-E-PAH, NAVAJO ALLOTTEE NO. 1047

IA-1044 *Decided September 3, 1959*

**Indian Lands: Descent and Distribution: Generally—Rules of Practice: Appeals: Generally**

A confession of error submitted by an Examiner of Inheritance for consideration in connection with an appeal from the Examiner's order will serve as justification for remanding the case to the Examiner for further action.

### APPEAL FROM AN EXAMINER OF INHERITANCE BUREAU OF INDIAN AFFAIRS

Lucille Paton Jim, a member of the Navajo Tribe, has appealed to the Secretary of the Interior from an order of an Examiner of Inheritance amending the original order determining heirs in the matter of the estate of Ka-E-Pah, deceased Navajo Allottee No. 1047.

The probate in this case was reopened upon the recommendation of the Examiner of Inheritance in order that he might conduct an investigation of an alleged error in the determination of the heirs of the decedent. After a hearing, the Examiner, by an order dated

[1] One member of the Board dissented from the denial of this claim because, in his opinion, the logs of exploration contained in the contract drawings indicated that soft material would predominate to an average depth of 7 feet from the original ground surface, and that hard material would predominate below that average depth.

December 10, 1958, modified the original order dated March 27, 1928. The appeal does not recite the interest of the appellant but states that a mineral lease of the allotment involved was signed by the successful bidder and approved by the Department, which lease may be seriously impaired by the order amending the original order determining heirs. Subsequent to the filing of the appeal we have received a letter dated February 12, 1959, addressed to the Secretary of the Interior, from the Examiner of Inheritance advising that his office has conducted an exhaustive search of Navajo allotment files and reviewed the entire contents of the allotment file of Kap ah, Navajo Allottee No. 1215 (Probate No. 85749-36). As a result of this review the Examiner is now convinced that Nos Bah, Census No. 12653, named as sole heir in the amending order dated December 10, 1958, in the estate of Ka-E-Pah, was married to Kap ah and not to Ka-E-Pah. The Examiner further states that the striking similarity in names was confusing and resulted in the apparent erroneous order of December 10, 1958. The Examiner recommends in his letter that the proceedings in the matter of the estate of Ka-E-Pah, deceased Navajo Allottee No. 1047, be remanded to his office to enable him to take proper action to vacate the order dated December 10, 1958, and to reinstate the original order dated March 27, 1928.

In the light of the confession of error submitted by the Examiner of Inheritance the matter should be remanded for further proceedings.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 25, Order No. 2509, as revised; 22 F.R. 7243), the reopening of the probate in the matter of the estate of Ka-E-Pah, deceased Navajo Allottee No. 1047, is remanded to the Examiner of Inheritance to conduct a further hearing in the matter, after notice, and to take such action as he may deem proper.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEAL OF FLORA CONSTRUCTION COMPANY

**IBCA-101** *Decided September 4, 1959*

**Contracts: Substantial Evidence—Rules of Practice: Evidence**

A report of a Government inspector is admissible as evidence in a contract appeal proceeding notwithstanding that it was not prepared until the end of the day during which the events reported transpired, and that it was written up with the aid of notes made by the inspector during the course of the day which were destroyed after completion of the report.

**Contracts: Additional Compensation—Contracts: Damages: Generally**

Interest is not allowable as a part of an equitable adjustment under a standard form Government contract.

**Contracts: Changed Conditions—Contracts: Changes and Extras**

Physical impediments to the performance of the contract work caused by the Government, or by another one of its contractors, do not constitute "changes" or "changed conditions" within the meaning of standard form construction contracts where such impediments do not alter in any way the quantum or characteristics of the work to be done as defined by the contract, are not contrary to anything contained in its provisions, and were not in existence when the contract was made or, if then in existence, were not conditions that were unusual as well as unknown to the contractor.

**Contracts: Interpretation**

An ambiguity in specifications and drawings prepared by the Government will be resolved in favor of the construction contended for by it where there is no showing that the contractor actually and reasonably relied upon a different construction or that the Government had a conscious design to write a different construction into the contract, and where the specifications and drawings lend more support to the Government's construction than to the one contended for by the contractor.

## BOARD OF CONTRACT APPEALS

A timely appeal has been taken by Flora Construction Company, Denver, Colorado, from a decision of the contracting officer, dated December 12, 1956, upon certain claims arising under a contract with the Bureau of Reclamation, dated April 22, 1955.

The contract provided for the construction of two 115-kilovolt transmission lines, each approximately 4 miles in length, running from a switchyard site at Gavins Point Dam on the south side of the Missouri River in Nebraska to a point of connection with an existing transmission line on the north side of that river in South Dakota. It was on U.S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts. It also incorporated certain standard specifications of the Bureau of Reclamation, designated "Standard Specifications and Drawings for Construction of 69- and 115-Kilovolt Wood-Pole, H-Frame Transmission Lines November 1953." The contract was on a unit price basis, the total estimated price being $75,292.22.

The appeal covers 7 claims out of a total of 11 that were reserved in the release on contract and made the subject of the contracting officer's decision. The claims that have been appealed are Nos. 1 to 5, inclusive, and Nos. 8 and 11.

### *Claim No. 1—Switch Structure*

The two transmission lines provided for in the contract were, except for the crossing of the Missouri River channel, to be wood-pole lines. Each line comprised three conductors, and the typical supporting structure consisted of two poles joined by a crossarm from

which the insulators were suspended. After the contract had been awarded, the Government determined to substitute for one of the typical structures near the northerly end of the "B" line (structure 89/9 at station 219+65) a more complicated structure supporting a switching mechanism. This structure consisted of five poles with various crossarms, channels, braces, and guys, on which the switching mechanism was to be placed, and to which the three conductors were to be dead-ended on both sides. The Government undertook to furnish the switch and two of the five poles, and appellant was to furnish the remainder of the materials needed.

Negotiations between the parties prior to initiation of construction of the switch structure failed to result in any agreement upon the price to be paid therefor. Appellant was thereupon instructed to go ahead with the building of the structure, and was informed that payment would be made at the actual necessary cost in accordance with paragraph A–9 of the standard specifications. The pertinent portion of that paragraph reads as follows:

> Extra work and material will ordinarily be paid for at the lump-sum or unit price stated in the order. Whenever, in the judgment of the contracting officer, it is impracticable, because of the nature of the work or for any other reason to otherwise fix the price in the order, the extra work and material shall be paid for at the actual necessary cost as determined by the contracting officer, plus an allowance, not to exceed 15 percent of such actual necessary cost of the extra work and materials, for superintendence, general expense, and profit. The actual necessary cost will include all reasonable expenditures for material, labor (including compensation insurance and social security taxes), and supplies furnished by the contractor, and a reasonable allowance for the use of his plant and equipment, where required, but will in no case include any allowance for office expenses, general superintendence, or other general expenses.

Upon completion of the switch structure appellant submitted a bill in the net amount of $3,539.25, plus allowances in an unspecified amount for commission on Government-furnished materials and for interest. The contracting officer in the decision appealed from found that the correct amount due appellant was $2,552.10, without either of the allowances just mentioned.

The difference between appellant's figure of $3,539.25 and the contracting officer's figure of $2,552.10 is based wholly upon disagreements as to the number of labor and equipment hours properly chargeable to the switch job. More particularly, of the 483½ labor hours claimed by appellant the contracting officer disallowed 182½ hours at straight time wage rates, and of the 317½ equipment hours claimed by appellant he disallowed 176½ hours.

The documentary evidence submitted by appellant at the hearing consisted of time cards made out by individual employees and foremen's reports of work done and men and equipment used. In opposition, the Government offered in evidence reports of an inspector who

had been specifically assigned the task of keeping track of the work being done at the site of the switch structure. The inspector testified that he had made up the reports at the end of each day's work, and that in listing the hours of work for the individual employees and machines he had relied partly upon his memory and partly upon notes jotted down on scratch sheets during the course of the day, and that these scratch sheets had subsequently been destroyed. At the hearing, counsel for the contractor sought to have the reports in question excluded from evidence on the ground that the testimony of the inspector showed that they were not original records kept in the regular course of business, but had been made up at the end of the day from other papers not in evidence.

In the circumstances we conclude that the inspector's reports were admissible in evidence under the business records rule. In any event, administrative proceedings are not ordinarily subject to the exclusionary rules of evidence.[1] Rather, the governing principle is that an administrative decision must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] The inspector's reports, in our opinion, measure up to the standard of reliability called for by that principle. The fact that a report is made up at the end of the day, instead of at the exact minute when the circumstances it purports to record actually transpired, is not sufficient to deprive it of that quality of contemporaneousness which is one of the basic requisites for a reliable written record. Nor is the fact that a report is made up with the aid of rough notes, jotted down by the writer of the report for the purpose of serving as an aid to his memory in preparing it and thereafter destroyed, sufficient to deprive the report of that quality of being based on actual firsthand knowledge by the person making it, which is another one of the basic requisites for a reliable written record.

The Board has made a day-by-day, man-by-man, unit-by-unit, examination of the evidence pertaining to labor and equipment hours. In so doing it has applied the well-established rule that the burden of proving the amount of a claim for extra work is upon the contractor. On the evidence as a whole, the Board finds that appellant actually and reasonably incurred direct labor and equipment costs for the switch structure, over and above those allowed by the contracting officer, to the extent indicated in the following tables.[3]

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[1] See Schwartz, "A Decade of Administrative Law: 1942–1951," 51 Mich. L. Rev. 775, 815–18 (1953).

[2] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229 (1938).

[3] The rates given in the table of labor hours are the straight time hourly rates (or, in the case of employees hired by the week, the per hour equivalents of the weekly rates) that were used by appellant in calculating the amount of its claim and by the contracting officer in calculating the amount to be awarded thereon. The rates given in the table of equipment hours are the hourly rates of ownership and operation expense that were also used by both appellant and the contracting officer for the purposes of such calculations, except in the case of the item of equipment designated as MW Portable Power Plant. The

Labor Hours

| | Foreman | Lineman | Groundman | Groundman | Laborer | Laborer | Total |
|---|---|---|---|---|---|---|---|
| Rates | $2.50 | $3.00 | $1.75 | $1.70 | $1.40 | $1.30 | |
| Oct. 5 | | | 7 | | 2 | | |
| Oct. 18 | | 8 | | | | | |
| Oct. 20 | 4 | 4 | | | | | |
| Oct. 25 | | 1 | | | | | |
| Oct. 27 | 1½ | 1½ | | | | | |
| Oct. 29 | | 2 | 1 | | | | |
| Nov. 4 | | | | 1½ | | | |
| Nov. 7 | | 6 | | | | | |
| Nov. 22 | 4 | | | | | | |
| Nov. 23 | 3 | 7 | 3 | | | 6 | |
| Hours | 12½ | 29½ | 11 | 1½ | 2 | 6 | 62½ |
| Money | $31.25 | $87.00 | $19.25 | $2.55 | $2.80 | $7.80 | $150.65 |

Equipment Hours

| | Pickup | FWD Truck With Power Plant | GMC Truck | MW Portable Power Plant | Total |
|---|---|---|---|---|---|
| Rates | $1.31 | $2.82 | $1.31 | $1.13 | |
| Oct. 5 | 1 | 4 | 4 | | |
| Oct. 18 | | 8 | | | |
| Oct. 20 | 4 | | | | |
| Oct. 24 | | 2½ | | | |
| Oct. 25 | | | | 8 | |
| Oct. 26 | | | | 8 | |
| Oct. 27 | 1½ | | | | |
| Oct. 29 | 1 | | | | |
| Nov. 2 | ½ | | | | |
| Nov. 4 | | 4 | | | |
| Nov. 7 | 1 | | | | |
| Nov. 10 | | 3 | | | |
| Nov. 22 | 4 | | | | |
| Nov. 23 | 9 | 2 | | | |
| Hours | 22 | 23½ | 4 | 16 | 65½ |
| Money | $28.82 | $66.27 | $5.24 | $18.08 | $118.41 |

Board has derived the rate for this item from the rental rate for gasoline-engine-powered lighting plants of 1,100 watts capacity or less given in the 1955 edition of the "Compilation of Rental Rates for Construction Equipment" prepared by the Associated Equipment Distributors, and from the ratio between ownership and operation expenses reflected in the rates used for the other items of equipment employed on the switch job.

Appellant in calculating the amount of its claim and the contracting officer in calculating the amount he awarded thereon made an allowance for payroll taxes at the rate of 11¼ percent of direct labor costs. Likewise, both made an allowance for superintendence, general expense, and profit at the rate of 15 percent of allowable costs. Applying these percentages, the amount of the additional compensation due appellant for the use of its labor and equipment becomes $328.91, as follows:

| | |
|---|---|
| Direct Labor | $150.65 |
| Payroll Taxes | 16.95 |
| Equipment | 118.41 |
| Allowable Costs | $286.01 |
| Superintendence, General Expense, & Profit | 42.90 |
| Total | $328.91 |

This brings us to appellant's contention that it is entitled to a commission on the cost of Government-furnished materials. Paragraph A–9 clearly precludes acceptance of the contention put forward by appellant. The claim for a commission on the cost of Government-furnished materials is denied.

Appellant further contends that it is entitled to interest at the rate of 6 percent on the amount of the claim from the date of acceptance of the contract work to the date of payment of the amount due. This contention, however, disregards what the Supreme Court has described as "the traditional rule that interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract."[4] Appellant cites no express provision for the allowance of interest in the instant contract or in any applicable statute, and the Board has found no such provision. Hence the claim for interest is denied.

Claim No. 1 is, therefore, allowed to the extent of $328.91.

*Claim No. 2—Line Location*

From the north bank of the Missouri River the course of the two transmission lines ran first across a level flood plain, then uphill through an area of badly broken terrain, and then across a rolling plateau above these "breaks." The only indication of the location of the lines in the contract documents was in the form of a "key map," drawn to the scale of 1 inch equals 10,000 feet. The "key map"

[4] *United States* v. *Thayer–West Point Hotel Co.*, 329 U.S. 585, 588 (1947). Accord: *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Komatsu Manufacturing Co., Ltd.* v. *United States*, 132 Ct. Cl. 314 (1955); *Ramsey* v. *United States*, 121 Ct. Cl. 426 (1951), *cert. denied* 343 U.S. 977 (1952); *Ogle*, 17 Comp. Gen. 526 (1937); *Bury Compressor Co.*, 61 I.D. 215 (1953); *Strick Co.*, ASBCA No. 2416 (April 17, 1956); *Montgomery Construction Co.*, ASBCA No. 2556 (January 23, 1956).

showed that there would be two angles in the course of the transmission lines and appellant's president in making his pre-bid investigation of the site inferred from the map, in conjunction with the terrain, that the first of these angles would fall on the flat land below the "breaks." Actually, however, appellant was required to locate the first angle on the top of a small bluff some 600 to 900 feet north of the point where its president had considered that the angle would fall. This, of course, resulted in the portion of the line between the first and the second angles running somewhat to one side of the course which he had visualized. Appellant contends that the structures at the first angle, and some of those in the stretch between it and the second angle, were more expensive to construct than they would have been if the first angle had been placed on the flat land. The amount claimed on this account is $2,070.

Allowance of this claim is clearly foreclosed by reason of a failure on appellant's part to comply with the protest provisions of paragraph A–11 of the standard specifications.[5]

Structures at the first angle were actually set in place on or about October 12, 1955, but, nevertheless, the record contains no evidence that any written protest was submitted until December 9 of that year. This was clearly too late. While appellant's president testified that he had communicated his objections orally to the chief inspector for the Government before the work was done, this conversation was, in our opinion, insufficient to constitute a timely and proper protest in view of the unequivocal requirement of paragraph A–11 that protests be in writing.[6]

In his decision the contracting officer considered the claim here involved from a substantive standpoint and concluded that it was without merit, but he also expressly invoked the lack of timely written protest as a bar to allowance of the claim. Such being the case, it

[5] This paragraph, as amended by paragraph 11 of the specifications, reads as follows:

"If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within thirty (30) calendar days after date of receipt of the written instructions or decision (unless the contracting officer shall grant a further period of time prior to commencement of the work affected) he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his protest. Except for such protests as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions and/or decisions of the contracting officer contained in letters transmitting drawings to the contractor shall be considered as written instructions or decisions subject to protest as herein provided."

[6] See *Dunnigan Construction Co.* v. *United States*, 122 Ct. Cl. 262, 292–93 (1952); *United States* v. *Cunningham*, 125 F. 2d 28, 30–32 (App. D.C. 1941); *Associated Piping and Engineering Co., Inc.*, 61 I.D. 60, 62 (1952).

could not be said that this omission had been waived by the contracting officer.

Nor is there merit to the contention that the omission should have been waived. The sole statement that any protest was made before the work was done is to be found in the testimony of appellant's president as to his conversation with the chief inspector. Although the latter was called as a witness, neither party questioned him on this point. Yet one of the very purposes of the requirement that protests be in writing is the avoidance of situations where the only proof of the making of a protest is in the form of the testimony of an interested witness. Furthermore, had a timely and proper protest been made, it would have afforded the Bureau of Reclamation an opportunity to examine the possibility of locating the first angle at the point desired by appellant or, at least, of making the same effort to keep track of the cost of the work as was done in connection with Claim No. 1. Thus it would be impossible for the Board to find that the Government was not in fact prejudiced by the omission to submit a timely written protest.

Finally, appellant contends that paragraph A–11 is not applicable to the instant case and that the governing provision is the portion of the "changes" clause (clause 3) of the General Provisions which states:

> Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: Provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract.

However, there was no more of a compliance with the requirements of Clause 3 than with those of paragraph A–11.

Claim No. 2, therefore, is denied.

*Claim No. 3—Channel Crossing*

The location of the transmission lines was planned so that these lines would cross the channel of the Missouri River at a point just east of and downstream from the spillway and powerhouse sections of the dam. This was at the south end of the lines and also of the dam. Steel towers were to carry this section of the lines. Under the terms of the contract, construction of the towers was the Government's responsibility, while stringing of the conductors across the river channel was appellant's responsibility.

Appellant's president made a pre-bid investigation of the site of the channel crossing sometime around March 15, 1955. At this time the spillway and powerhouse sections were in process of construction, the steel towers had not yet been erected, and the river channel was dry, having been sealed off by a cofferdam in order to facilitate construc-

tion of the lower levels of the spillway and powerhouse. Working space in the area was constricted by a high bluff which closely approached the south bank of the river. Appellant's president observed a substation on the bluff, at a point southwest of the dam, from which power was supplied for the construction work, but noticed that the temporary powerlines used for this purpose did not cross the path of the lines to be strung by appellant. The bid opening date was April 7, 1955, and appellant mailed its bid 2 days before that date.

The steel towers were completed in the early part of September 1955. By that time several things had happened that affected the work of stringing the conductors between them, which was performed during the 2 ensuing months. First, the contractor for construction of the powerhouse had strung a 12.45-kilovolt temporary powerline along the south bank of the river in such a way that it crossed at right angles the path of the lines to be strung by appellant. Secondly, the same contractor had also placed temporary buildings on the right-of-way of the lines. Finally, the cofferdam had been removed and the channel between the steel towers was full of water. These events occurred after the award of appellant's contract except for the building of the powerline, which preceded the bid opening date.[7]

It is appellant's contention that the powerline, the buildings, and the removal of the cofferdam were unanticipated and unreasonable impediments to its work for which it should be paid by the Government. In this connection it also asserts that had the Government been more prompt in erecting the towers, it could have strung the conductors between them before the cofferdam had been removed. The amount claimed is $1,725.

In evaluating these contentions it must be borne in mind that the Board does not have general jurisdiction to settle claims against the Government for breach of contract, or for breach of quasi-contractual obligations, or for torts. Insofar as pertinent to the instant case, we have jurisdiction to allow a claim for additional compensation

[7] The construction of Gavins Point Dam was under the supervision of the Corps of Engineers. According to its records, the temporary powerline in question was begun on March 10 and finished on March 18, 1955. That appellant's president did not observe the building of this line during his pre-bid investigation may perhaps be attributed to the fact that, as his testimony shows, he arrived at March 15 as the approximate date of the investigation by a process of conjecture, rather than on the basis of actual recollection, so that the actual date conceivably might have been earlier than March 10. Or this failure may perhaps be explained by the fact that he did not extend his site investigation to the vicinity of the substation, and, therefore, would hardly have been in a position to observe line construction operations until they had reached the area of concentrated activities below the bluff, where appellant's work was to be done. He conceded that he made no inquiries of the contractor who built the temporary line, or of anyone else, as to what plans there were, if any, for providing facilities to serve the construction operations with power, over and above those in existence at the time of his visit to the site.

only when the claim arises out of circumstances for which an adjustment of the contract price is authorized by some provision of the contract itself, as in the case of the equitable adjustments provided for in the "changes" and "changed conditions" clauses (Clauses 3 and 4) of the General Provisions. The first of these clauses applies to changes ordered by the Government "in the drawings and/or specifications of this contract and within the general scope thereof." The second applies to "(1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract."

The Board is unable to find in the circumstances of this claim any basis for a price adjustment under the contract. The impediments and delay of which appellant complains appear to have made its work at the channel crossing more expensive than it had anticipated, but they did not alter in any way the quantum or characteristics of that work as defined by the contract.

The specifications and drawings contained nothing on the subject of the cofferdam or of buildings on the right-of-way, and for this reason alone it would be impossible to consider either the removal of the cofferdam or the presence of the buildings as a "change" within the meaning of Clause 3, or as a "changed condition" within the meaning of the first of the two categories of such conditions described in Clause 4. Nor can they be considered as coming under the second category, for the language used in Clause 4 imports that in order to be within the second category a condition must be one the existence of which is capable of being known at the time when the contract is made, and, hence, must be one which is in existence at that time.[8] And it is well established that delays by the Government in performing its own obligations are neither "changes" nor "changed conditions."

With respect to the temporary powerline, appellant points to the fact that the "key map" included in the contract documents showed a number of powerlines, including some that crossed the course of the lines to be constructed by appellant, and others at a distance from that course, but did not show the line in controversy. This map, however, affords no clear indication of an intent to show all existing powerlines, much less an intent to show powerlines not yet in existence when the contract documents were offered for bidding. If appellant did deduce such an indication from the map, the deduction was unreasonable, for the map showed no powerlines in the vicinity

[8] *Morrison-Knudson Co.*, CA-170 (October 20, 1952); *Koeneke*, ASBCA No. 3163, 57-1 BCA par. 1313 (1957).

of the south end of the dam and yet, as appellant knew from the pre-bid investigation of its president, there was in this vicinity a substation with one or more lines transmitting power to it, and from it to the dam.[9]

These considerations derive added force from the fact that appellant made no effort to recheck conditions at the channel crossing site during the period that elapsed between the pre-bid investigation and the bid opening date, notwithstanding its president's knowledge that major construction operations were going forward in immediate proximity to that site, and notwithstanding the rather pointed warning in paragraph A–22 of the standard specifications that the work to be done under the contract would include the making of satisfactory provisions to overcome interferences with transmission, telegraph, or telephone lines "existing on date bids are received." Such a recheck would have revealed the presence of the line in question since it was completed nearly 3 weeks before the bid opening date. As the presence of the line did not contravene any indication contained in the contract documents, it must be concluded that it was neither a "change" under Clause 3 nor a "changed condition" of the first category described in Clause 4. Furthermore, the presence of the line was not a circumstance so out-of-the-ordinary, considering the size of the dam construction job and the limitations on working space imposed by the river and the bluff, as to bring it within the second category of Clause 4.

Claim No. 3, therefore, is one which neither the contracting officer nor the Board could allow.

*Claim No. 4—Reframing Poles*

One of the structures on the "B" line (structure 91/6 at station 117+19.48) was set in such a manner that the center pole was too high. Appellant contends that this was due to an error by a Government inspector in checking the setting of the structure. Appellant performed the necessary corrective work and claims additional compensation therefor in the amount of $242.34.

This claim is barred by reason of lack of timely compliance with the protest provisions of paragraph A–11 of the standard specifications.

While the facts of the claim were the subject of considerable controversy at the hearing, no witness placed the performance of the corrective work at a later date than approximately October 20, 1955. The earliest written notice of the claim that appears in the record is dated December 9, 1955, and, hence, was too late. The Government in-

[9] Appellant's further contention that the controversial powerline did not appear on the plan and profile drawings furnished it after the award of the contract is irrelevant, for these drawings were not a part of the contract documents and were not relied upon by appellant in preparing its bid, their contents being unknown to it at that time.

spector, however, testified that on the same day on which the work was done appellant's president told him that a claim would be made. This was not enough, for, as pointed out in connection with Claim No. 2, paragraph A–11 requires that protests be in writing. Furthermore, there is nothing in the record to indicate that the inspector was an authorized representative of the contracting officer for the purpose of receiving protests, or that he communicated the statement of appellant's president to any such representative.

Although the contracting officer found the claim to be without merit, he expressly invoked the failure to make timely protest in writing as a ground for his rejection of the claim. The discrepant and uncertain accounts of what happened in connection with the setting and correction of the structure, as given at the hearing, pointedly illustrate the significance of a timely and proper protest to the proper official as a means for facilitating resolution of a dispute while the facts are still fresh. In the circumstances, it must be concluded that the contracting officer's refusal to waive was fully justified.

Appellant urges, however, that the Government inspector, when the need for the corrective work was discovered, orally informed appellant's foreman that this work would be paid for as an extra, and contends that it was the normal practice in the Bureau of Reclamation for an informal commitment of this sort to be followed up at a later date by the formal allowance of an extra, notwithstanding a failure to protest. What may be the proper view of the law applicable to such a situation need not be here considered, for in any event the evidence is insufficient to establish that the asserted informal commitment was in fact made. Appellant's president testified that the foreman in charge of the erection of the structure told him that the Government inspector had said that an extra would be allowed. The inspector, on the other hand, testified that he told no one that the work was a proper extra or that a claim would be paid. Bearing in mind that the burden of proof is on appellant, and that its version of what happened is based entirely on controverted hearsay testimony, the Board finds that the inspector did not inform any of appellant's representatives that the work in question would be regarded as an extra or paid for as such.

The circumstances related above, as in the case of Claim No. 2, also necessitate rejection of appellant's contention that the claim is open for consideration under the notice provision of the "changes" clause.

Claim No. 4, therefore, is denied.

*Claim No. 5—Saddle Clamps*

Many of the wood-pole structures to be erected under the contract were to have X-braces between the poles. Appellant was ordered to install on each pair of X-braces a saddle clamp, which is a device for clamping together the braces at the point where they cross one another

in the center of the X. Most of the structures to be equipped with X-braces were two-pole straight line structures of the type designated as HS. Appellant asserts that while the contract required saddle clamps for the other types of structures, where strains were greater, it did not require them for the HS structures. For providing saddle clamps on these latter structures appellant claims additional compensation of $139.44.

The provisions with respect to X-braces in the standard specifications mentioned steel end fittings for the braces, and bolts, locknuts, and washers for attaching the braces to the poles, but said nothing about saddle clamps. The standard specifications contained seven drawings on which X-braces were shown for structures of the types covered by the instant contract. Drawing No. 1 was for the HS structures. It depicted by dotted lines braces *without* saddle clamps. Drawings Nos. 2, 3, and 8 were for structures of types other than HS. Each depicted by dotted lines braces *with* saddle clamps. Drawing No. 39 showed various details of two-pole straight line structures, a category that included HS structures. It depicted by solid lines braces *with* saddle clamps. The list of materials appearing on this drawing, however, referred to a "Two piece X-brace, boxed end fittings," *without* mentioning saddle clamps. Drawing No. 40, which related to two-pole structures of types other than HS, was identical with No. 39 in the particulars above described. Drawing No. 45, which related to three-pole structures, showed the ends, but not the intersection, of the braces, and in its list of materials referred to "X-Brace complete with fittings, washers, nuts and bolts." All seven drawings were expressly made a part of the contract by paragraph 75 of the specifications.

Consequently, the terms of the contract harbored a considerable degree of ambiguity on the subject of saddle clamps for HS structures, and were fairly susceptible of being construed either as requiring or as not requiring saddle clamps for these structures. With respect to such a situation, the Court of Claims has held:

> Where the Government draws specifications which are fairly susceptible of a certain construction and the contractor actually and reasonably so construes them, justice and equity require that that construction be adopted.[10]

One essential ingredient of this long-established rule is that the construction which the contractor seeks to have adopted is a construction which it itself actually and reasonably placed upon the contract.[11] In the instant case, however, there is no evidence to show that appellant omitted saddle clamps for the HS structures in computing the amount of its bid, or took any other action, before the present controversy

[10] *Peter Kiewit Sons' Co.* v. *United States*, 109 Ct. Cl. 390, 418 (1947).
[11] *Western Contracting Corp.* v. *United States*, Ct. Cl. No. 344–55 (December 3, 1958).

arose, which manifested an understanding on its part that the contract did not require saddle clamps for such structures. In fact, what evidence there is suggests that appellant may have initially read the specifications and drawings as calling for saddle clamps for HS structures. During the interval between the award of the contract and the giving of the notice to proceed, appellant placed with a manufacturer an order for the X-braces necessary for the performance of the contract. Notwithstanding that it would have been possible for appellant to have purchased braces without saddle clamps, this order specifically mentioned that all of the braces were to have saddle clamps, and under it the manufacturer furnished a saddle clamp for each pair of braces. In these circumstances we can find no basis for the application of the *contra proferentem* rule, as quoted above.[12]

It is true, as appellant points out, that in an earlier version of the standard specifications saddle clamps were expressly mentioned and, in addition, were shown on the drawing for HS structures. The contracting officer, however, stated that the omission of these particulars from the version incorporated in the instant contract was due in part to an effort to eliminate wordage deemed superfluous and in part to inadvertence, and no evidence to rebut this statement appears in the record. Thus, it cannot be said that the differences between the two versions reflect a conscious design to dispense with saddle clamps for HS structures. This being so, the differences simply tend to confirm the ambiguousness of the terms of the contract, and afford no more of a reason for resolving the ambiguity in appellant's favor than they do for resolving it in the Government's favor.

Returning to the contract documents, the depiction in solid lines of a saddle clamp on the X-brace shown on drawing No. 39 would seem to be entitled to somewhat greater weight than the mere omission of saddle clamps from the other places where they might logically have been included; i.e., the list of materials, drawing No. 1, and the specifications themselves. In the absence of any more reliable indicia of the meaning which the parties intended, we construe the contract as requiring appellant to provide saddle clamps for the HS structures.

Claim No. 5, therefore, is denied.

### *Claim No. 8—Peninsula Operations*

Between the channel crossing and the north bank of the Missouri River the transmission lines ran through a low-lying area that, prior to the construction of Gavins Point Dam, had been occupied partly by islands and partly by water. The contract stated that in this area the wood-pole structures for the lines were to be placed on peninsulas projecting downstream from the toe of the dam, and further stated

[12] *Cf. Consolidated Engineering Co., Inc.* v. *United States*, 98 Ct. Cl. 256, 280–81 (1943).

that these peninsulas were being constructed under a separate contract.

Appellant claims the sum of $862.50 on account of various delays and impediments which, according to the testimony of its president, were encountered in building this section of the transmission lines. The asserted delays and impediments are, in summary, as follows:

(a) The contractor for the construction of the dam was slow in completing the peninsulas and making them available to appellant.

(b) A chalk stockpile on one of the peninsulas, removal of which was made the Government's responsibility by the terms of the contract, was not timely removed.

(c) The dam construction contractor built a fence, with locked gates, at the north end of the dam, and failed to make suitable provision for unlocking the gates at appropriate times, thereby restricting ingress to and egress from the peninsulas.

(d) This contractor dug drainage ditches that hampered the stringing of the conductors.

(e) This contractor stopped stringing operations that were in progress, and required the removal of wire reels during the period of stoppage, in order to facilitate the completion of its own work.

(f) Line construction materials, such as crossarms and insulators, left on the peninsulas were broken or destroyed before they could be installed.

Appellant's president also testified that the measures summarized in items (c), (d), and (e) were, in the main, taken by the dam construction contractor at the direction of personnel of the Corps of Engineers, the agency having supervision over the construction of the dam.

The legal considerations mentioned in the discussion of Claim No. 3 are equally applicable to the first five items of the present claim. The Board can find in appellant's description of these items nothing which could be considered as amounting to a "change," or to a "changed condition," or to any other circumstance for which an adjustment in price is authorized by the contract. In essence, all of these items are for damages for breach of contract, a matter over which the Board lacks jurisdiction.

Item (f) would appear to be one in which a price adjustment on account of the costs of complying with the requirement of the Government that the broken or destroyed materials be replaced by appellant could be made administratively, provided some wrongful act or omission of the Government was a cause of the breakage or destruction. The evidence, however, goes no further than to suggest that the actual cause was, in all probability, negligence or perhaps vandalism, on the part of unidentified employees of one of the contractors or subcontractors engaged in performing work at the dam site. As-

sumption by the Government of an obligation to exclude all such persons from the areas where appellant was working is plainly negatived by the numerous references in the contract to work to be done by contractors other than appellant. As there is no showing that the Government, or any of its own personnel, was at fault, there is no basis on which appellant can be relieved of the replacement costs.

Claim No. 8, therefore, is one which neither the contracting officer nor the Board could allow.

*Claim No. 11—Adverse Weather*

The date for completion of the work was September 15, 1955. The time for completion was, however, extended by the contracting officer to November 30, 1955, and the work was actually completed and accepted on that date. The ground for such extension, as found by the contracting officer, was that certain of the working areas could not be made available to appellant until November 8, 1955, because of necessary exclusive use of these areas prior to that date by contractors engaged in building the dam itself. Appellant contends that adverse weather conditions during the period from September 15 to November 30 increased the cost of the work above what it would otherwise have been, and claims the sum of $1,650 on this account.

The delay in completion beyond the date originally set is ascribed by appellant to the same circumstances that form the basis of Claims Nos. 3 and 8. Those circumstances, we have found, do not afford a basis on which relief could be afforded appellant in this proceeding. The instant claim, being merely for additional losses or expenses attributable to those circumstances, is necessarily subject to the same infirmities as are Claims Nos. 3 and 8. This is also true of the ground to which the contracting officer ascribed the delay in completion, since such matters as items (a) and (b) of Claim No. 8 appear to have been the basis for his finding that certain working areas could not be made available to appellant until November 8, 1955.

It follows that Claim No. 11 is one which neither the contracting officer nor the Board could allow.

CONCLUSION

The Board, therefore, determines that the appellant is entitled to an equitable adjustment of the contract price in the amount of $328.91 on account of Claim No. 1, and to that extent the appeal is sustained. With respect to the remainder of the sums claimed, the appeal is denied.

HERBERT J. SLAUGHTER, *Member.*

I concur:

PAUL H. GANTT, *Acting Chairman.*

## APPEAL OF HENKLE AND COMPANY

IBCA-212 *Decided September 15, 1959*

**Contracts: Appeals—Rules of Practice: Appeals: Dismissal**

Where the contracting officer fully informs a contractor of the right of appeal and of the necessary procedural steps to be taken, and appellant remains inactive and silent and does not perfect appeal, the appeal will be dismissed for lack of prosecution.

BOARD OF CONTRACT APPEALS

ON MOTION TO DISMISS:

The motion of Department counsel of August 13, 1959, to dismiss the appeal for lack of prosecution is granted.

The findings of fact and decision of the contracting officer of June 24, 1959, denied two claims in the respective amounts of $663.34 and $136, and granted an extension of time of 9 days in connection with the drilling of four water wells at the Keyes Helium Plant.

The findings of fact and decision contained a clear-cut reference to the right of appeal to higher authority.

The contractor wrote a letter to the Board, addressed to the Helium Activity in Amarillo, Texas, on July 17, 1959, in which it stated that—

> * * * we wish to register our desire to appeal the Findings of Fact as submitted with your letter of June 23, 1959.
>
> We would appreciate your notification of the time and date of our appeal as soon as possible with any other pertinent instructions.

By letter of July 23, 1959, the Chief of the Division of Gas Field Operations of the Helium Activity sent to the contractor the pertinent regulations of the Board of Contract Appeals (43 CFR, 1954 Rev., Part 4) and invited attention—

> to Section 4.5 of these regulations in order that you can specify the portions of the findings of fact or decision which you deem are erroneous. Also, you will note that a brief may be submitted in support of the appeal.

The appellant neither specified "the portion of the findings of fact or decision from which the appeal is taken" nor "the reasons why the findings or decision are deemed erroneous." (43 CFR 4.5(a).)

The record discloses that a copy of the motion to dismiss was served on the contractor at the time of filing with the Board on August 13, 1959 (43 CFR 4.13). Appellant did not reply to the motion.

Under these circumstances, the Board must conclude that the appellant has abandoned its appeal. Consequently, the motion to dismiss is granted.

Generally, the Board will not lightly dismiss an appeal, especially if the wording of the appeal supports a conclusion that an appeal to higher authority was intended. The Board will jealously watch

that substantive rights of the parties are not defeated by mere technicalities. However, in such an instance as the present one, where the contracting officer fully informs a contractor of the right of appeal, and of the necessary procedural steps to be taken, and such action on the part of the contracting officer is followed by complete inaction and silence on the part of the contractor for a considerable period of time, it must be assumed that the contractor has lost interest in the appeal and abandoned it. *Parker-Schram Company*, IBCA–119 (January 28, 1959); see *Reading Clothing Manufacturing Company*, ASBCA No. 3912 (1957).

PAUL H. GANTT, *Acting Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

## PAUL D. HAYNES

A–28043 *Decided September 21, 1959*

**Rules of Practice: Appeals: Dismissal**

An appeal to the Director of the Bureau of Land Management from the rejection of an oil and gas lease offer is properly dismissed where after the notice of appeal is filed the appellant withdraws his lease offer and requests a refund of the payment of advance rentals.

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

A request for reinstatement of an offer for an oil and gas lease which the offeror has withdrawn constitutes a new filing which must comply with the requirements of the regulations, including the payment of a filing fee, to earn the offeror priority.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Paul D. Haynes has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated February 24, 1959, which dismissed his appeal from a decision of the manager of the Santa Fe, New Mexico, land office, dated February 10, 1958, rejecting his noncompetitive oil and gas lease offer New Mexico 033618 (Oklahoma).

On March 6, 1958, Haynes, through his attorney, W. H. Burnett, filed an appeal from the manager's decision. The record shows that on the next day the land office received a letter signed by the appellant himself in which he stated:

> In regards to your letter of February 10 and to the rejected lease offers I have decided to drop the offers rather than to appeal again.
>
> I have deposited 50¢ per acre on 414 acres and 408 acres. Please have the department make me the refund on this amount as soon as possible.

On March 10, 1958, another letter signed by the appellant was received at the land office in which he stated:

> Please disregard my recent letter, which was not mailed until yesterday, requesting that a refund be made on above described lease application. I have decided to appeal the case through Mr. W. H. Burnett.

The manager took no action on the first letter and after receipt of the second letter forwarded the case to the Bureau offices in Washington, D.C.

The Director pointed out that the Department has held that an appeal will be dismissed where, after the appeal is taken, the appellant withdraws his offer (*Helen Bugas*, A–27584 (March 10, 1958)), and that since there is no authority for reinstating a lease offer after it has been withdrawn, the appeal was dismissed.

In his appeal the appellant contends that since his decision to continue the appeal "was accepted in as much as the Department did not refund the money since that date over a year ago, and the appeal did stay in process * * *," he does not feel that the appeal was justifiably dismissed.

The appellant's contentions are without merit. Under the Department's rules of practice, 43 CFR, 1954 Rev., Part 221 (Supp.), generally speaking, the officer to whom an appeal is made is the person authorized to determine if an appeal is defective on any procedural ground. Consequently, the manager quite properly forwarded the case to the Director in order that that officer could rule upon the appeal. The fact that the appeal was not reached for a decision for 1 year, because of administrative delay, did not mean that the appeal was "accepted" in any sense. When the appeal was reached for decision it was dismissed for the reason stated.

Whether the appeal was properly dismissed depends upon the consequences of the appellant's withdrawal of his offer. The pertinent regulation provides:

> An offer may not be withdrawn, either in whole or in part, unless the withdrawal is received by the land office before the lease, an amendment of the lease, Form 4–1163, or a separate lease, whichever covers the land described in the withdrawal, has been signed on behalf of the United States. 43 CFR, 1954 Rev., 192.42(h).

A withdrawal takes effect, without any further action by the Secretary, from the moment it is filed and once it is filed the offer and all rights and obligations under it are at an end. Cf. *Mary J. Woolley et al.*, 5 L.D. 222 (1886); *Hughey v. Dougherty*, 9 L.D. 29 (1889).

In an analogous situation, the Department has held that after a lessee has relinquished his lease, he cannot withdraw his relinquishment nor can the Secretary reinstate the lease. *Thomas F. McKenna, Forrest H. Lindsay*, 62 I.D. 376 (1955).

After withdrawing his offer, the former offeror stands in the same relation to the land applied for as any other would-be offeror. To gain a preference right to a lease he must file a proper application in accordance with the requirements of the regulations. While there does not seem to be any reason why the withdrawn offer and rental payments still in the land office could not be considered as a new offer, at the request of the offeror; as a new offer, it must be accompanied by a filing fee in order to earn it any priority (43 CFR 192.42(e)(1)). Since the appellant did not submit a filing fee with his request that his withdrawal be disregarded, his request, even if considered as a new offer, was and remains defective and is subject to rejection. 43 CFR 192.42(g)(i)(iii).

Since the subject matter of the appeal ceased at the time the appellant withdrew his lease offer, the appeal was properly dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2. 2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEAL OF CARIBBEAN CONSTRUCTION CORPORATION

**IBCA-90 (Supp.)** *Decided September 22, 1959*

**Contracts: Additional Compensation—Contracts: Substantial Evidence**

The amount of the equitable adjustment to be made on account of a "change" or a "changed condition" may be determined on the basis of a fair and reasonable approximation of costs, arrived at by a studied consideration of the record as a whole. Cost tabulations made by either party, even though there is oral testimony as to their correctness, do not afford a satisfactory basis for an equitable adjustment if major discrepancies exist between such tabulations and the cost records from which they are represented as having been derived, or if other facts or circumstances reveal the existence of major errors in them.

### BOARD OF CONTRACT APPEALS

This appeal, which is the second one in the instant case, necessitates a determination of the amount of the equitable adjustments to be made on account of two claims, the merits of which were considered in our decision of June 28, 1957 (64 I.D. 254) upon the original appeal. The first claim is for excess costs of pile removal; the second is for excess costs of pipe trenching and pipe laying done in muck. Each has its source in a contract with the Office of Territories for the construction of a sewer at Charlotte Amalie, St. Thomas, Virgin Islands.

In the cited decision the Board held that both claims were meritorious ones, under either Clause 3 of the contract, relating to "changes," or Clause 4, relating to "changed conditions." Conformably to a stipulation entered into by the parties, the Board thereupon remanded the claims to the contracting officer for a determination of the amount to be allowed on each. In this connection the Board pointed out that the maximum allowable on either claim would be the sum reserved by the contractor in its release on contract; namely, $4,791.25 for the pile removal claim and $13,473.38 for the work in muck claim.

It was further stated in the decision that the provisions of section 6–09 of Part I of the specifications should be followed in determining, subject to the foregoing limitation, the amount of the equitable adjustments to be made. The pertinent portions of that section read as follows:

(a) In making any change contemplated by Article 3 of Standard Form 23A—General Provisions—Construction Contracts, the approximate charge or credit for the change shall be determined by the Contracting Officer in one of the following methods prior to the issuance of the order for the changed work:

* * * * * * *

(3) By ordering the Contractor to proceed with the work and to keep and present in such form as the Contracting Officer may direct, a correct account of the cost of the change together with all vouchers therefor.[1] The cost may include an allowance for overhead and profit not to exceed twenty percent (20%) of the net cost. The cost may also include all items of foreman labor, materials and all items of cost such as public liability and workmen's compensation insurance, and social security, old age and unemployment insurance; however, no percentage for overhead and profit shall be allowed on items of social security, old age and unemployment insurance. If deductions are ordered, the credits shall be the net cost. Among the items considered as overhead are included insurance, other than mentioned above, bond or bonds, superintendent, timekeeper, clerks, use of small tools, incidental job burdens, and general office expenses.

Following the remand, appellant and the contracting officer attempted, but without success, to reach an agreement upon the amount of the excess costs incurred. The contracting officer thereupon issued supplemental findings of fact, dated October 2, 1957, in which he stated $2,075 for pile removal and $4,212 for work in muck. From these findings appellant took a timely appeal.

At the hearing on this appeal oral testimony was given by appellant's president and by its former secretary-treasurer, a person with professional training in accounting. The Government elected to rest its case without presenting oral testimony. The record contains the certified payrolls and certain other vouchers submitted by appellant

[1] As the contracting officer and his representatives at the site failed to recognize that their instructions to proceed with the work amounted to a "change" within the meaning of Clause 3, no order to keep a cost account or to preserve vouchers was ever actually given to appellant.

while the work was in progress, together with photostats of about 370 bills and other vouchers submitted during the subsequent negotiations. These documents are represented as comprising all, or substantially all, of appellant's basic cost records for the sewer construction job.

Appellant's theory of the case is summed up in a tabulation of costs prepared by its former secretary-treasurer which, according to the testimony of both witnesses, errs, if at all, on the side of understating, rather than overstating, the costs actually incurred. This tabulation places the total costs of the job at $113,870.13, and allocates them to four categories of work, as follows:

| | |
|---|---|
| Pile Removal | $4,523.98 |
| Work in Ordinary Material | 18,147.90 |
| Work in Muck | 83,338.39 |
| Grit Chamber | 7,859.86 |
| Total | $113,870.13 |

Appellant's witnesses testified that this allocation had been made on the basis of the vouchers themselves, its president's knowledge of the work that had been done, and the diary kept by its superintendent at the job site.[2]

With respect to the pile removal item, it was testified that the costs of removing piles shown on the contract drawings were included in the item for work in ordinary material, thus confining the former item to the excess costs incurred by reason of the presence of piles that, as held in the original decision, could not reasonably have been anticipated when the contract was made. With respect to the item for work in muck, excess costs of $61,406.24 were arrived at on the basis of a comparison with the ordinary material item, made as set out below. The witnesses testified that of the total length of the sewer lines 832.5 linear feet were in ordinary material and 1,006 linear feet were in muck; by using these figures as divisors of the tabulated costs for the two items the costs per linear foot were computed as being $21.80 for work in ordinary material and $82.84 for work in muck; the difference between these latter amounts of $61.04 was taken as the measure per linear foot of the excess costs attributable to the presence of the muck; and by using 1,006 as the multiplier of such difference the excess costs were computed as totaling $61,406.24. The grit chamber item in the tabulation covers a part of the job that involved neither pile removal nor work in muck.

In rebuttal of this tabulation, the Government presented an analysis of appellant's vouchers made by an engineer of the Office of Territories. According to this analysis the total costs of the job were $44,037.93, or substantially less than one-half of the amount shown

[2] The diary appears in the record, except that the pages covering the period from May 7 through May 27, 1956, are missing.

by appellant's figures. The Government engineer did not allocate the total job costs among the four categories of work used by appellant.

An examination of appellant's tabulation and the Government's analysis in the light of the testimony and documents of record makes it readily apparent that neither constitutes a satisfactory basis for determination of the amount of the equitable adjustments to be made.

Looking first at appellant's tabulation, we find that the total costs there given are almost double those shown by the cost records made available to the Board. The aggregate of the amounts shown in the cost records, after exclusion of patent duplications, is actually somewhat less than $60,000. And even this sum includes substantial items, such as the salary of appellant's superintendent, which under section 6–09 of Part I of the specifications are not allowable as job costs, but are to be absorbed in the allowance made for overhead and profit. It is true, on the other hand, that there are some self-evident gaps in the cost records, such as a missing payroll and an entire lack of data on payroll taxes, but these gaps could hardly account for more than a small fraction of the otherwise unexplained difference of over $50,000 between the tabulated costs and those shown on the vouchers submitted to the Board.

Nor can it be concluded that the costs are correctly allocated in the tabulation. The $83,338.39 allocated to work in muck amounts to 73 percent of the tabulated costs. This percentage reflects, among other things, the view of appellant's witnesses that muck was encountered for a distance of 1,006 linear feet along the main sewer line. The Board in its original opinion identified a stretch of approximately 800 linear feet (from Station 37+00 to Station 45+00) along the main sewer line as being the location where muck was encountered. We have reviewed that finding in the light of the additional evidence now before us, but are not persuaded that muck, in a form or to an extent so at variance with the contract documents as to entitle appellant to an adjustment of the contract price, prevailed for distances exceeding 800 linear feet.

An illustration of the excessiveness of the tabulated costs, both in the aggregate and in the amounts allocated to work in muck, is afforded by the expense breakdowns included in the tabulation. These breakdowns give $28,626.18 as the cost of direct contract materials, of which $23,893.23 is allocated to work in muck, and give $33,867.42 as the cost of direct contract labor, of which $23,204.34 is allocated to work in muck. Thus, according to the tabulation, the pipe trenching and pipe laying operations in the areas where appellant considered that muck had been encountered necessitated an outlay for materials equal to the outlay for labor, notwithstanding that

the pipe itself was furnished by the Government. On the other hand, the accounts of the difficulties experienced in these areas, as given by appellant's president at the hearings on both the former and the instant appeals and by its superintendent at the first of these hearings, and as contained in the superintendent's diary, emphasize the extent to which labor and equipment costs were increased by the presence of the muck, and contain nothing to suggest that material costs were increased to anything approaching a like extent. Nor is it possible to derive from the vouchers submitted a figure for direct contract materials that amounts to even one-fourth of the total stated in the tabulation.

Turning to the Government's analysis, we find that it understates the costs incurred. For example, the amounts withheld from employees' pay for personal income taxes and for social security contributions, although reported on the certified payrolls, are not reflected in the analysis. Payroll taxes, such as the employer's social security contributions, are also not reflected in the analysis. Materials are confined to those reported in the periodic payment estimates, and, since these estimates were based on end-of-month inventories of the materials stored at the job site, materials that were incorporated into the contract work during the same month in which they were delivered at the site are not reflected in the analysis. Thus, no costs for cement are included, although a significant amount of concrete work was performed.

There are other deficiencies as well, both in appellant's tabulation and in the Government's analysis.

The testimony, cost records, and other basic data adduced by the parties do not provide a foundation on which the excess costs of pile removal and work in muck can be computed with mathematical precision, but they do provide sufficient reliable information to admit of those costs being fairly and reasonably approximated. The Court of Claims, in upholding findings made by one of its Commissioners in a case that involved problems of proof similar to the ones here presented, has recently stated:

> In his determination as to the amount of damage suffered by the plaintiff, Commissioner Evans based his conclusions upon "an inference drawn from the evidence as a whole, being in the nature of a jury verdict." We are of the opinion that the Commissioner was correct in determining damages based upon his judgment arrived at by a studied consideration of the record before him. This court has many times held that the measure of damages is not an exact science calling for a hard and fast rule, but is a determination based upon the facts and circumstances of each case.[3]

[3] *Western Contracting Corp.* v. *United States*, Ct. Cl. No. 344–55 (December 3, 1958). See also *Peter Kiewit Sons' Co.* v. *United States*, 138 Ct. Cl. 668, 679 (1957); *F. H. McGraw and Co.* v. *United States*, 131 Ct. Cl. 501, 510 (1955); *Central Wrecking Corp.*, 64 I.D. 145, 160 (1957) and cases there cited.

Applying this standard to the evidence before us, we find that appellant is entitled to an equitable adjustment of $2,600 on account of pile removal.

The record contains a detailed analysis of the excess pile removal work made by the same engineer who subsequently prepared the Government's analysis of appellant's costs as a whole. This analysis gives 7 full days and 12 half days as the time devoted to that work, and $1,213.08 as the costs of its performance. Of these costs $665.01 is for labor, $528.07 is for crane expense, and $20 is for other equipment. The labor figure, while possibly erring somewhat on the low side, appears to be close to the actual amounts.

The crane expense figure, on the other hand, clearly reflects misapprehension of the legal principles governing the determination of equipment charges. The crane was rented at the start of the job from a firm in the continental United States under an agreement which obligated appellant to bear all transportation costs, was purchased by appellant while it was in use on the job, was sold to a firm in the Virgin Islands while it was still in such use, and was then rented back from the latter firm by appellant. In these circumstances the sums properly allowable as crane expense include (*a*) rental paid to the first lessor, (*b*) rental paid to the second lessor, (*c*) rental value of the crane for the intervening period as to which no rental was paid to either lessor, (*d*) cost of transport of the crane to the Virgin Islands, (*e*) what it would have cost to transport the crane to the continental United States if appellant's obligation to return the crane to the first lessor had not been terminated through its purchase by appellant, (*f*) repairs not chargeable to either lessor, and (*g*) operating costs. The aggregate of these sums must be divided by the number of days the crane was actually at the jobsite during the period of contract performance, after deduction of any days on which it was reasonably withheld from use such as Sundays, holidays, and days consumed in making necessary repairs, in order to determine a proper rate of expense for each day of actual use. So compiled, the available data justifies a figure of $105 per working day for crane expense.[4]

A fair and reasonable approximation of the excess costs of pile removal, that takes into account the various facts and circumstances disclosed by the evidence, would be as follows:

[4] Compensation for the services of the crane operator and oiler is included in the labor item, and, hence, has been excluded from the crane item.

| | |
|---|---|
| Labor | $710.00 |
| Payroll Taxes | 50.00 |
| Crane (13 days @ $105 per day) | 1,365.00 |
| Other Equipment | 50.00 |
| Allowable Costs | 2,175.00 |
| Overhead and Profit[1] | 425.00 |
| Total | 2,600.00 |

[1] This item represents 20 percent of the allowable costs after making adjustment for payroll taxes on which, under section 6-09 of Part I of the specifications, overhead and profit are not allowable.

Applying the same standard, as quoted above from the Court of Claims, we find that appellant is entitled to an equitable adjustment of $9,100 on account of work in muck.

With respect to this part of the case, the first major issue presented is: What was the total amount of the costs that appellant actually and reasonably incurred in performing the contract work? From the cost records in evidence, the Board finds that this amount, exclusive of items properly chargeable as overhead, was, in round figures, $50,000.

A further major issue is: How should the total costs, after deduction of the excess costs of pile removal and the grit chamber costs, be allocated as between work in ordinary material and work in muck? The most reliable guides to a proper allocation, in our opinion, are to be found in the diary of appellant's superintendent and in the certified payrolls. An examination of the former indicates that of the 142 days which elapsed from January 19, 1956, the date when excavation for the sewer lines was started, through June 8, 1956, the last day of work, there were about 65 days when the principal seat of construction operations was within the 800 linear feet of main sewer line where muck prevailed.[5] An analysis of the payrolls indicates that the wages paid for work on these 65 days amounted to about 48 percent of the wages paid for work on all of the 142 days during which the sewer lines were under construction.[6] Evaluating these matters in the light of the whole record, the Board finds that an allocation of the total costs, after the deductions mentioned, in the proportion of 52 percent to work in ordinary material and 48 percent to work in muck is the one that is best supported by the evidence.

A third major issue is: By what measure should the costs per linear foot of the work in ordinary material be determined for the pur-

[5] Identified as closely as the nature of the operations permits, these days were February 12 through April 7, April 17 through April 20, and May 30 through June 3. The operations during the 3 weeks for which diary pages are missing appear from other evidence to have been concentrated outside the 800 linear feet.

[6] No payroll was submitted for the final 4 days of work (June 5 through 8), but, considering the limited scope of the operations then being carried on, this omission is not a factor of material consequence for the purposes of the analysis here involved.

pose of comparing with them the costs of the 800 linear feet of work performed in muck? The contract work comprised 1,495 linear feet of main sewer line and 713 linear feet of laterals, a total of 2,208 linear feet. Ordinary material prevailed for 695 linear feet of main sewer line and all of the 713 linear feet of laterals, a total of 1,408 linear feet. An examination of the contract unit prices reveals that the prices which appellant bid for the various items of work to be performed along these 1,408 linear feet, when consolidated together and stated in terms of a total price per linear foot, were equal to the prices which it bid for the various items of work performed within the 800 linear feet of muck, when similarly consolidated and stated. All things considered, the Board finds that 1,408 linear feet is the measure of the work in ordinary material that is best supported by the evidence.

A fair and reasonable approximation of the excess costs of work in muck, that takes into account the various facts and circumstances disclosed by the evidence, would be as follows:

| | | |
|---|---|---|
| Total Job Costs | | $50,000.00 |
| Less: Pile Removal | $2,175.00 | |
| Grit Chamber | 6,325.00[1] | 8,500.00 |
| Remainder of Costs | | $41,500.00 |
| Work in Ordinary Material (52% of $41,500) | | $21,580.00 |
| Work in Muck (48% of $41,500) | | $19,920.00 |
| Cost per Linear Foot in Ordinary Material ($21,580 ÷ 1,408) | | $15.33 |
| Cost per Linear Foot in Muck ($19,920 ÷ 800) | | $24.90 |
| Excess Cost per Linear Foot ($24.90 — $15.33) | | $9.57 |
| Allowable Costs ($9.57×800) | $7,656.00 | |
| Overhead and Profit[2] | $1,444.00 | |
| Total | $9,100.00 | |

[1] Considering the general overstatement of costs in appellant's tabulation, $6,325 appears to be a more realistic figure for the grit chamber costs than the $7,859.86 given in that tabulation.

[2] See footnote 1, p. 340.

While the foregoing itemizations of the excess costs of pile removal and work in muck, respectively, are necessarily less than exact to the last dollar, a studied consideration of the record leads us to conclude that they measure those costs with sufficient certainty to serve as the basis for the making of appropriate price adjustments under the contract.

## Conclusion

The Board, therefore, determines that the appellant is entitled to equitable adjustments of the contract price in the aggregate amount of $11,700 on account of the claims asserted in this appeal, and to that

extent the appeal is sustained. With respect to the remainder of the sums claimed, the appeal is denied.

HERBERT J. SLAUGHTER, *Member.*

I concur:

PAUL H. GANTT, *Acting Chairman.*

Member WILLIAM SEAGLE did not participate in this decision, being absent on leave.

## DUNCAN MILLER

A–28041 *Decided September 23, 1959*

**Oil and Gas Leases: Termination—Oil and Gas Leases: Lands Subject to**

Under the automatic termination provision of section 31 of the Mineral Leasing Act, that upon failure of a lessee to pay his rental on or before the anniversary date the lease will be automatically terminated, a lessee has the whole of the anniversary date, while the land office is open for business, within which to pay the rental, and an oil and gas lease application filed on the anniversary date for land included in the prior lease is prematurely filed and must be rejected, the prior lease being in effect for the whole day.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated March 10, 1959, which affirmed a decision of the manager of the Billings, Montana, land office, dated February 20, 1958, rejecting in part his noncompetitive oil and gas lease offer, Montana 020915, because of a conflict with a prior lease, Billings 041366.

The record shows that the prior lease, Billings 041366, was issued to Miller as of November 1, 1949, and was extended to October 31, 1959, on November 17, 1954. At the time the lease was extended in 1954 it was made subject to the amendment of section 31 of the Mineral Leasing Act by the act of July 29, 1954 (30 U.S.C., 1952 ed., Supp. V., sec. 188), providing for the automatic termination of a lease by operation of law for failure to pay the lease rental on or before the anniversary date of the lease. The manager held that the lease "was canceled on October 31, 1954 [1955] for failure to pay seventh year's rental." The record shows that a notation of the termination of the lease was made on the tract book of the land office on November 3, 1955, at 8:22 a. m. Miller's lease offer, Montana 020915, was filed on November 1, 1955, at 2:30 p. m.

The manager and the Acting Director both relied upon the following departmental regulation:

Sec. 192.161 *Cancellation and termination of lease.* (a) Any lease issued after July 29, 1954, or any lease which is extended after that date pursuant to sec. 192.120, on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental on or before the anniversary date of such lease. * * * The termination of the lease for failure to pay the rental must be noted on the tract book, * * *, of the appropriate land office. *Until such notation is made, the lands included in such lease are not subject to, nor available for, leasing.* Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected. 43 CFR, 1954 Rev., 192.161 (Supp.). (Italics supplied.)

The manager and the Acting Director rejected the appellant's lease offer on the ground that it conflicted with Billings 041366 for the reason that the prior lease had terminated and that the termination of that lease had not been noted on the tract book of the land office when the lease offer was filed on November 1, 1955. The manager and the Acting Director assumed that the prior lease terminated at the end of October 31, 1955. In this they were in error.

The act of July 29, 1954, added to the second paragraph of section 31 of the Mineral Leasing Act, as amended, the following:

> Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental *on or before* [italics added] the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however,* That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made. [68 Stat. 583, 585.]

The legislative history of this amendment shows that when the proposed amendment was first presented to the Senate Committee on Interior and Insular Affairs, this Department suggested that the lease be automatically terminated if the lessee failed to pay rental or minimum royalty "prior to the anniversary date of the lease." [1] Subsequently, the Department revised its proposal to eliminate automatic termination for failure to pay minimum royalty and in addition stated:

> Our proposal would also be revised to make the provision for automatic termination effective the day after the anniversary date of the lease instead of the anniversary date itself. This would give the lessees an additional day within which to make the rental payment necessary to continue their noncompetitive oil and gas leases.[2]

In the report of the House Committee on Interior and Insular Affairs on the proposed amendment it was explained that the Department had agreed "to change the required payment to prevent

[1] Letter to Chairman, Senate Committee on Interior and Insular Affairs from Assistant Secretary of the Interior, dated April 20, 1954, set out in H. Rept. 2238, *infra,* fn. 3. [P. 5]

[2] Letter to Chairman, Senate Committee on Interior and Insular Affairs from Assistant Secretary of Interior, dated June 1, 1954, set out in H. Rept. 2238, *infra,* fn. 3. [P. 8]

automatic cancellation of leases on or prior to the anniversary date instead of prior to the anniversary date. In other words, if a lease is dated January 1, 1954, the anniversary date is the date of lease and payment need not be made on the date prior thereto." [3]

Thus, it was the clear intent of the Department and Congress that a lessee has the whole of the anniversary date of the lease while the land office is open for business within which he may pay his advance rental and prevent the automatic termination of his lease, and, until the anniversary date has passed, the lease is not terminated. Cf. *W. V. Moore*, 64 I.D. 419 (1957).

Therefore, in this case since Miller's prior lease had as its anniversary date November 1, Miller could have paid the rental at any time during the day that the land office was open for business, and since this was so the lease remained in effect until the end of November 1, 1955. Consequently, at the time Miller filed his lease offer at 2:30 p.m. on that date, the prior lease was still in effect. An offer for an oil and gas lease is properly rejected where the lands applied for are included in an existing lease. *Joyce A. Cabot et al.*, 63 I.D. 122 (1956); *R. B. Whitaker et al.*, 63 I.D. 124 (1956); *R. M. Young, Jr., Mary R. Sivley*, A–27640 (January 30, 1959); *Raymond J. and Harold J. Hansen et al.*, A–27503 (January 3, 1958); *Richard P. DeSmet et al.*, A–27837 (October 29, 1958).

Thus, the appellant's offer should have been rejected for the reason that the land applied for was not available for leasing at the time the offer was filed because it was included in an outstanding lease.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed for the reason given in this decision.

EDMUND T. FRITZ,
*Acting Solicitor.*

[3] House Report 2238, 83d Cong., 2d sess., pp. 4–5.

U.S. GOVERNMENT PRINTING OFFICE: 1959

## ERVIN CARL AND SADIE V. LEMBKE

A–28015 (Supp.) *Decided October 5, 1959*

**Rules of Practice: Appeals: Service on Adverse Party**

Where an appeal to the Secretary is dismissed for failure to serve a copy of the notice of appeal on the adverse party, and the appellant subsequently submits proof showing that the adverse party was served within the time required, the decision dismissing the appeal will be vacated and the case considered on its merits.

**Public Sales: Award of Lands**

The general rule is that where a single subdivision is offered for public sale and two or more adjoining landowners assert a preference right to purchase, if the applicant for the sale is not a preference-right claimant the award will be made to the first person asserting a preference right in the absence of equitable considerations justifying an award to some other preference-right claimant.

**Public Sales: Award of Lands**

An award of a single subdivision of public land offered at public sale to the first person asserting a preference right to purchase will not be disturbed where the applicant for the sale is not a preference-right claimant and there are no equitable considerations requiring an award to any other preference-right claimant.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

By a decision dated June 29, 1959 [A–28015, unreported] an appeal to the Secretary of the Interior by Ervin Carl and Sadie V. Lembke was dismissed by the Department on the ground that the record showed the appellants had failed to serve a copy of their notice of appeal upon the adverse party named in the decision from which the appeal was taken, as required by the Department's rules of practice (43 CFR, 1954 Rev., 221.34 (Supp.)). The appellants have now submitted proof that service on the adverse party was made within the time required by the rules of practice. Accordingly, the previous decision dismissing the appeal is hereby vacated and the appeal will be considered on its merits. *Henry W. and Beatrice H. Luhmann*, A–27941 (Supp.) (June 15, 1959); *Della Lee Halloran*, A–27433 (Supp.) (May 31, 1957).

This is an appeal from a decision of the Director, Bureau of Land Management, dated January 23, 1959, which reversed a decision of the Eastern States land office dated August 27, 1957, awarding certain land sold at public sale to the Lembkes. The land is a single legal subdivision described as lot 1, sec. 18, T. 137 N., R. 28 W., 5th P.M.,

Minnesota. The land was awarded to the appellants on the basis of a finding that they have the only reliable access by land to the lot.

The record shows that the land involved was offered at public sale on June 12, 1957, pursuant to an application filed by Mr. and Mrs. George M. Anderson. Walter E. Anderson was the sole bidder at the sale. On June 14, 1957, Walter E. Anderson asserted a preference-right claim to the land as an adjoining landowner. On July 8, 1957, the Lembkes also asserted a preference-right claim as adjoining landowners.

In his decision the Director pointed out that the land involved is a single subdivision and that the pertinent regulation of the Department (43 CFR, 1954 Rev., 250.11(b)(3) (Supp.)) provides that where only one subdivision is offered for sale and it adjoins the lands of two or more preference-right claimants, it will, in the absence of equitable considerations requiring otherwise, be awarded to the applicant for the sale if he is a qualified preference-right claimant, and, if he is not a preference-right claimant, the land will be awarded to the "first qualified person who properly asserts such a preference right within or prior to the 30-day preference-right period."

The Director pointed out that the applicants for the sale, Mr. and Mrs. George M. Anderson, did not assert a preference-right claim to the land, and concluded that since the first qualified preference-right claim was asserted by Walter E. Anderson, the cited regulation required that the land be awarded to Anderson.

I do not agree with the Director's conclusion that 43 CFR, 1954 Rev., 250.11(b)(3) (Supp.) *requires* that an award of a single subdivision of land offered at public sale be made to the first person asserting a preference-right claim without reference to any facts or circumstances in the case.

Section 250.11(b)(3) provides as follows:

> * * * Where only one subdivision is offered for sale and it adjoins the lands of two or more preference right claimants, it will, *in the absence of equitable considerations requiring otherwise*, be awarded to the applicant for the sale if he is a qualified preference-right claimant; if he is not, it will be awarded to the first qualified person who properly asserts such a preference right within or prior to the 30-day preference-right period. * * * (Italics supplied.)

The Director apparently construed the language emphasized as applying only to the first clause, i.e., cases where the applicant for the sale is a preference-right claimant, and not to the last clause, i.e., cases where the applicant for the sale is not a preference-right claimant. In the second class of cases, the Director interpreted the regulation as saying that the award must be made to the person first asserting a preference-right claim, even though equitable considerations would favor awarding the land to a junior preference-right claimant.

Although the language of the regulation is susceptible of this interpretation, it does not require it and the history of the regulation shows that the contrary meaning was intended. Prior to June 4, 1953, section 250.11(b)(3) provided that where only one subdivision was offered for sale and it adjoined the lands of two or more preference-right claimants,

> * * * it will generally be awarded to the applicant for the sale if he is a qualified preference-right claimant; if he is not, it will be awarded to the first qualified person who properly asserts such a preference right within or prior to the 30-day preference-right period. 43 CFR, 1949 ed., 250.11(b)(3).

Nothing was said about equitable considerations.

On June 4, 1953, the language just quoted was amended to read:

> * * * it will, in the absence of equitable considerations requiring otherwise, be awarded to the applicant for the sale if he is a qualified person who properly asserts such a preference right within or prior to the 30-day preference-right period. 43 CFR, 1949 ed., 250.11(b)(3) (Supp.).

This amendment introduced the language pertaining to consideration of equitable factors in making an award. However, it also dropped out the clause relating to the procedure in making an award where the applicant for the sale is not a preference-right claimant. This was an inadvertence which was corrected by the amendment of the regulation on October 24, 1955, to its present form. In a memorandum to the Secretary, dated October 10, 1955, which accompanied the proposed amendment of section 250.11(b)(3), the Director stated that:

> * * * Circular No. 1848 dated June 4, 1953, introduced the present text of the above sentence. The prior text contained the underlined language [pertaining to awarding the land where the applicant is not a preference-right claimant]. The purpose of Circular No. 1848 was to set forth the factors involved in equitable divisions of lands among preference-right claimants. Nothing in the record indicates any intent to change the rules of priority governing in the absence of equitable considerations. Our conclusion then is that the underlined language was inadvertently omitted from the text through clerical error.
>
> The underlined language gives the rule for awarding a tract where none of the claimants applied for the sale and no equitable considerations compel awarding the tract to any one of them.

Thus, it was the clear intention of the amendment of this regulation to restore the omitted language in the 1953 amendment of the regulation. It was the Department's intention that although the general rule is that where a single subdivision is offered for sale and the applicant for the sale is not a preference-right claimant the land will be awarded to the preference-right applicant first asserting his claim, if equitable considerations dictate, an award of the land may be made to a person other than the claimant who first asserted his preference right. Consequently, it is improper to award a single subdivision to

the first person asserting a preference right where other persons have also asserted a preference right within the 30-day preference-right period, unless it is first determined that equitable considerations do not compel an award to any of the junior claimants. However, in the absence of equitable considerations requiring an award to one of the preference-right claimants, the general rule applies and the award will be made to the person who first asserts his claim for preference.

After careful consideration of all of the facts and circumstances, I conclude that there is no showing in the record of equitable considerations which require a departure from the general rule and which warrant an award to the appellants. The fact that Anderson can only reach the subject land by water amounts to no more than a slight hardship or inconvenience and is not sufficient reason to overturn an award based on the general rule.

Therefore, the decision of the Director, Bureau of Land Management, is affirmed for the reasons given in this decision.

ROGER ERNST,
*Assistant Secretary.*

## AUDREY I. CUTTING
## GEORGE PETER SMITH

A-28031 *Decided October 8, 1959*

**Administrative Practice—Rules of Practice: Appeals: Generally**

After an appeal is taken to the Director from a decision of a land office manager, jurisdiction over the case is in the former and the latter has no authority to act upon it.

**Patents of Public Lands: Generally**

Where a protestant files a protest against the issuance of a patent for a homestead entry in which it is alleged that the entryman has alienated his entry prior to submission of final proof, notice of the charge is served upon the entryman and he responds to the charge in his final proof, there is a protest pending within the meaning of the proviso to section 7 of the act of March 3, 1891, which will prevent the entry from being confirmed upon the lapse of 2 years from the date of the issuance of the receipt acknowledging payment of final fees and commissions.

**Patents of Public Lands: Generally—Contests and Protests**

A protest which alleges that mining claims have been located upon land which has been surveyed at the request of a settler, does not, without further proceedings, amount to a pending protest or contest within the meaning of the proviso to section 7 of the act of March 3, 1891.

*October 8, 1959*

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Audrey I. Cutting has appealed to the Secretary of the Interior from a decision dated February 9, 1959, of the Director of the Bureau of Land Management which ordered that a patent be issued to George Peter Smith for 160 acres of land near mile 113 on the Glen Allen Highway, Alaska.

It appears that Smith initiated a settlement claim under the homestead law (48 U.S.C., 1952 ed., Supp. V, sec. 371; 43 U.S.C., 1952 ed., sec. 166) on June 19, 1947. On April 18, 1950, he filed a petition for a free survey of his claim. The survey, designated U.S. Survey No. 2792, was filed in the Anchorage land office on April 14, 1952. On May 4, 1953, Mrs. Cutting filed an application (Anchorage 023991) for a trade and manufacturing site (48 U.S.C., 1952 ed., sec. 461) for the N½ of Smith's settlement, stating that the land is to be used commercially as a roadhouse and eventually for a hunting and fishing headquarters. Mrs. Cutting also submitted a letter in which she stated that she had located four mining claims on the S½ of Smith's settlement and that Mrs. Chrie Ida Rees, her mother, had located four claims on the N½. She said that the mining claims can be considered a contest against the homestead entry.

In a decision dated May 28, 1953, the manager rejected Mrs. Cutting's application for a trade and manufacturing site on the ground that an application must be rejected where the land has not actually been used by the applicant for business purposes and because it conflicted with Smith's entry. He also held that the mining claims could not be considered as a contest because they had not been offered for patent. On the same day the manager informed Smith by letter that the plat of survey for his homestead had been officially filed, that Smith could now file an application for a homestead entry and submit final proof, that "It is urgent and required that your homestead entry and final proof be filed before July 14, 1953," that Mrs. Cutting had made several protests against Smith's entry, and that the manager's decision of May 28, 1953, spoke for itself.

In an undated letter received by the manager on June 22, 1953, Mrs. Cutting stated an "objection to your Notice of Rejection" of her trade and manufacturing site application on the grounds that Smith on April 19, 1950, the day after he filed his application for free survey, had entered into an agreement with her for the purchase of the homestead, that in June 1950 she took possession of the settlement and moved into the cabin on it and remained there until she learned of the true conditions of her contract to purchase, that she has continued to pay Smith the monthly installments required by the contract, that she

had been informed that Smith did not intend to convey the patent to her when he received it, that she had applied for the trade and manufacturing site to protect her interests and equity in the property, and that the property had been used as a hunting and fishing headquarters on a business basis. In conclusion, she said "If you will send me further instructions as to filing a further Protest, I will be guided by your respected advice." Her letter bore a notation that a copy was sent to Smith.

There is no indication in the record that the manager made any response to Mrs. Cutting's letter.

On July 3, 1953, Smith filed an application for homestead entry and submitted final proof. In response to questions on the form for final proof, which asked if the entryman had sold, conveyed or agreed to sell or convey or optioned, mortgaged, or agreed to option, mortgage or convey any portion of the land, Smith stated that he had rented the property to "another person" and agreed to sell the property at a later date, that the other party breached the agreement almost immediately after it was made and that he repossessed the property, that he was ignorant of the requirements concerning alienation of homestead lands, that he did not acquire his homestead for purposes of speculation, and that he intended to keep it for his home and had no plans to sell it or any part of it.

In a letter to the manager, dated July 15, 1953, and received on July 20, 1953, Mrs. Cutting said that "*In appealing your decision of May 28th, 1953*, * * * it is now necessary to send your department a photostatic copy of the Purchase Contract by and between Mr. George P. Smith and myself. * * *" (Italics added.) She also said that she was writing for the necessary papers and asked for an extension of time.

On September 2, 1953, the land office received another letter from Mrs. Cutting, in which she said that she had left Alaska in 1951, that the attorney in Alaska with whom she had left the papers had not responded to her request for their return, and that she was enclosing a letter authorizing the manager to ask for the documents.

It does not appear that the manager made any reply to either of these letters.

Almost 4 years later, on April 18, 1957, the manager issued a decision in which he finally dismissed Mrs. Cutting's protest against Smith's entry and rejected her trade and manufacturing site application on the ground that Mrs. Cutting had not indicated that she wished to appeal from his decision of May 28, 1953, but merely stated that she was objecting to it.

On May 17, 1957, Mrs. Cutting requested a rehearing on the basis of extenuating circumstances and new evidence.

On June 3, 1957, the manager construed the request for rehearing as notice of appeal and dismissed it for failure to submit a filing fee and serve notice of the appeal on the adverse party.

On July 3, 1957, final certificate was issued to Smith.

On July 8, 1957, Mrs. Cutting filed with the land office another petition for rehearing.

On July 10, 1957, the manager informed Mrs. Cutting that her protest together with all pertinent case records were to be forwarded to Washington for consideration.

On November 12, 1957, Mrs. Cutting submitted to the Director copies of documents relating to the agreement of Smith to sell his entry to her.

In his decision of February 9, 1959, the Director reviewed the propriety of issuing a patent to Smith and held that one must issue, as required by section 7 of the act of March 3, 1891 (43 U.S.C., 1952 ed., sec. 1165), because more than 2 years had elapsed since the issuance of the receiver's receipt upon final entry and no contest or protest was pending. In reaching this conclusion, he determined that Mrs. Cutting's letters received on June 22, 1953, and July 20, 1953, were neither a contest nor a protest.

In her appeal from the Director's decision, Mrs. Cutting says that she was absent from Alaska between 1951 and 1957, but that she has remained in possession of the Smith entry and kept her personal belongings there, that she has been the victim of a conspiracy, that Smith does not intend to keep his agreement to convey the entry to her by warranty deed after he receives a patent, that she has discovered minerals on the land, and that there has been a protest pending against Smith's entry.

Mrs. Cutting's objections to the issuance of a patent to Smith appear to be three-pronged: first, that the land is mineral; second, that her application for a trade and manufacturing site ought to have been allowed; and, third, that Smith has agreed to sell the entry to her.

Before considering the Director's decision on the merits, I believe it is necessary to examine the procedural status of this matter. The Director based his decision upon the assumption that all that was before him was the question of the propriety of issuing a patent to Smith. However, it seems to me that the first question to be determined is whether Mrs. Cutting appealed from the manager's decision of May 28, 1953, and what the consequences would be if she did.

An examination of the record indicates that while Mrs. Cutting's letter of June 22, 1953, may not have been indisputably an appeal, her

letter of July 15, 1953, plainly indicated that she had intended that her first letter constitute an appeal. Even without the second letter, the first letter should have been considered as an appeal because at that time it was common practice for land offices and the Bureau to treat practically any objections to a decision as an appeal.

After an appeal had been filed, the manager lost jurisdiction of the case and had no further authority to take any action concerning it. See *Humble Oil and Refining Company*, 65 I.D. 257, 259–260 (1958); *Ruby E. Huffman et al.*, 64 I.D. 57 (1957).

Thus, when the matter came before the Director it should have been considered as an appeal from the manager's decision of May 28, 1953, as well as a review of the propriety of issuing a patent to Smith.

Therefore, all matters properly raised by Mrs. Cutting in her appeal to the Director may now be considered on this appeal.

Since the Director held that the proviso to section 7 of the act of March 3, 1891 (43 U.S.C., 1952 ed., sec. 1165), requires that a patent be issued to Smith, the first consideration is whether this conclusion is correct.

The proviso reads in pertinent part as follows:

> * * * after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead * * * laws, * * * and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him * * *. [26 Stat. 1098, 1099.]

It is well established that mere allegations that valid mining claims have been located upon land in an entry without further proceedings does not amount to a pending contest or protest. *Dwight S. Young, John Vaos*, 61 I.D. 374 (1954); *Jerry H. Converse*, 52 L.D. 648 (1929). Therefore, Mrs. Cutting's contention that the land is mineral in character is not enough to toll the running of the 2-year statute.

However, her allegation that Smith had sold her the entry, supported as it was by references to an agreement to purchase and a warranty deed, is a far more clear and certain charge, sufficient if true to require the cancellation of the entry. 43 CFR 65.18. Smith was notified of the charge by Mrs. Cutting and by the manager and in his final proof gave his version of the transaction with Mrs. Cutting; that is, that he had rented the homestead to her and agreed to sell it at a later date, but that upon breach of the agreement he had repossessed the property. In other words, the entryman had notice of the charge and responded to it well within the 2-year period.

As the Department stated in *Dwight S. Young et al., supra*, p. 376, "a * * * protest to defeat the confirmatory effect of the proviso to section 7 of the act of March 3, 1891, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him

a showing of material fact, when served with notice thereof; and such a proceeding will be considered as pending from the moment the affidavit is filed, in the case of a private contest or protest * * * ."

Thus, all the requirements for a pending protest have been met, except the reference to an affidavit. However, it is not and never has been demanded of a protest that it be under oath to be valid.

The Director held that although Smith had actual notice during the 2-year period that a protest had been filed against his entry, nonetheless as no proceeding based on the protest was initiated which placed the entryman on his defense or required of him a showing of material fact, there was no pending protest on July 6, 1955, 2 years after issuance of the receiver's receipt to Smith. This ruling puts it in the hands of the Bureau to vitiate a protest simply by not acting on it for a period of 2 years after the issuance of a receipt and then saying that no action on it can be taken because a patent must be issued, despite the protest. I am not aware of any case which has construed the 1891 act to permit this to be done.

Accordingly, I believe that a contest should be brought against the entry on the ground that the entryman forfeited his entry by transferring it before the submission of final proof.[1]

There remains the question of Mrs. Cutting's claim to the entry stemming from her application to purchase it as a trade and manufacturing site. Mrs. Cutting's application was filed on May 4, 1953. It was not filed on the form required by the pertinent regulation. 43 CFR, 1949 ed., 81.1b (Supp.). Furthermore, it covered land for which Smith had filed an application for a free survey based upon his settlement and occupation of the land under the homestead laws. Since a trade and manufacturing site claim can be initiated only by the occupancy of vacant and unreserved public land (*id.* 81.1a; 43 CFR, 1949 ed., 81.6(b)), it was proper to reject the application for conflict with Smith's settlement. Finally Mrs. Cutting stated that the land was mineral, a fact which in itself is sufficient reason to warrant rejection of her application (*id.* 81.6(f)).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director is set aside and the case is remanded for further proceedings consistent herewith.

EDMUND T. FRITZ,
*Acting Solicitor.*

[1] In a footnote to his decision, the Director points out that if the entryman rescinds his agreement before final proof, the entry will not be canceled. However, the application of this rule depends upon the circumstances in each case and I believe a hearing is necessary to fully develop the facts in this matter.

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## APPEAL OF OSBERG CONSTRUCTION COMPANY

IBCA–139 *Decided October 16, 1959*

**Contracts: Additional Compensation—Contracts: Changes and Extras—Contracts: Changed Conditions**

A contractor who experienced large overruns in estimated schedule quantities in compacting embankments under a contract containing an "approximate quantities" provision is not entitled to additional compensation under the "changed conditions" clause of the contract merely because of such overruns, notwithstanding that a mathematical error was made by the Government in estimating the schedule quantities, nor because it had to perform the additional work of compacting the embankments during the dry summer months when the amount of moisture in the ground was less than in the winter or the spring. The contractor is also not entitled to an equitable adjustment under the "changes" clause, although errors in topography, resulting from the use by the Government of an inaccurate topographical map, increased the quantities of the compacted embankments, since the nature of the work to be done was in no wise altered. However, to the extent that the overrun in quantities of compacted embankment was attributable to the errors in topography, the contractor may be entitled to an equitable adjustment under the "changed conditions" clause, in that the true topography could be regarded as a "latent" physical condition at the site differing materially from the indicated topography.

BOARD OF CONTRACT APPEALS

The Osberg Construction Company of Seattle, Washington, has taken a timely appeal from findings of fact and decision of the contracting officer, dated October 2, 1957, denying its claim for additional compensation in the amount of $32,830.96 under its contract No. 14–06–D–1489 with the Bureau of Reclamation, hereinafter referred to as the Bureau.

The contract, which was dated November 10, 1955, was on U.S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts. It provided for the construction and completion of the earthwork and structures, Badger East and West Laterals and Highlands Feeder Canal and Laterals under Schedules Nos. 1 and 2 of the specifications. It was on a unit-price basis, and the estimated contract price was $464,435.53.

The claim of the appellant arises out of the performance of item 7 of Schedule 1 and of item 57 of Schedule 2 of the specifications, both of which provided for compacting embankments. The estimated quantity for item 7 was 18,000 cubic yards, and for item 57 was 11,500 cubic yards, the unit price in each case being 30 cents. The final payment quantities for items 7 and 57 were, respectively, 71,568 cubic yards and 39,703 cubic yards. The appellant's claim

is for the additional costs which it allegedly sustained by reason of these very large overruns in the estimated quantities. The additional costs are attributed by the appellant to the fact that the overruns made it necessary to perform a good deal of the work of compacting the embankments during the spring and summer when the natural moisture in the ground was insufficient, and greater amounts of water had to be supplied.

Paragraph 4 of the General Conditions of the specifications was an "approximate quantities" provision which declared that the quantities noted in the schedule were approximations for comparing bids, and that no claim should be made against the Government for excess or deficiency therein, actual or relative; and that payment at the agreed prices would be in full for the completed work, and would cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

Paragraph 42 of the Special Conditions of the specifications, which dealt with the compacting of embankments, contained also the following provision:

> The 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.* (Italics supplied.)

The overruns in the estimated quantities of compacted embankment were attributable to the following factors:

(*1*) Mathematical errors in computing the quantities of compacted embankment by the average end area method which resulted in the omission of a total of 20,900 cubic yards from the two schedules.

(*2*) The omission from the estimates of the quantities for the 6-inch layer of the foundation for the compacted embankments,[1] amounting to 17,788 cubic yards for item 7 and 9,231 yards for item 57.

(*3*) Slight revisions in the compacted embankments for a number of laterals, which were made in the field in accordance with the provision of paragraph 42 of the specifications quoted above, and which increased the quantities of compacted embankments by 1,605 cubic yards.

(*4*) Errors in topography in determining cross slopes and the profile of Lateral HF–1.8 B, resulting from the use of an inaccurate and small scale topographical map prepared by the

[1] Provision for this work was made in Paragraphs 40 and 42 of the Special Conditions of the specifications.

State of Washington in 1921. These errors in topography, which were embodied in the drawings, added 33,672 cubic yards to the estimated quantities of compacted embankments, of which 9,083 cubic yards was for Lateral HF–1.8 B. Except for this one lateral, however, all other components necessary for a computation of the quantities of compacted embankments were accurately shown on the drawings. Thus, the center line profile of the existing ground, and of the bottom of the canal as it was to be constructed, was based on accurate field surveys, and the typical drawings indicating the dimensions of the banks, the areas to be compacted, and the dimensions of the excavations were also correct. The errors in the topography affected only the calculation of the quantities for the cross slopes of the ground adjacent to the center line, since the steeper the slope across the canal the greater would be the amount of the excavation and of the compacted embankments; the cuts on the upper side of the canal would have to be much deeper and the excavation slope lines would have to extend higher in order to "daylight"; and on the lower side of the canal the elevation of the ground where the embankment was to be placed would be lower than the center line and more embankment and compacted embankment would be required to bring the embankment up to the required grade than would be indicated by the center line profile. In the case of Lateral HF–1.8 B, the center line profile was not based on any field survey but was plotted on the drawing on the basis of the elevation of the ground surface indicated by the inaccurate topographical map. Actually the ground surface was much lower than indicated, and this made it necessary to place much more compacted embankment than could have been computed from the specification drawings.

Because of the erroneous topography the contractor could not have determined from the drawings, of course, the total amount of the overruns in compacted embankments. In his findings, the contracting officer pointed out, however, that the contractor could have estimated from the specifications and drawings the amount of the overrun attributable to factors (*1*), (*2*), and (*3*), and that if it had made the necessary calculations it would have been able to determine that the quantity of compacted embankment for item 7 of Schedule 1 would be more than double, and for item 57 of Schedule 1 would be considerably greater than the estimated quantity of compacted embankment.

The appellant argues that its claim should be allowed either under Clause 3 or Clause 4 of the General Provisions of the contract, which

are, respectively, the "changes" and "changed conditions" clauses of the contract.[2] Apparently, the appellant regards the large overrun in quantities of compacted embankment as constituting in itself a "change" or a "changed condition." It denies that it was under any duty to calculate or that it could have calculated the probable quantities of compacted embankment from the drawings or specifications, since the contracting officer had the authority under Paragraph 42 of the Special Conditions of the specifications to alter the dimensions of the embankments. The appellant finds "changed conditions" in the fact that it had to perform the work of compacting the embankments during the dry summer months when the amount of moisture in the ground was less than in the winter or the spring.

In its notice of appeal a hearing was requested by the appellant but in the brief which it filed in support of its appeal this request was in effect withdrawn, since it conceded that the factual findings of the contracting officer which had a bearing on the liability of the Government were correct, and declared that it was only challenging the conclusions which he drew from these facts. Thus, a hearing for the purpose of taking testimony is unnecessary. The record presents only questions of law with respect to the liability of the Government.

The Board must conclude that the appellant's claim is not allowable under the "changes" clause of the contract. A change can be effected only by some action taken by the contracting officer subsequent to the execution of the contract. It does not appear that the contracting officer altered in any manner the nature of the work to be done on the canal or any of the laterals, including Lateral HF–1.8 B. The dimensions to which they were to be constructed, whether the widths, depths, or cross slopes be taken into consideration, remained the same. The topography of the ground also, of course, remained the same, both before and after the work was commenced and completed. The errors embodied in the topographical map did, to be sure, increase the quantities of compacted embankment but this resulted not from any change made by the contracting officer but from a misrepresentation made by the Government prior to the execution of the contract with respect to one of the conditions under which the work would have to be performed.

As for the applicability of the "changed conditions" clause, it is well settled that under the type of "approximate quantities" provision

[2] The "changes" clause authorizes the contracting officer to make changes in the drawings or specifications of the contract within the general scope thereof, subject to equitable adjustment of the contract price or time of performance, while the "changed conditions" clause provides for an equitable adjustment upon the discovery of materially different subsurface or latent physical conditions or unknown physical conditions at the site of an unusual nature.

in the present case an equitable adjustment cannot be predicated on the mere existence of an overrun in schedule quantities. Moreover, mathematical errors of the Government in making up its estimates will be disregarded to the extent that the schedule quantities can be verified with reasonable accuracy by the contractor from a study of the specifications and drawings.[3] In the present case, to be sure, there were errors in the topographical map which were responsible for 33,672 cubic yards of the overrun, which represented approximately 30 percent thereof. But, while the appellant could not have discovered the topographical errors merely from an examination of the map, a verification of the estimated quantities in the schedules, which the appellant failed to undertake prior to bidding, would certainly have put it on notice that the estimates were very radically wrong. The appellant argues, to be sure, that since the dimensions of the embankments could be altered by the contracting officer, no verification was possible but this argument is certainly self-defeating. If this argument be accepted as valid, the appellant in effect undertook to construct laterals of any dimensions desired by the contracting officer, and the estimates of quantities in the schedules became perfectly meaningless, in which case the appellant would have no legitimate basis for complaining of overruns. The Board believes, however, that whatever is the precise bearing of the authority of the contracting officer to vary the dimensions of the embankments, it could not be invoked to justify overruns which were not based on this factor but upon errors in the drawings.

It has always been held, to be sure, that "approximate quantities" provisions of the type involved in the present case, do not protect the Government against claims if it has ordered changes, or the contractor has encountered changed conditions which are responsible for an increase beyond the estimates. As already pointed out, there were no changes made by the Government in the work required to be done. It is obvious, also, that the effects of the seasonal variations in the condition of the ground cannot constitute a changed condition within the meaning of the language of that clause. Apart from the fact that there were no representations made in the specifications with respect to particular moisture conditions, the seasonal variations, which are known to everybody, cannot be said to be "subsurface or latent" physical conditions at the site, nor can they be said to be in any way "unusual." Moreover, to constitute a "changed condition," it must be a condition that was in existence when the contract was

[3] See, for instance, *J. D. Armstrong Co., Inc.*, 63 I.D. 289 (1956), and *Appeal of Texas Construction Co. and Hyde Construction Co.*, 64 I.D. 97 (1957).

made[4] and the appellant is here complaining of a condition which arose while the work under the contract was in progress.

Although the appellant does not make any such contention, the question arises, however, whether the actual topography could not be regarded as a latent physical condition at the site differing materially from that indicated in the drawings, in which case there would be a basis for relief under the "changed conditions" clause which does cover the forms of misrepresentation coming within its scope.

In *Allied Contractors, Inc.*, ASBCA No. 2905 (November 7, 1956), 56–2 BCA paragraph 1089, in which the amount of excavation for footings was almost doubled because the existing grades were actually higher than shown on the drawings, the Board held that they constituted a latent physical condition at the site, in that the incorrectness of the elevations was not "discernible by a naked eye inspection." However, in this case, the contract was on a lump sum basis, and the quantities of excavation were not approximate. A similar result was reached, however, in *Utah Construction Company*, Eng. C&A No. 617 (March 1, 1956), despite the inclusion in the specifications of an "estimated quantities" provision in the contract which involved excavation work in connection with the relocation of a railroad. The Board directed an equitable adjustment to be made by reason of an overrun of excavated quantities when it was shown that there was a material difference between the ground and rock surfaces shown on a cross-section drawing and actual conditions found in the field, the misrepresented surfaces being held to be a latent physical condition at the site within the meaning of the "changed conditions" clause.

As neither the appellant nor the Government has argued the issue whether, under the circumstances of the present case, the actual topography was a latent physical condition at the site which was misrepresented in the drawings, the case is remanded to the contracting officer for consideration of the issue and for the making of supplemental findings. The findings and decision should be made within 30 days of the date of the receipt of this decision by the contracting officer. If the appellant is dissatisfied with the findings and decision, it may appeal therefrom within 30 days of receiving them, in accordance with the provisions of the "disputes" clause of the contract.

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[4] See *Morrison-Knudsen Co., Inc.*, 60 I.D. 479, 483 (1951); *Central Wrecking Corp.*, 64 I.D. 145, 153 (1957); *Flora Construction Co.*, IBCA–101 (September 14, 1959); *E. O. Korsmo Construction Co.*, War Dept. BCA No. 1080 (January 13, 1946), 4 CCF par. 60,050; *Koeneke*, ASBCA No. 3163, 57–1 BCA par. 1313 (1957).

In the course of the consideration of the appeal, the Board inquired whether it was conceded by the Government that as a result of the overrun in the quantities of compacted embankment the appellant had incurred additional costs. In replying to this inquiry, Department counsel stated that it was conceded that the appellant may have experienced higher costs for the portion of the work performed during the summer months than it did during the spring due principally to the fact that more water was required but that it was not conceded that the contract price of 30 cents per cubic yard for compacting embankments was inadequate compensation for the overrun in quantities of compacted embankment. This position was based on the analysis of a great many bids for similar work performed in the same general area at all seasons of the year except winter. The Government also argued that a determination of the contractor's increased costs, if any, would necessarily have to take into consideration such factors as "increased use of and income from equipment brought onto the job for a relatively small quantity of compacted embankment; greater use of the equipment at each location along the canal, thereby reducing the on-the-job moving costs per cubic yard of embankment; greater over-all income against which to charge the job overhead without a corresponding increase in the overhead; and other factors which would influence the unit costs."

In view of this statement of the Government's position and argument, the Board deems it necessary to point out that if the contracting officer should conclude that any portion of the appellant's claim is administratively cognizable, the equitable adjustment to which the appellant would be entitled would have to be based on all its additional costs in performing the overrun, plus a reasonable allowance for overhead and profit. The unit price would not govern unless it happened to constitute also a fair and reasonable price for the additional work performed, nor would the appellant necessarily be bound by the prices paid for similar work in the area. However, any savings attributable to the increase in quantities may be taken into consideration. In any event, any equitable adjustment to which the appellant may be entitled would have to be limited to the amount of the overrun attributable to the errors in topography.

## Conclusion

Therefore, the case is remanded to the contracting officer with instructions to proceed as outlined above.

William Seagle, *Member.*

I concur:

PAUL H. GANTT, *Acting Chairman.*

Board Member HERBERT J. SLAUGHTER, who was on leave, did not participate in the disposition of this appeal.

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## RIGHTS OF MINING CLAIMANTS TO ACCESS OVER PUBLIC LANDS TO THEIR CLAIMS

**Mining Claims: Generally—Rights-of-Way: Act of January 21, 1895**

The United States Mining Laws give to the locators and owners of mining claims as a necessary incident the right of ingress and egress across public lands to their claims for purposes of maintaining the claims and as a means toward removing the minerals.

**Mining Claims: Generally—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way**

The rights-of-way provided for in 43 CFR, 1954 Rev., 115, 154–179 (Supp.) for the Oregon and California Railroad and Reconveyed Coos Bay Grant lands were primarily for timber roads. Roads "acquired by the United States" as those words are used in those regulations, do not include roads constructed by others under statutory right for mining purposes.

**Rights-of-Way: Act of January 21, 1895—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way—Fees**

One who applies for a right-of-way under the act of January 21, 1895, must comply with the requirements of the regulations and pay whatever fee that they require. And, whether he acquire a right-of-way under an appropriate rights-of-way act or use the land for that or any other purpose, he must comply with all applicable regulations issued under the Oregon and California Grant land laws, which are directed to the management of the area, but such regulations may not impose fees for the enjoyment of rights granted by other laws unless clearly authorized by law.

M–36584 OCTOBER 20, 1959

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have asked whether a mining claimant, who builds a road to his mining claim across public land, may be charged a fee for the use of such road, where no exclusive right-of-way is applied for or granted by the United States.

In the particular case to which you call my attention it is alleged that mining locations were made on public land more than 50 years ago and the claimant, to provide access to his claims and a way for hauling ore from the claims, constructed a road over public lands. Your inquiry will be discussed in the light of these allegations. Your

inquiry results because the regulations in 43 CFR, 1954 Rev., 115.154–179 may be susceptible of the construction that such a charge must be made. These regulations relate only to rights-of-way for tram roads *granted* under the act of January 21, 1895 (28 Stat. 635; 43 U.S.C., 1952 ed., sec. 956), and the act of August 28, 1937 (50 Stat. 874; 43 U.S.C., 1952 ed., sec. 1181a), and apply, primarily at least, to purchasers of timber on the Oregon and California Railroad Grant lands. Unless there is reason for saying that the act of August 28, 1937, contains provisions under which a charge may be made for using a road even though it is not a right-of-way granted under the 1895 act the principle or right to charge for the use of *any* road on public lands by *any* user as it is said the regulations applicable to the Oregon and California lands may indicate to be, would apply equally to the public lands generally. Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.

I do not believe that a charge may be made in such cases. The general authority of the Secretary and the Director, Bureau of Land Management, over the public lands (5 U.S.C., 1952 ed., sec. 485; 43 U.S.C., 1952 ed., sec. 7 [see note fol.]) might be construed to permit it, were it not for the fact that legislation providing for the making of entries and locations necessarily presupposes a right of passage as an incident to the other rights granted, and the general rule that free passage over the public lands has always been recognized. Until recent years free *use* of the public range was the custom. See *Buford* v. *Houtz*, 133 U.S. 320 (1890) and *McKelvey* v. *United States*, 260 U.S. 353 (1922). Prior to the enactment of the mining laws, minerals in such lands were freely exploited by the public without hindrance. (1 Lindley, *Mines*, secs. 46 and 56, 3d ed. 1914, and cases cited.) The Taylor Grazing Act (43 U.S.C., 1952 ed., sec. 315) took away the free grazing privilege previously sanctioned by custom just as the mining laws of 1867 and 1872 took away the implied license to mine. But in both of these cases the changes were made by legislation, not by executive action. The Taylor Grazing Act and subsequent legislation have established a policy of management of the public lands similar, although, with minor exceptions, not as comprehensive or as rigid as that provided by law for certain reservations. Perhaps the control provided by law for national forest reserves more nearly approaches that provided for the Oregon and California Railroad Grant lands, and to a lesser degree the public domain grazing districts. As to such

national forest lands, Congress in the act of June 4, 1897 (30 Stat. 36; 16 U.S.C., 1952 ed., sec. 478), expressly reserved the right of ingress and egress to settlers, and to others for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to compliance with the rules and regulations covering such national forests. The Department of Agriculture in its regulations, 36 CFR, 1949 ed., 251.5(c) (Supp.) does not even require the constructor of a road in such cases (said to have a "statutory right" of access), to obtain a permit, but, with minor exceptions, does require that permission be obtained by others. Thus the practice of that Department is directly contrary to the proposal discussed here. With respect to public lands in grazing districts the law reserves the right of ingress and egress and provides that nothing in it "shall restrict" mining activities, in substantially the same language as is used in the 1897 act, *supra*. The only applicable regulations of the National Park Service relate to Death Valley National Monument, 36 CFR, 1949 ed., 20.26(a)(4) (Supp.) and Mt. McKinley National Park, 36 CFR, 1949 ed., 20.44 (Supp.). Those regulations require only that a miner obtain a permit and as to Death Valley Monument, keep his road in good repair while using it. No fee is charged. Although not so stated as in the national forest regulations, the basis for the free use appears to be the "statutory right" of access.

In general Congress has recognized the right of "free passage or transit over or through public lands; * * *" and has enacted penal legislation to prevent its obstruction. Section 3, act of February 25, 1885 (23 Stat. 322; 43 U.S.C., 1952 ed., sec. 1062). It has also provided relief to the owners of mining claims where access was denied for any reason. Act of June 21, 1949 (63 Stat. 214; 30 U.S.C., 1952 ed., sec. 28b).

The genesis and history of the mining laws make it clear that Congress intended to give the miner free access to minerals in the public lands and to leave him free to mine and remove them without charge. Congress in the 1860's failed to go along with an executive recommendation for disposing of the minerals by lease in order to raise revenue. It has consistently since then left the miner free and untrammeled so far as his mineral rights are concerned. In recent years it has subsidized the miners of certain strategic and critical minerals. Further, Congress, in effect, confirmed the miner's rights previously exercised under sufferance as much as it granted mining rights. It declared the minerals to be "free," 30 U.S.C., 1952 ed., sec. 22, and by section 38 of that title it is declared, in effect, that a location need not be recorded in order to acquire the right to mine so far as the United States is concerned, adverse possession being sufficient. It has always

been recognized that the policy of Congress is to encourage the development of minerals and every facility is afforded for that purpose. *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673 (1888) and *Steel* v. *Smelting Company*, 106 U.S. 447 (1882).

Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads. In effect, it provided only for a procedure where possession could be maintained and patent to the land could be obtained. Otherwise the clear intent was that the miner should have the right to appropriate the minerals and convey them to market. Lindley in his 3d edition on *Mines*, volume 2, sections 629 and 631, points out that roadways are necessary as an adjunct to working a claim and as a means toward removing the minerals.

The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. *Emily Lode*, 6 L.D. 220 (1887). In *Douglas and Other Lodes*, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in *Tacoma and Roche Harbor Lime Co.*, 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied to an aerial tramway in *United States* v. *El Portal Mining Co.*, 55 I.D. 348 (1935), citing the *Tacoma* case, *supra*. These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.

We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, *supra*, the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the

past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

It appears that the presumed authority to charge a fee is based on 43 CFR, 1954 Rev., 115.171(b) (Supp.) providing for the payment by a permittee for the use of a road "constructed or acquired" by the United States. There is also authority to charge for tramroad rights-of-way, granted pursuant to 43 CFR, 1954 Rev., 244.52, in section 244.21 (Supp.). But both sections 115.171(b) and 244.21 pertain to *granted* rights-of-way. They do not apply to roads constructed by an entryman or locator solely to provide access to his entry or claim. The road was not built by the United States nor can it be deemed to have been acquired by it in the sense contemplated by section 115.171(b). Even if the word "acquired" as there used is given its broadest possible meaning it is not believed that it would encompass an access road of the kind discussed here. It is true that the title to the land is in the United States but the road is in the nature of a "private road" across another's land which is primarily used by one or more persons but which may be used by anyone. The United States can no doubt use such a road or permit its permittees or licensees to do so at least to the extent that it does not unduly interfere with its use for the legitimate purpose for which it was built. If it is abandoned for that purpose it falls in the public domain if used as a public road, otherwise it is the sole property of the United States.

In practice the Bureau of Land Management has granted tram road rights-of-way on the public domain elsewhere than on the Oregon and California Grant lands only where miners or others have desired an exclusive right of user. On the Oregon and California Grant lands, and interspersed public lands, the need for the use of such granted rights-of-way by a class of persons no doubt is such as to require all users to participate in their maintenance and this may well be justified, if not under the 1895 act certainly under the 1937 act, but this may be done without extending the fee principle to roads constructed under clearly implied statutory authority as ways of necessity, unless such extension is required or authorized by law.

With respect to timber roads on the Oregon and California Railroad Grant lands, it is noted that the regulation governing the grant of rights-of-way under the 1895 act also cites the 1937 Timber Management Act, *supra*, as statutory authority. The latter act gives the Sec-

retary broad authority in the management and sale of timber whereas the later act of April 8, 1948 (62 Stat. 162), extends the mining laws to the area with only two qualifications: (*1*) that the ownership and management of the timber is reserved to the United States and (*2*) that mining claimants must record their locations and assessment work affidavits in the land office. Beyond this the law vests no discretionary authority over such claims in the Secretary. This is a further reason for believing that Congress intended that, except as provided in the law, miners' rights on such land would be the same as on other public domain land. It is true that neither the 1937 act nor the 1948 act contains language respecting the right of passage similar to that in the National Forest and Taylor Grazing Acts. But this is far from conclusive of a different intent. In the light of the history of the 1948 act it seems likely that Congress did not then feel that it had intended in 1937 to affect mining rights in those lands at all. They had been consistently protected everywhere else. The 1948 act clearly intended to restore the status quo and to give to miners everything they enjoyed on public lands except as otherwise expressly provided.

I cannot agree with the State supervisor in his belief that the act of August 31, 1951 (65 Stat. 290; 5 U.S.C., 1952 ed., sec. 140), applies here. That act requires Federal agencies to charge for—

> any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility *performed, furnished, provided, granted, prepared, or issued by any Federal agency* * * *. (Italics added.)

The grant of the minerals with all incidents thereunto pertaining is direct from Congress to the miner. The act contains no language that could be construed to authorize a Federal agency to make a charge in such case. The act does not require that the Department examine all grants made by Congress and amend them so as to impose charges for rights freely granted, whether expressly as the right to locate and mine, or by reasonable, if not necessary, implication, as the right of passage.

The Bureau of Land Management has made no grant nor performed any service. The miner built the road by implied authority from Congress. He is liable in damages if he unnecessarily causes loss or injury to the property of the United States and, as previously stated, his right to use the road, even though he built it, is not exclusive but his right to use it for mining purposes is as evident as his right to mine.

Although no charge may be made on a road as constructed and used as a necessary incident to the maintenance of a mining location and its development, a miner who wishes to use a road built or acquired by the United States must comply with the applicable regulations. And, if he applies for and obtains a right-of-way under the 1895 act he must

pay whatever fee is required by the regulations. And, of course, any person who uses public land within the Oregon and California Grant lands area must comply with all applicable and reasonable regulations issued under the act of August 28, 1937, *supra*, as amended, for the management of the area, but that act does not supersede the mining laws.

EDMUND T. FRITZ,
*Acting Solicitor.*

## ESTATE OF JOHN STEVENS OR JOHN STEPHENS

IA-1002 *Decided October 26, 1959*

**Indian Lands: Descent and Distribution: Escheat**

The next of kin of an Indian decedent, who is not an enrolled member of the Klamath Tribe with at least one-sixteenth degree of Indian blood of the Klamath Tribe, may not inherit the decedent's restricted or trust property within the Klamath Reservation, but such property will escheat to the Tribe.

### APPEAL FROM AN EXAMINER OF INHERITANCE BUREAU OF INDIAN AFFAIRS

Clyde Busey, as guardian ad litem for Stanley Stevens, a mentally incompetent adult person, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance, dated September 24, 1958, denying his petition for a rehearing in the matter of the estate of John Stevens or John Stephens, who died intestate on or about December 29, 1941.

In his original order, dated July 2, 1958, the Examiner found that Stanley Stevens was the son and only apparent heir at law of John Stevens, but that he was not entitled to inherit the trust or restricted property herein involved because, as has been conceded, he was not an enrolled member of the Klamath Tribe, and thus did not qualify as an heir under the provisions of section 5 of the act of June 1, 1938 (52 Stat. 605, 606).[1] This section was repealed by the act of August 13, 1954 (68 Stat. 718, 721).

The real property herein involved is described as the NW¼ of Section 20, T. 36 S., R. 10 E., W.M., Oregon, containing 160 acres. The original allottee of that property was Kate Stanley, a Klamath Indian, to whom allotment No. 1553 was made and a trust patent

[1] "Hereafter only enrolled members of the Klamath Tribe of not less than one-sixteenth degree Indian blood of the Klamath Tribe shall inherit or take by devise any restricted or trust property within the Klamath Reservation * * *."

issued in 1921, shortly after she married the decedent, John Stevens. There is in addition the sum of $456.60 in the Individual Indian Money Account of the decedent on deposit at the Muskogee Area Office, Muskogee, Oklahoma, representing accumulations, rents and/or profits from said real property. Kate Stanley died later in 1921, leaving her husband as her sole heir. John Stevens subsequently remarried, and the appellant, Stanley Stevens, was born to this union. The couple was later divorced, and upon the death of John Stevens in 1941, he was survived only by the appellant. John Stevens was an Ottawa Indian, resident of Oklahoma, and never resided on the Klamath Reservation.

It is appellant's primary contention that the original allotment to Kate Stanley was made in such terms as to secure to her heirs vested rights which were protected by the Fifth Amendment to the Constitution, as against subsequent legislation such as the act of 1938. A second position taken by appellant is that there was no applicable escheat statute in effect at the time of John Stevens' death.

The Examiner appears willing to concede that the original allotment gave a vested right to Kate Stanley and that this right was transferred to her husband at her death, which occurred prior to the enactment of the above 1938 act. He denies, however, that any such right extended to Stanley Stevens, whose claim as an heir did not arise until December 29, 1941, the date of his father's death, which was within the period when the 1938 act was in effect. We believe the Examiner decided this point correctly.

Important to a determination of this case is the examination of two escheat statutes. The first is section 6 of the above act of June 1, 1938, which provides as follows:

> If any enrolled member of the Klamath Tribe dies without lawful heirs or devises (sic), all interest which such member has in any restricted or trust property within the Klamath Reservation shall revert to and become part of the common tribal property.

Appellant points out, and we think correctly, that this statute can have no application for the reason that the decedent, John Stephens, was never an enrolled member of the Klamath Tribe. The second escheat statute, more general in nature, is the act of November 24, 1942 (56 Stat. 1021; 25 U.S.C., 1952 ed., sec. 373a), which reads in part as follows:

> That upon final determination by the Secretary of the Interior that the Indian holder of a trust or restricted allotment of lands or an interest therein has died intestate without heirs, the lands or interests so owned, together with all accumulated rents, issues, and profits therefrom held in trust for the decedent, shall escheat to the tribe owning the land at the time of allotment subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate and subject to

all valid existing agricultural, surface, and mineral leases and the rights of any person thereunder.

The situation then, at the time of John Stevens' death, was that his son was barred by reason of section 5 of the act of June 1, 1938, *supra*, from inheriting the property on the Klamath Reservation. This is true notwithstanding the fact that John Stevens was an Ottawa Indian, since section 5 applies to all Indian decedents possessing the type of property involved in that section, and irrespective of whether such property was inherited before the date of that act, as in the present case.[2] However, the only escheat procedure providing for the return of property to the Tribe was limited at the time of John Stevens' death to cases where the deceased Indian was an enrolled member of the Klamath Tribe, which the present decedent was not.

The effect of this incongruous legislation was to leave the title to the property suspended with no one in a position to make claim to it. It must be assumed, therefore, that the 1942 general escheat statute was intended to correct this and other similar situations known to exist, and that such legislation should be given retroactive effect. While the general rule is that a statute, in the absence of specific language to the contrary, should be considered prospective rather than retrospective, there are recognized exceptions to the rule. For instance, in 11 Am. Jur., *Constitutional Law*, sec. 367, it is stated:

> While it is recognized that the legislature cannot in general establish a rule to operate retrospectively, when a rule of the law is unsettled, the legislature may settle it, and such a rule necessarily operates both prospectively and retrospectively.

Certainly, when an Indian dies and by statutory enactment no one, neither his kin nor the Tribe on whose reservation the land is located, may claim the property, the above rule should be invoked. In effect the Department has so construed the application of the act of November 24, 1942, *supra*. In at least two cases where a decedent died prior to the date of the act of November 24, 1942, the property of such decedent was held to escheat in accordance with the terms of that statute.[3]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order 2509, as revised, 22 F.R. 7243), the decision of the Examiner of Inheritance, denying the

[2] See Estate of Minnie Wilson, Susanville Allottee No. 1049–1070 (I.O. file 18496–45); and the Estate of Mary Hilton Healy or Mary Spring, Susanville Allottee No. 537 (37239–47).

[3] See for instance Escheat of the Estate of Alexander Daylight deceased Coleville Allottee, Decision of Solicitor, dated December 7, 1956, and Escheat of the Estate of We-hun-kah, deceased Wisconsin Winnebago Allottee, Decision of the Acting Solicitor, dated April 9, 1951. [Available in Solicitor's Office.]

appellant's petition for a rehearing, is affirmed and the appeal is dismissed.

It follows that the recommendation of the Examiner of Inheritance that the property should escheat to the Klamath Tribe should be adopted, and that the property escheat on the basis of the authority vested in the Secretary of the Interior by the provisions of the act of November 24, 1942, *supra*, and delegated to the Solicitor (sec. 25(c), Order No. 2509).

Accordingly, it is ordered that the allotment of Kate Stanley, Klamath Allottee No. 1553, for which trust patent No. 805384 was issued on May 6, 1921, and which is described as the NW¼ of Sec. 20, T. 36 S., R. 10 E., W.M., Oregon, containing 160 acres, together with all accumulated rents, issues, and profits therefrom, shall escheat to the Klamath Tribe, in accordance with the provisions of the act of November 24, 1942.

Since the estate has an appraised value of over $7,500, it is further ordered that the sum of $75 shall be paid from the estate of the decedent into the Treasury of the United States as a fee in connection with these probate proceedings, in accordance with the terms of the act of January 24, 1923 (42 Stat. 1185; 25 U.S.C., 1952 ed., sec. 377).

EDMUND T. FRITZ,
*Acting Solicitor.*

## DUNCAN MILLER

A–28035 *Decided October 30, 1959*

**Oil and Gas Leases: Applications—Alaska: Oil and Gas Leases**

Oil and gas lease offers for unsurveyed unnamed islands in Alaska are properly rejected where the description in the offers states only that the islands are located between named unsurveyed islands, named bodies of water, and the shoreline, such a description being too indefinite to identify the islands included in the offer; and oil and gas lease offers for portions of unsurveyed named islands in Alaska are properly rejected where the portion of the island desired is described only by quantity of land and by stating the direction of the land applied for from one outside boundary.

**Oil and Gas Leases: Applications**

Where an offer contains an indefinite description as to certain unsurveyed lands applied for, but other lands in the offer are properly described, the offer may be accepted as to the properly described lands, all else being regular.

**Oil and Gas Leases: Applications—Oil and Gas Leases: Six-mile Square Rule**

Where an oil and gas lease offer includes certain lands which are properly described and others which are indefinitely described and the indefiniteness of the description of part of the land makes impossible a determination whether the entire offer describes land which can be contained in a 6-mile square area, and the description in the offer does not violate the 6-mile square requirement, the offer is not subject to rejection for violation of the 6-mile square rule.

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

Where the exact acreage covered by an oil and gas lease offer cannot be determined because certain unsurveyed lands included in the offer cannot be identified as a result of the indefinite description of such lands, but other lands covered by the offer are properly described, and where it cannot probably be said that the total acreage in the offer exceeds 2,560 acres, the offer is not subject to rejection for violation of the 2,560-acre rule.

**Oil and Gas Leases: Applications—Oil and Gas Leases: Rentals**

Where the amount of rental submitted with an offer appears to be sufficient, but this cannot be positively determined because a part of the land covered by the offer is inadequately described, and the rental submitted is more than sufficient for land included in the offer which is properly described and cannot be said to be insufficient for all the land included in the offer, the offer is not subject to rejection on the ground that insufficient rental was submitted.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision of March 2, 1959, by the Director, Bureau of Land Management, modifying the rejection by the manager of the Anchorage land office of oil and gas lease offers Anchorage 029086 and 029087, filed by the appellant on February 7, 1955.

The lands here applied for consist of unsurveyed islands, several of which are named, but most of which are unnamed, and portions of one named island, all in the "Yakutat Bay Area," Alaska.

The description of the islands included in 029086 is as follows:

Krutoi Island, approximately 160 acres;
Otmeloi Island, approximately 120 acres;
Kriwoi Island, approximately 320 acres;
Two very small islands, Fitzgerald Island & Gregson Island, approx. 80 acres total;
Dolgoi Island, approximately 720 acres;
All of a series of unnamed islands lying between Dolgoi Island and the Kantaak Island, excluding any portion not lying within a six-mile square that would include Kruto[i] Island, approximately 400 acres;

The most northerly 280 acres of Kantaak Island.
Total, approximately 2,080 acres, more or less.
(Distances expressed here are in land miles or equivalent of land miles.)
(The word shoreline is the mean high tide line).

Offer 029087 covers islands described as follows:

All of Kantaak Island except the most northerly 280 acres, approximately 2440 acres;
All of a series of very small islands lying between Kantaak Island on the northwest, Monti Bay on the southwest and Johnson Passage on the northeast and on the east by the shoreline of the mainland, total approx. 120 acres.
Above being 2560 acres more or less.
(Distances expressed here are in land miles or equivalent of land miles.)
(The word shoreline is the mean high tide line.)

No map or other means of identifying the islands included in the above-quoted descriptions was submitted with the applications.

The offers were rejected by the manager on the ground that the description of the lands applied for was inadequate, it being impossible to determine exactly what lands are included in the applications, to calculate the acreage covered by the application, or to determine whether the areas are within a 6-mile square. The Director's decision held that these offers were defective insofar as they covered unsurveyed unnamed islands or archipelagos and portions of unsurveyed named islands because the descriptions were inadequate to identify the lands sought for leasing. Accordingly, the Director's decision rejected offer 029087 in its entirety, and rejected offer 029086 except to the extent that the latter offer described entire named islands. The Director's modification of the manager's decision was based on a departmental decision holding that a description in an application for entire unsurveyed islands in Alaska which identifies the islands by name and names the waters surrounding the named islands, if the named islands are easily identifiable from maps and charts available to the land office, is a sufficient description of such unsurveyed islands in Alaska under the regulations in effect when the offers here involved were filed [1] (*Layton A. Bennett et al.*, A–27659 (November 3, 1958).)

On appeal, although Miller asserts that the descriptions in the applications definitely establish the location of the lands applied for, he requests permission to adjust the offers in any way necessary to comply with the regulations. A cross-appeal was filed in the instant proceeding on behalf of the Colorado Oil and Gas Corporation which, as a

[1] 43 CFR, 1954 Rev., 71.2, the departmental regulation governing the description in lease offers for unsurveyed Alaskan lands which was in effect when these offers were filed, was revoked by Circular 2017 of May 16, 1959 (24 F.R. 4140). Offers for public land oil and gas leases filed after May 20, 1959, must contain land descriptions consistent with the requirements of 43 CFR 192.42a (Circular 2017, *supra*).

junior applicant for the lands, filed protests against the allowance of any of the lands included in the appellant's offers. The matters asserted on appeal will be considered before determining the questions raised by the protestant on the cross-appeal.

The appellant's assertion that the descriptions in both applications definitely establish the location of the lands applied for is incorrect. Although the six entire named islands first listed under offer 029086 are adequately described in accordance with the rule stated in the *Bennett* case, the remaining lands included in the offer are not properly described. The offer purports to exclude any portion of "All of a series of unnamed islands lying between Dolgoi Island and the Kantaak Island" not within a 6-mile square that would include Krutoi Island, but such a description does not identify a specific 6-mile square. The inclusion of all of a series of unnamed islands within an indefinite 6-mile square is uncertain and incomplete since any of several possible 6-mile squares would correspond with this description. Inasmuch as different islands would be included in the application if one 6-mile square area is selected than would be included if another 6-mile square is selected, it is plain that the description in 029086 does not identify which unnamed islands are intended to be included in the offer. By departmental regulation (43 CFR, 1954 Rev., 192.42(g)(1)(i)), an offer will be rejected without priority if the land description "is insufficient to identify the lands." Consequently, offer 029086 was properly rejected insofar as it purported to cover unnamed islands lying between Dolgoi and Kantaak Island.

To the extent that both 029086 and 029087 included a portion of an unsurveyed named island (Kantaak Island), the descriptions are defective. An application for a portion of a named island must describe the portion applied for more exactly than by indicating only the quantity of land and its direction from one boundary of the island. Such a description of a portion of Kantaak Island is inadequate, among other reasons, because of the irregular shape of the north boundary and because various maps differ substantially as to the boundaries of and the extent of the land area included in the island. And even without these difficulties, when only a portion of a named unsurveyed island is applied for, a metes and bounds description with the courses and distances from the outside boundaries of the island, or the equivalent of such a description, should be given for any boundary of the portion applied for which is not a part of the outside boundary of the named unsurveyed island (see *Merwin E. Liss*, A–27924, A–27940 (August 31, 1959); *Celia R. Kammerman et al.*, 66 I.D. 255 (1959); *Henry S. Morgan et al.*, 65 I.D. 369 (1958)).

The rest of the lands applied for under 029027 consist of an unspecified number of unnamed unsurveyed islands which are described as lying between one named island, a named bay, a named water passage, and the shoreline of the mainland. The absence of a metes and bounds description in this offer or of a map or other means of indicating the location of the unnamed unsurveyed islands makes identification of these islands impossible because of the indefinite boundaries of the bay and the water passage referred to in the offer and because of the uncertainty as to whether a number of islands (or parts of islands) near the shoreline of the mainland are or are not included in 029087.

For the reasons mentioned above, Miller's appeal presents no basis for modifying the Director's decision that, except as to the entire named islands included in 029086, the lands covered by the two offers here involved are not identifiable.

The protestant's cross-appeal objecting to the allowance of 029086 as to any of the lands applied for asserts, first, that the application does not state in what waters the islands named are located. The assertion is incorrect. The offer states that the islands are in the "Yakutat Bay Area." As Yakutat Bay is the correct name of the waters surrounding the named islands applied for under offer 029086, the statement in the offer indicating that the islands are in the Yakutat Bay area is a sufficient designation of the waters surrounding the named islands.

The remaining matters raised by the cross-appeal require consideration of a number of mandatory provisions of the regulations for filing oil and gas lease offers.

43 CFR, 1954 Rev., 192.42(d) provides in relevant part that:

> * * * Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed, and if not surveyed, by a metes and bounds description connected with a corner of the public land surveys by course and distance and must cover only lands entirely within a six-mile square. Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies * * *.

43 CFR, 1954 Rev., 192.42(g)(1) requires that:

> 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 or the lands are not entirely within a 6-mile square.
>
> (ii) The total acreage exceeds 2,560 acres, except where the rule of approximation applies or is less than 640 acres or the equivalent of a section and is not within the exceptions in paragraph (d) of this section.
>
> (iii) The full filing fee and the first year's rental do not accompany the offer, the rental payment to be for the total acreage if known, and if not known, for the total acreage computed on the basis of 40 acres for each smallest legal subdivision.

Subparagraph (2) of this paragraph permits the allowance of an offer deficient in the first year's rental by not more than 10 percent if the proper amount is timely paid, and approval of a lease for 2,560 acres based upon an offer for not more than 10 percent over the maximum allowable acreage.

The protestant contends that offer 029086 does not meet the requirement of the 6-mile square limitation, that the land areas covered by the offer exceed the 2,560-acre limitation by more than 10 percent, and that the proper advance rental was not submitted with the offer, as the area covered thereby exceeds by more than 10 percent the acreage covered by the rental payment. These contentions are inaccurate.

On its face, offer 029086 complies with both the acreage and the rental requirements. The offer states that the named islands contain 1,400 acres, that the unnamed islands and the portion of Kantaak Island contain, together, 680 acres, making a total of 2,080 acres covered by the application. Advance rental on 2,080 acres was submitted with the offer. The Bureau's Cadastral Engineering office has determined informally that the six entire named islands applied for under the offer contain approximately 1,190 acres. The acreage of the unnamed islands cannot be computed because of the insufficient description of those islands. However, little basis appears to exist for holding that the total acreage in the offer would exceed 2,560 acres. Thus, because the exact acreage included in the application cannot be determined for the reason that a part of the land is indefinitely described, and because the exact rental required cannot be determined for the same reason, but, nonetheless, it cannot be said that the total acreage in the offer exceeds the 2,560-acre maximum, there is no basis for holding that the application actually violated the acreage and rental requirements of the regulation.

Likewise, offer 029086 did not violate the 6-mile square rule since the description of the land included in the application expressly excludes any land not lying within a 6-mile square that would include Krutoi Island. Although, as has already been pointed out, the description is defective in that it does not cover a particular and definite 6-mile square, it cannot be said that the offer covers land in excess of a 6-mile square. Consequently, the entire offer is not subject to rejection for failure to comply with the 6-mile square rule, even though the indefinite description of part of the lands requires the rejection of the offer as to such lands.

The only question remaining to be determined then is whether the fact that some of the lands included in 029086 are indefinitely described requires the rejection of the application as to the lands which

are properly described (the entire named islands). In a number of cases the Department has allowed oil and gas lease applications as to tracts which were adequately identified and rejected the same applications as to tracts which were improperly identified (*Merwin E. Liss, supra; Celia R. Kammerman et al., supra; Ernest W. Sawyer, Jr.*, A–26573 (January 27, 1953)). These decisions indicate that an entire offer is not required to be rejected under 192.42(g)(1)(i) where the description is sufficient to identify only part of the lands applied for.

Accordingly, the Director's decision allowing 029086 as to the entire named islands was proper and the protestant's cross-appeal is denied.[2]

Miller's request for permission to adjust his offers cannot be granted. He may, of course, amend the descriptions in the offers, but they will be subject to any intervening applications filed before the filing of his amended descriptions (*Sidney A. Martin, C. C. Thomas*, 64 I.D. 81 (1957); *James Dęs Autels*, A–26245 (November 14, 1951)).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

[2] The protestant also filed a motion to dismiss the appeal on the ground that the appellant's statement of reasons in support of the appeal does not constitute a statement of reasons for appeal as required by the rules of practice. As the appellant's statement of reasons is not clearly violative of the rules, the motion is dismissed.

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## J. W. BAULER

## WALTER P. SHARPE

A–28069 *Decided November 2, 1959*

**Oil and Gas Leases: Rentals—Alaska: Oil and Gas Leases**

Under the amendment of section 22 of the Mineral Leasing Act by the act of July 3, 1958, payment of the first year's rental at the rate of 50 cents per acre is properly required with respect to offers for oil and gas leases on lands in Alaska filed on or after May 3, 1958.

### APPEALS FROM THE BUREAU OF LAND MANAGEMENT

J. W. Bauler and Walter P. Sharpe have separately appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated March 10, 1959, which affirmed decisions of the manager of the land office at Anchorage, Alaska, requiring the payment of additional rental in the amount of 25 cents per acre for the 1,280- and 2,560-acre tracts covered by their noncompetitive oil and gas lease offers, Anchorage 043376 and 044392, which were filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

Bauler's lease offer was filed on May 21, 1958; Sharpe's on July 16, 1958. Section 17 of the Mineral Leasing Act, then and currently, requires payment "in advance of a rental of not less than 25 cents per acre per annum." There is a further provision in this section for waiver of rentals for the second and third lease years unless a valuable deposit of oil or gas be sooner discovered. The pertinent departmental regulation provides in pertinent part that rentals shall be payable in advance under noncompetitive leases issued under section 17 of the Mineral Leasing Act covering land wholly outside the known geologic structure of a producing oil or gas field at the following rates:

(1) For the first lease year, 50 cents per acre or fraction thereof, except as to Alaska where the rate shall be 25 cents per acre or fraction thereof.
(2) For the second and third lease years, no rental.
(3) For the fourth and fifth years, 25 cents per acre or fraction thereof.
(4) For the sixth and each succeeding year, 50 cents per acre or fraction thereof, except as to Alaska where the rate shall be 25 cents per acre or fraction thereof. (43 CFR, 1954 Rev., 192.80(a).)

Both Bauler and Sharpe made an advance payment of the first year's rental with their offers at the rate of 25 cents per acre in accordance with the departmental regulation. But on July 3, 1958, section 22 of the Mineral Leasing Act, which is applicable to oil and gas leasing in Alaska, was amended to read in part as follows:



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* * * *Provided,* That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of 25 cents per acre as lease rental for the first year of such leases * * *. (72 Stat. 324.) [P.L. 85-505.]

Bauler contends that—

* * * the Bureau of Land Management did not observe principles pertaining to acts of good faith and conformance with established ethics and the exercise of proper judgment in accepting the lease application under the prevailing terms and conditions having been in possession of knowledge that pending legislation may have had a retroactive effect on lease offer conditions. (72 Stat. 324) It is further contended that a moratorium on accepting applications should have been declared until the Congress had acted or that a notice should have been issued to the effect that if the legislation passed as proposed with a retroactive clause then in that case the rental would be increased from 25¢ to 50¢ an acre.

He requests that the additional rental be waived or paid out of appropriated funds or that collection of the additional sums be suspended until the Congress can remove the retroactive effect of the proviso of July 3, 1958.

Sharpe asserts that his offer complied with the regulations in force when his offer was filed; that a notice or order signed by the Secretary on July 24, 1958, dealing with the application of the rental proviso in the act of July 3, 1958, did not apply retroactively to his offer; and that the rental proviso did not require or authorize an increase in rentals in Alaska.

It is unnecessary to answer the appellants' arguments in detail.[1] Section 10 of the act of July 3, 1958, which amended section 22 of the Mineral Leasing Act, was initiated by the Senate Committee on Interior and Insular Affairs. In its report on the legislation (S. Rept. 1720, 85th Cong., 2d sess., pp. 6-8), the committee had this to say:

A special statutory provision known as the Alaska oil proviso (30 U. S. C. 251) was enacted as part of the original Mineral Leasing Act of 1920 and has not been amended since. By the terms of this statute, the Secretary is give[n] the discretion to establish the levels of rental and royalty payments on Alaska lands at whatever figure he chooses and is given the discretion to waive all rentals and royalties for not more than the first 5 years of any lease. Under the authority of the Alaska oil proviso, the Department of the Interior has promulgated rules by which leases in Alaska are subject to a rental of 25 cents per acre for the 1st year and the 4th through 10th years. Within the States, leases on similar lands are subject to a per-acre rental of 50 cents for

[1] It may be noted that the notice of July 24, 1958 (23 F.R. 5700), which was signed by the Acting Director of the Bureau of Land Management, had nothing to do with the issue presented in this case.

the 1st year, nothing for the 2d and 3d years, 25 cents per year for the 4th and 5th years, and 50 cents per year for the 6th through 10th years. The prescribed royalty on unproved lands within the States is 12½ percent; in Alaska this figure is reduced to 5 percent for the first 10 years for the original discoverer and for all of those lessees who participate in a unit agreement under which the original discovery was made.

The committee amendment, which is section 10, amends the Alaska oil proviso which now grants the Secretary the authority to charge a lesser rental and royalty on Alaska lands than on similar lands within the States, revoking such authority. The amendment also specifically requires that the Secretary charge equal rents and royalties for similar lands in the Territory and in the States.

An exception is made for those who are entitled to leases under offers or applications to lease which were filed prior to May 3, 1958, and pending on that date. Such applicants and offerors will be entitled to a lease at a rental of 25 cents per acre for the first year, and the remaining 4 years of the original term will be at the same rental which applies to similar lands in the States. Thus, these particular applicants and offerors, if otherwise qualified and entitled to a lease will be entitled to such lease at a rental of 25 cents for the first year, nothing for the second and third years, and 25 cents per acre per year for the fourth and fifth years. This exception to the lease rental rate will not apply to any extended term of such leases. The amendment requires that all leases hereafter issued on noncompetitive Alaska lands will require the payment of the same royalty as is required on similar lands within the States of the United States. No reduction of this royalty figure is allowed for leases issued pursuant to offers or applications filed prior to May 3, 1958. Those who have leases in effect as of the date of the act would be entitled to maintain their leases at the previous rental and royalty figure during the original term of the lease. However, the amendment causes a change in the rules and regulations; so any extended term hereafter granted on such existing leases will be subject to the increased rental and royalty figure.

The committee recognizes that concessions have heretofore been made to encourage oil development in Alaska. This amendment would discontinue such concessions. It was probably very wise to make such concessions in the past; however, it now appears that interest has been aroused to unprecedented heights and the necessity for such encouragement has disappeared.

From the hearings and the staff investigation on this bill, it does not appear that such a discontinuance of special concessions would result in any substantial impediment to further development in Alaska. Under the circumstances, the committee believes that the public interest demands a reasonable return from these lands to be used for the support of roads and schools and other public necessities in the Territory. Under the terms of Public Law 88 of the 85th Congress, 90 percent of the proceeds from these lands is paid to the Territory for such purposes. The additional revenue which will result from this amendment will go a long way toward meeting the financial problems of the Territory.

* * * * * * *

Section 10 prohibits the granting of special rental or royalty concessions for Alaska lands and requires that rentals and royalties be charged at the same rates which apply to similar lands within the States. A single exception is made to allow the issuance of leases at a lease rental of 25 cents per acre for the first year of leases issued pursuant to offers or applications filed prior to May 3, 1958, and pending on that date.

This language clearly evidences the view of the Senate committee that the 25 cent rental rate in Alaska was a special concession which should not be perpetuated. It also plainly shows that the committee intended that the amendment should become effective with respect to all offers filed on or after May 3, 1958. Accordingly, it appears that the Department was required to collect the additional rental in advance of the issuance of leases in response to the appellants' offers which, admittedly, were not filed in time to entitle them to the preferred treatment.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## DUNCAN MILLER ET AL.

A-28120 *Decided November 9, 1959*

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions**

Section 30(a) of the Mineral Leasing Act, as amended, provides for separate leases only in those instances where partial assignments of oil and gas leases are made and for the extension of those separate, or segregated, leases only when the conditions outlined in the section are met.

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions**

Nothing in section 30(a) of the Mineral Leasing Act, as amended, operates to extend oil and gas leases assigned in their entirety; consequently, where an assignment of a lease in its entirety, filed during the last month of the 5-year extended term of a lease, is approved, the action is erroneous since the assignment could become effective only on the first day of the month following expiration of the lease.

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions—Oil and Gas Leases: Cancellation**

Where an assignment of an oil and gas lease in its entirety and a partial assignment of the lease by the assignee under the first assignment are filed during the last month of the extended 5-year term of the lease, it is error to approve the assignments and to hold that the segregated leases are extended for a period of 2 years as the result of the partial assignment, and the extensions should be canceled.

**Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Extensions**

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed

for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

These are four separate appeals to the Secretary of the Interior by Duncan Miller, Esther H. Krohn, Ernest G. Erickson, and Harold J. Hansen from a decision by the Director, Bureau of Land Management, dated April 2, 1959, in which the Director affirmed the rejection of their offers to lease, noncompetitively, lot 5, sec. 31, and lots 1 and 2, sec. 32, T. 5 N., R. 16 W., S. B. M., California, under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226), on the ground that the land was embraced in outstanding oil and gas leases at the time the offers were filed.

A 5-year noncompetitive oil and gas lease, Los Angeles 064149, covering the above-described land, totaling 41.06 acres, was issued to Mrs. Gertrude H. Lackie as of March 1, 1948. That lease was assigned in its entirety to The Texas Company in 1952 and that company applied for and received a 5-year extension thereof. The entire lease was reassigned to Mrs. Lackie in 1955, who then assigned it to Intex Oil Company, effective as of October 1, 1957. By decision dated December 16, 1957, the manager of the land office at Los Angeles informed Intex Oil Company that because of a discovery made on lot 4, sec. 31, lot 5 of the same section, covered by Los Angeles 064149, had been deemed to be within the known geologic structure of the Tapia Canyon field and that the rental under the lease would, beginning with the next lease year, be at the rate of $1 per acre or fraction thereof.

On January 24, 1958, there was filed in the land office an assignment of Los Angeles 064149 in its entirety from Intex Oil Company to Gertrude H. Lackie and on the same day there was filed a partial assignment of the lease, covering lots 1 and 2 of sec. 32, containing 32.62 acres, from Gertrude H. Lackie to Raymond D. Lackie and Blanche K. Lackie. On February 18, 1958, Mrs. Lackie filed the required bond for the protection of the surface owner of the land. The assignment from Intex to Mrs. Lackie was approved by the manager on February 27, 1958, effective as of March 1, 1958. On the next day, February 28, 1958, the manager approved the partial assignment to Raymond D. and Blanche K. Lackie and designated the segregated lease covering lots 1 and 2, sec. 32, as Los Angeles 064149–A, thus leaving only lot 5, sec. 31, in Los Angeles 064149. In his approval of the partial assignment, the manager stated that the lease terms of the two leases were considered to be extended for 2 years from March 1, 1958.

The appellants filed their lease offers on March 3, 1958. The manager rejected their offers by decision dated August 21, 1958, and on

September 15, 1958, Duncan Miller filed his appeal to the Director.[1] The other appellants appealed shortly thereafter.

The Director, relying upon the supplemental decision in *Franco Western Oil Company et al.*, 65 I.D. 427 (1958), held that the two leases would be considered as having been properly extended, all else being regular, and that the appellants' lease offers, "filed when the lands applied for were embraced in valid existing leases, were properly rejected."

The appellants contend that the situation dealt with in the supplemental *Franco Western* decision is not applicable here because the assignor under the partial assignment, Gertrude H. Lackie, could not have become the record titleholder of Los Angeles 064149 during the term of that lease. They argue, therefore, that the lease could not have been extended for an additional 2-year period by her partial assignment.

The arguments presented by the appellants have merit. In *Franco Western* the Department was dealing with partial assignments made by record titleholders of oil and gas leases filed during the 12th month of the 10th year of extended leases. In its first decision in that case, rendered on August 11, 1958 (65 I.D. 316), the Department determined that for leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there was at least one month remaining in the term of the lease. That decision overruled a prior construction of section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 187(a)). The supplemental decision held merely that the decision of August 11, 1958, would be given prospective application only and that those leases which had been, prior to August 11, 1958, extended for a further 2-year period on the basis of partial assignments filed during the 12th month of the 10th year of the leases would be considered as having been properly so extended.

Shortly after the Director rendered his decision in this case, the Department had occasion to consider a situation comparable to the situation presented by the present appeals. There (*E. C. Donohue and Wilma Donohue Moleen*, A–27881 (April 21, 1959)), the manager had been confronted with two assignments filed on the same day, in the 12th month of the 10th year of an extended lease. One was an assignment of the lease in its entirety from the record titleholder to Donohue and the other a partial assignment made by Donohue. The manager held that, since an assignment takes effect as of the first day of the

[1] The record shows that on July 14, 1958, Mrs. Lackie executed an assignment of Los Angeles 064149 to E. S. Arnn. On the same date she entered into a drilling and operating agreement with Arnn. The assignment was filed in the land office on August 29, 1958. On September 22, 1958, the parties were informed that, because of the questionable status of the two leases and because of the appeal filed by Miller, action on the assignment from Mrs. Lackie to Arnn would be deferred until action on the appeal had been taken.

lease month following the date of filing, the effective date of the assignment of the whole lease would have been after the expiration date of the lease; that since the assignee under the assignment of the whole lease could have acquired no interest in the lease after its expiration date, he had nothing to assign to his assignee; and that the lease expired by operation of law at the end of its 10-year extended term.

In affirming the manager, the Department said:

> Thus while any oil and gas lease may be assigned in whole or in part, the section provides for separate leases only in those instances where partial assignments are made and for the continuation of those separate, or segregated, leases only when the conditions outlined in the section are met.
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> * * * * * * *
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> As nothing in section 30(a) of the Mineral Leasing Act operates to extend leases assigned in their entirety, it is obvious that the manager was correct in determining that the lease had expired by operation of law prior to the date on which the assignment to Donohue could have become effective and that since Donohue took no interest in the lease under the assignment he had nothing to convey to Mrs. Moleen.

In the present case, while the assignments were filed in January 1958, the assignment of the entire lease from Intex to Mrs. Lackie cannot be considered to have been filed until February 18, 1958, when she filed the required bond,[2] and therefore that assignment cannot be considered to be effective until March 1, 1958, which was after the expiration of the 10-year extended term of the lease.

As there is no provision in section 30(a) for the extension of leases which are assigned in their entirety, the lease (Los Angeles 064149) expired by operation of law on February 28, 1958, and the extension granted to the segregated leases, based on the partial assignment, cannot be considered to be entitled to recognition by anything said in the supplemental *Franco Western* decision. Immediate steps should, therefore, be taken to cancel the extensions granted under segregated leases Los Angeles 064149 and 064149–A.

However, notwithstanding the fact that the extensions granted have now been determined to have been erroneous, it was proper to reject the appellants' offers to lease the land. This is so because the extensions were granted prior to the filing of the appellants' offers, by an official of the Department authorized to grant extensions of oil and gas leases. While those extensions were outstanding, whether or not the extensions were proper, they served to segregate the land and prevented the initiation of rights in the land by others. *Hjalmer A.*

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[2] Section 30(a) provides in pertinent part:

* * * any oil or gas lease * * * may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary [of the Interior] * * * and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, *together with any required bond* * * *. (Italics supplied.) [60 Stat. 955–956.]

*Jacobson, E. B. Todhunter*, 61 I.D. 116, 118–119 (1953); *R. M. Young, Jr., Mary R. Sivley*, A–27640 (January 30, 1959.[3]

It is to be noted that while the extensions granted were not valid extensions, as held by the Director, the cases cited by the Director support the proposition that where land is in an outstanding lease, whether that lease is valid or invalid, offers to lease such land must be rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), and for the reasons set forth above, the decision of the Director, Bureau of Land Management, is affirmed and the case is remanded to the Bureau for appropriate action consistent with this decision.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## JANIS M. KOSLOSKY

A–28103 *Decided November 10, 1959*

**Oil and Gas Leases: Applications**

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.

**Oil and Gas Leases: Applications**

A noncompetitive oil and gas lease offer for 2,560 acres is properly rejected in its entirety where 2,240 acres of the land applied for are withdrawn from mineral leasing and other land adjoining the remaining 320 acres was available for leasing at the time the application was filed.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On July 29, 1957, Janis M. Koslosky filed a noncompetitive oil and gas lease offer, Anchorage 035501, for 2,560 acres, more or less, of unsurveyed land in what will be T. 17 S., R. 46 and 47 W., Seward Meridian, Alaska, when surveyed. In his description of the land applied for the applicant added the note: "(Includes a portion of PLO 255)."

By a decision dated April 9, 1958, the manager of the Anchorage, Alaska, land office rejected the application in its entirety. The manager stated that 2,240 acres of the land applied for was included in Public Land Order No. 255 (11 F.R. 8368 (1946)) which withdrew the land from all forms of appropriation, including the mining and

[3] In any event, the offers would have been subject to rejection as to lot 5, sec. 31, because that land had previously been determined to be within the known geologic structure of a producing oil or gas field and thus subject to competitive bidding only.

mineral leasing laws. He also stated that at the time the offer was filed contiguous land to the north was available for leasing "as land covered only by an outstanding oil and gas application does not render the land unavailable for leasing within the meaning of the regulations requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres." Koslosky appealed to the Director, Bureau of Land Management, who affirmed the manager in a decision dated April 6, 1959. The applicant has now appealed to the Secretary of the Interior.

The pertinent regulation of the Department (43 CFR, 1954 Rev., 192.42(d), as amended, 43 CFR, 1954 Rev., 192.42(d) (Supp.)) provides in part:

> * * * Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:
>
> * * * * * * *
>
> (2) Where the land is surrounded by lands not available [for leasing] under the act.

The Department has ruled that lands embraced in outstanding oil and gas lease applications are lands that are available for leasing under 43 CFR 192.42(d)(2), and that an application for less than 640 acres which fails to include adjoining lands in outstanding lease applications is defective and must be rejected. *R. S. Prows*, 66 I.D. 19 (1959); *Natalie Z. Shell*, 62 I.D. 417 (1955). Therefore, had the appellant's application been only for the 320 acres of land not embraced in Public Land Order No. 255 without including the adjoining land to the north which was available for leasing, the application would properly be rejected under the consistent rulings of the Department.

However, it should be noted here that the appellant's lease offer embraced 2,560 acres, not 320 acres, and it was only after the manager had plotted the description of the lands applied for that it was determined that 2,240 acres of the land applied for were withdrawn and not available for leasing. Thus, the question arises as to whether the 640-acre limitation should apply in this case since the maximum acreage was applied for.

In *Eugene J. Bernardini et al.*, 62 I.D. 231 (1955), Bernardini and Travis filed simultaneous oil and gas offers for the same lands. A drawing was held and the Travis offer received priority. Bernardini then filed a protest against issuance of a lease to Travis. Bernardini contended that Travis had filed two offers both of which included the same 120 acres, and that the manager incorrectly eliminated only the 120-acre parcel from both the offers instead of rejecting both offers in their entirety. Bernardini also contended that after eliminating the 120-acre parcel Travis' offer became an offer for less than 640 acres

and could not meet the requirements of 43 CFR, 1954 Rev., 192.42(d). Bernardini argued that an offer for an oil and gas lease is not eligible for acceptance when, even though at the time of filing it embraced 640 acres or more of land then available for oil and gas lease, some intervening action has rendered so much of the land unavailable for oil and gas leasing as to leave the remaining area smaller than 640 acres, and that if this were not so it would be possible for a person to lease an isolated tract of 40 acres in circumvention of the regulation by the simple ruse of including the 40 acres as part of a 640-acre tract of which 600 acres were already under lease or otherwise not available.

In answer to this argument the Department stated that such a practice would undeniably contravene the regulation, but that the appellant's illustration was sound only when it referred to lands covered by an offer to lease which at the time of the filing of the offer were not available for leasing, and that a wholly different situation existed where, after the filing of an offer, certain land embraced in the offer became unavailable for leasing because of a withdrawal, for instance, with the result that the land originally included within the offer is reduced to an area smaller than 640 acres. The Department then stated:

> That an oil and gas lease offer, apart from the exceptions in the regulation referred to above, and if otherwise valid, may be *accepted* for an area covering less than 640 acres so long as it embraced at least 640 acres of land available for oil and gas lease at the time of its filing is an interpretation both reasonable and fully consistent with the language and purpose of the regulation. * * *
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> * * * * * * *
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> As has been indicated above, the point of time in the existence of the offer which the regulation impliedly regards as critical and determinative is the very inception of the offer, in other words, the moment of its filing. Thus, inclusion in the offer at that time of a permissible amount of available acreage satisfies the regulation. (P. 235.)

Thus the *Bernardini* case clearly indicated that if an offer were filed for over 640 acres of land but less than 640 acres of the land were available for leasing at the time of filing, the offer would be considered in contravention of the regulation.

In this case, at the moment the appellant's application was filed, 2,240 acres of the land included in the offer were unavailable for leasing because the land was withdrawn by Public Land Order No. 255. This fact was ascertainable from the land office records, and the appellant appears to have known his offer conflicted with the land order by reason of the note attached to the metes and bounds description of the land applied for. Moreover, other land adjoining the 320 acres not covered by the withdrawal was available for leasing, although it was included in other outstanding lease offers. Thus, had the appellant filed an application for the 320 acres he desired to lease plus 320 acres of the other adjoining available land included in outstanding

lease offers, his application would have satisfied the regulation and could have been accepted. Since the application included the withdrawn lands, which the appellant should have known were withdrawn, and failed to include other land available for leasing, it was obviously in contravention of the pertinent regulation and was properly rejected.

The appellant's sole argument in his appeal to the Secretary is that he did not file on the adjoining available lands because these lands were included in applications filed by persons who were members of a group associated with him that filed on all of the surrounding lands in the area. He argues that he had no reason to believe that anyone in the group would withdraw his application and that, therefore, there was no reason to file a conflicting application, thereby leading to creation of unnecessary delay by virtue of filing a conflicting application and the payment of unnecessary excess rental.

The appellant's argument is not persuasive and is without merit. The pertinent regulation (43 CFR, 1954 Rev., 192.42(d)) was adopted for the benefit of the United States and the public interest. This Department must administer the rule equally and impartially as to individuals, companies, syndicates, corporations, or whoever applies for an oil and gas lease of public lands. There is no valid reason to give preferential treatment to the appellant simply because his application was filed as a part of group action to secure a large block of oil and gas leases.

Moreover, oil and gas lease offers are processed in the order of their filing. Consequently, the argument that unnecessary delays would have occurred had the appellant filed an application for lands already included in applications filed by other members of his group is not persuasive for the reason that those applications would have been reached for processing before his junior application was considered. Action on the senior offers would not have been delayed because his junior offer included some of the same land. And once the senior offers were processed and leases were issued, there would have been no delay in processing his offer for the remaining available land.

As for paying excessive rental, the appellant would have been no worse off than he actually was; that is, he had to remit with his offer advance rental for the 2,240 acres of withdrawn land which were included in his offer.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

DUNCAN MILLER
LOUISE CUCCIA

A–28059 *Decided November 17, 1959*

Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Extensions

Where the Geological Survey reports to the manager that a lease is extended by reason of production and the manager so notes the serial register page, the lands covered by the lease are not available for further leasing until the termination of the lease is noted in the tract books, even though in fact production on the lease had ceased prior to the termination of the primary term of the lease.

Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Extensions

Offers to lease for oil and gas for lands covered by an oil and gas lease in its extended term must be rejected, whether the extension is valid or not, because such lands are not open to filing until the cancellation or termination of the lease has been noted on the tract book.

Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Known Geological Structure

A noncompetitive oil and gas lease offer for lands within the limits of the known geological structure of a producing oil and gas field must be rejected.

Oil and Gas Leases: Known Geological Structure

The Geological Survey's definition of the known geologic structure of a producing oil or gas field will not be disturbed in absence of a clear and definite showing that it was improperly made.

Oil and Gas Leases: Cancellation

An oil and gas lease must be canceled where the lessee filed his application for the lands involved at a time when the lands were included in an outstanding lease determined to be extended by production, although subsequently the determination was found to have been erroneous.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision dated March 10, 1959, of the Acting Director of the Bureau of Land Management which affirmed the action of the manager of the Santa Fe land office in rejecting in part Miller's offer for a noncompetitive oil and gas lease, New Mexico 023800, on the grounds that the tracts rejected were either in an outstanding oil and gas lease or within the known geologic structure of a producing oil and gas field at the time Miller filed his offer.

In his offer, filed on April 4, 1956, Miller applied for the SW¼ sec. 7, W½NW¼, SW¼ sec. 18, SW¼ sec. 34, and the S½SW¼, SW¼SE¼ sec. 35, T. 9 S., R. 36 E., N. M. P. M.

A previous oil and gas lease, Las Cruces 067763, which had included all of the land applied for by Miller, except the W½NW¼

sec. 18, had been issued to the Magnolia Petroleum Company for a 5-year term beginning June 1, 1949. The record indicates that a discovery of oil was made on the lease in a well on the SW¼SW¼ sec. 7 on May 7, 1951, and that the well, after producing 174,287 barrels of oil, was abandoned in March 1954 and was plugged in December 1955.

In a memorandum dated July 1, 1954, the oil and gas supervisor, Geological Survey, Roswell, New Mexico, informed the manager of the Santa Fe land office that the Magnolia lease was considered to be extended by producing operations. On May 27, 1955, the lessee relinquished the lease and by a decision dated September 13, 1955, the manager canceled the lease as of the date of filing of the relinquishment. The tract book records were noted on September 13, 1955.

Meanwhile, on August 25, 1955, Louise Cuccia filed a noncompetitive offer, New Mexico 020768, covering all the lands in the Magnolia lease, plus the W½NW¼ sec 18 and other lands. The manager, in a decision dated February 16, 1956, allowed the offer for all the subdivisions not covered by the Magnolia lease, except the W½NW¼ sec. 18, as to which the offer was rejected because it was within the known geologic structure of a producing oil and gas field. The manager rejected the offer as to the areas previously in the Magnolia lease on the ground that Mrs. Cuccia's offer was filed prior to the notation of the relinquishment of that lease in the tract book, and that the land was not available for leasing prior to notation. In addition, the manager held that since the SW¼ sec. 7 was also in the known geologic structure of a producing oil and gas field it was, in any event, not available for noncompetitive leasing.

In a memorandum dated March 28, 1956, the Geological Survey informed the manager of the dates on which production had started and ended on the Magnolia lease. It concluded that since production had ceased prior to the termination date of the lease, the lease could not be extended by producing operations as stated in its memorandum of July 1, 1954, and said that memorandum should be corrected.

Thereupon, in a decision dated May 25, 1956, the acting manager revoked his decision rejecting Mrs. Cuccia's offer as to lands previously covered by the Magnolia lease, except for the W½NW¼ sec. 18 and the SW¼ sec. 7, and issued an amendment adding the SW¼ sec. 18 SW¼ sec. 34, and S½SW¼, SW¼SE¼ sec. 35 to Mrs. Cuccia's lease.[1]

In a decision dated January 20, 1958, the manager issued a lease to Miller for lot 2 (SW¼NW¼) sec. 18. He rejected Miller's offer as to the SW¼ sec. 7 and the NW¼NW¼ sec. 18, on the ground that they are in the known geologic structure of a producing oil

[1] Mrs. Cuccia appealed from this decision on the ground that the SW¼NW¼ sec. 18 was not within the known geologic structure of the Bough field. In a decision dated March 10, 1959, the Acting Director, Bureau of Land Management, held that although Mrs. Cuccia's allegation was correct, she had not filed a timely appeal from the manager's decision rejecting the offer to that extent, that the subdivision had been leased to Duncan Miller, and that in the circumstances her offer could not be reinstated in the presence of Miller's intervening rights.

and gas field, the Bough field, effective January 12, 1950, and are not available for noncompetitive leasing. He rejected the offer as to the SW¼ sec. 18, the SW¼ sec. 34, and the S½SW¼, SW¼SE¼ sec. 35, on the ground that they are included in the Cuccia lease.

On the appeal, the Director held, as to the lands rejected for conflict with the prior Cuccia lease, that such lands became available for leasing at the expiration of the 5-year term of the Magnolia lease and that Mrs. Cuccia's offer was the first filed thereafter and earned her a statutory preference right to a lease. As to the lands rejected for being in the known geologic structure of the Bough field, he held that a noncompetitive offer for such lands must be rejected and that the Geological Survey's definition of the known geological structure of a producing oil and gas field will not be disturbed in the absence of a clear showing that the definition was improperly made.

On appeal Miller contends that, according to the official records of the Department, the Magnolia lease was an existing lease until the notation of its relinquishment was made on September 13, 1955; that the serial register page showed that the lease was a producing lease as of July 18, 1951, and that the next entry is a notation stating that in a memorandum dated July 1, 1954, the oil and gas supervisor advised that the lease was considered extended by production;[2] that he is the first qualified applicant to file after the relinquishment of the prior lease was noted; and that he is the first qualified offeror. He also states that it was error to reject his offer for the lands said to be in the known geologic structure of a producing oil and gas field.

In a supplemental statement Miller further urges that because the well on the SW¼ sec. 7 was not plugged until December 22, 1955, the Magnolia lease subsisted beyond its term.

Considering first the lands rejected for being within the known geologic structure of the Bough field, it appears that Miller's only objection to the inclusion of these tracts within the field is that the Magnolia lease ceased production. However, the fact that a well has stopped producing does not automatically require a redefinition of the boundaries of the field. *Marie Williams*, A–25635 (April 21, 1949); *K. S. Albert*, 60 I.D. 62 (1947). The appellant has offered no other evidence to support his position. In the absence of a clear and definite showing that it was improperly made, the Geological Survey's definition of a producing oil or gas field will not be disturbed. *Duncan Miller*, A–27737 (November 20, 1958).

The remaining lands involved in Miller's appeal raise a more difficult problem. The first question to be determined is the date on which the Magnolia lease terminated. The Geological Survey has reported, and Miller has not disputed, that production from the only well on the lease ceased production no later than March 1954, and

[2] On the date that Mrs. Cuccia filed her offer, the serial register page read:
"* * *
7/18/51 case record to BLM—Producing.
July 7, 1954 Memorandum 7/1/54 Oil and Gas Supervisor Roswell, New Mexico, advises lease is considered extended by producing operations."

that the well was not producing at the termination of the primary term of the lease on May 31, 1954. Under section 17 of the Mineral Leasing Act, as amended, as it read on that date, a lease could be automatically extended upon the expiration of its primary term only if there was on the leasehold a well producing oil and gas in paying quantities or if diligent drilling operations were in progress on the leasehold during any period of nonproduction. 30 U.S.C., 1958 ed., sec. 226.[3] *H. K. Riddle*, 62 I.D. 81 (1955); *James Shelton*, 62 I.D. 236, 239 (1955). As the lease did not meet either of the alternatives for extension it expired by operation of law at the end of its primary term, the fact that there had been production during the primary term not serving to extend the lease. *Id.*

If the facts in the matter on appeal went no further, then Mrs. Cuccia, as the first qualified applicant to file after the prior lease had expired by operation of law, would clearly have earned a preference right to a lease.

However, here, prior to the date on which Mrs. Cuccia filed her offer, the Geological Survey reported that the Magnolia lease was considered to be in its extended term because of production and the manager so noted the serial register page. Had there actually been production on the lease on its expiration date, the lease would have been extended at least so long as there was production and the leased lands would not thereafter have been available for further leasing until the termination of the producing lease had been noted on the tract books. *Kenneth A. Araas*, A–26672 (April 28, 1953); see *E. A. Vaughey*, 63 I.D. 85, 88, fn. 4 (1956).

Therefore we must consider whether the erroneous advice of the Geological Survey and the action of the manager were of any consequence.

The Department has repeatedly held that an outstanding oil and gas lease, whether void or voidable, bars any filing for the leased land until the cancellation of the lease is noted on the tract books. *Joyce A. Cabot et al.*, 63 I.D. 122 (1956); *R. B. Whitaker et al.*, 63 I.D. 124 (1956); *Allan A. Stramler, Jr.*, A–27949 (June 15, 1959). It is also well established that an erroneous extension of an oil and gas lease by a competent official who has jurisdiction over the lease requires the rejection of all subsequent conflicting offers filed before the cancellation of the erroneously extended lease is noted in the tract book. *Hjalmer A. Jacobsen, E. B. Todhunter*, 61 I.D. 116 (1953); *Margaret A. Andrews et al.*, 64 I.D. 9 (1957).

Recently the Department has applied this rule to situations in which managers have held leases to be in their extended term, not as a result of an application for extension filed by the lessee, but as a result of their interpretation of the pertinent statute. In several cases where

[3] The provisions of the Mineral Leasing Act, dealing with termination of leases on which production has ceased, were further amended by the act of July 29, 1954 (30 U.S.C., 1958 ed., secs. 187a, 188, 226, 226e). Even under these more liberal provisions the Magnolia lease would not have earned an extension. *Steelco Drilling Corp.*, 64 I.D. 214 (1957).

the manager held that the partial assignment of a lease in its extended term extends both the assigned and retained portions of the lease for a minimum period of 2 years from the effective date of the assignment, even though the leases thus continue beyond the 5-year extension of the original lease, the Department has agreed with the manager but pointed out that even if the leases were improperly extended, the lands they covered would not be available for further filing until their cancellation or revocation is noted on the tract book. *Richard P. DeSmet et al.*, A-27837 (October 29, 1958); *Duncan Miller*, A-28008 (August 10, 1959).

In another case, the Department has held that where the manager informed a lessee that her lease, in the 5th year of its extended term, was extended for 2 years from the date of discovery of oil or gas in paying quantities on another lease which had been created by assignment out of first lease during its original term, an offer filed after the 5-year extended term would have terminated must be rejected because, even if the extension were improper, while it was outstanding it prevented the initiation of rights in the land by others. *R. M. Young, Mary R. Sivley*, A-27640 (January 30, 1959).

The purpose of the notation rule is to assure to all the public equality of filing. *Elmer F. Garrett*, 66 I.D. 92, 95 (1959); *Max L. Krueger et al.*, 65 I.D. 185, 191 (1958). When the record indicates that a lease has been extended, it would be unfair to hold that land is available for leasing because, entirely outside the record, facts existed which, if known, would have required a finding that the lease was not eligible for extension. To do so would give an unfair advantage to those who knew that production had ceased prior to the expiration of the prior lease. See *Max L. Krueger et al.*, *supra*, p. 191.

Thus in the matter before us the Geological Survey notified the manager that the Magnolia lease was considered to be extended by producing operations and the manager noted the serial register accordingly. These acts are as valid to extend the lease as a manager's interpretation of a statute. All actions by the lessee and manager taken thereafter were consistent with view that the lease was in its extended term. It was only after Mrs. Cuccia appealed from the manager's partial rejection of her offer that it became clear that the lease had been improperly extended. These facts, it seems to me, fall well within the purpose of the notation rule and the cases to which it has been applied. Therefore the Magnolia lease, having been determined to have been extended by persons authorized to make such a determination and having jurisdiction over the land, barred further filing for the lands it covered until its termination was noted on the tract book.[4] Accordingly, these lands were not available for filing

[4] This situation is to be distinguished from one in which a lessee asserts that his lease is extended by production, but no authorized official so determines. Then the land becomes available for leasing upon the expiration of the lease term. *Duncan Miller*, A-27959 (August 3, 1959). It is also to be distinguished from the question of whether the erroneous actions in fact extended the lease. *Champlin Oil and Refining Company et al.*, 66 I.D. 26 (1959); *The Superior Oil Company and The British-American Oil Producing Company*, 64 I.D. 49 (1957).

when Mrs. Cuccia filed her offer and it should have been rejected to that extent. The lease issued to her was in violation of the statutory preference right accorded to Miller as the first qualified applicant, and must be canceled as to the SW¼ sec. 18, the SW¼ sec. 34, and the S½SW¼, SW¼SE¼ sec. 35. Miller's lease should then be amended to include these subdivisions. *R. S. Prows*, 66 I.D. 19, 22 (1959), and cases cited.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed in part and reversed in part and the case is remanded for further action in accordance with this decision.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## DORIS L. ERVIN ET AL.

A-28106 *Decided November 20, 1959*

**Oil and Gas Leases: Applications—Surveys of Public Lands: Generally**

An oil and gas lease offer is properly rejected as to surveyed lands which are not described in conformity with the most recent plat of survey.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Doris L. Ervin and the other parties named above [1] have appealed to the Secretary of the Interior from a decision of April 21, 1959, by the Director of the Bureau of Land Management which affirmed a decision by the manager of the Anchorage land office rejecting in part oil and gas lease offer Anchorage 028126 and accepting the offer as to the rest of the land subject to stipulations governing the leasing of wildlife refuge lands (43 CFR, 1954 Rev., 192.9 (Supp.)). The lands here involved are located in T. 5 N., R. 8 W., Seward Meridian, Alaska, and this appeal is confined to the decision regarding the offer for lot 9, section 7, containing 21.67 acres of land.

The offer, filed on November 30, 1956, was rejected as to lot 9, sec. 7, for the reason that the land should have been described as lots 12, 13, 14, and 15, as shown by the most recent plat of survey, approved February 3, 1953. The Director's decision pointed out that a departmental regulation (43 CFR, 1954 Rev., 192.42(d)) provides in relevant part that:

* * * Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed * * *.

The Bureau has held that this provision requires that the land description in an offer be in accordance with the current survey.

[1] Betty Louise Ervin, Clayton Allan Ervin. Ed.]

The plat of survey of T. 5 N., R. 8 W., Seward Meridian, was accepted June 24, 1943. That plat designates the land here involved as lot 9, section 7. On February 3, 1953, a supplementary plat of section 7 showing amended lottings was accepted. The supplementary plat designates as lots 12, 13, 14, and 15 the land previously identified as lot 9. The supplementary plat showing the amended lottings was officially filed at the Anchorage land office on March 31, 1953.

On appeal, it is contended that the provisions of the Mineral Leasing Act and of the regulations issued pursuant thereto do not require that lands be described according to the latest approved plat of survey, that the lands described in the appellants' offer as lot 9, section 7, are properly described and are identifiable. However, over a period of many years, the Department has held that the approved plat of an official survey is conclusive as to the designations of the tracts embraced therein, and must govern in the disposal of those lands (*George W. Fisher*, 24 L.D. 480 (1897); see *Elisha B. Martin*, 16 L.D. 424 (1892), holding that a patent could not be issued for land under a technical subdivisional description not shown by the public surveys). With respect to offers filed under the Mineral Leasing Act, the Department has expressly held that surveyed lands must be described by legal subdivisions or fractional lots in conformity with the official system of the public land surveys (*L. S. Keye*, A–24369 (August 5, 1946)).

Plats of survey are kept at the local land offices for public information and the filing of a plat gives notice of the official survey of the land (see *Anderson* v. *State of Minnesota*, 37 L.D. 390 (1909)). Where there are two or more surveys of the same land, that survey which has been finally approved and which is recognized as the existing or subsisting official survey is the one which will control in determining questions arising in connection with the survey (see *State of Minnesota*, 32 L.D. 65 (1903)). Similarly, where a supplemental plat of survey of a section within a township is approved and filed, the most recently accepted supplemental survey is conclusive as to the designation of the tracts (see *George W. Fisher*, *supra*; *State of Minnesota*, *supra*). Indeed, if descriptions other than those shown on the most recently accepted plat of official survey were held to be accurate land descriptions, the practice of correcting surveys, making new surveys, and filing supplemental plats of survey would be quite pointless. There is no question that the authority to survey the public lands includes authority to order new surveys and to correct and supplement existing surveys (*Michigan Land and Lumber Co.* v. *Rust*, 168 U.S. 589, 594 (1897); *Cragin* v. *Powell*, 128 U.S. 691, 698 (1888)). An almost necessary corollary of this authority is the administrative rule that, in disposing of public lands, the most recently accepted plat of survey is the official survey of the land shown thereon.

The appellants' offer for lot 9, like the applications considered in the *Martin* and *Fisher* cases, describes an area which does not exist

on the official plat of survey. An offer for surveyed lot 9, section 7, which lot is not shown on the most recent plat of survey cannot be regarded as segregating lots 12, 13, 14, and 15 in section 7. The description of lot 9, section 7, in the appellants' offer informs neither the land office nor the public that an application for lots 12, 13, 14, and 15, section 7, has been filed (see *Margaret Prescott*, 60 I.D. 341 (1949)). The supplementary plat which relotted lot 9 as lots 12, 13, 14, and 15 was filed in the land office more than 3½ years before the appellants' offer was filed. There was no excuse, and they offer absolutely none, for their failure to describe the land they desired in terms of the latest official plat of survey. Accordingly, the contentions on appeal provide no basis for altering the decision rejecting the appellants' offer as to lot 9, section 7.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## FERRIS F. BOOTHE

A-28058 *Decided November 23, 1959*

**Administrative Procedure Act: Exemption from—Administrative Procedure Act: Hearings—Soldiers' Additional Homesteads: Generally**

Applicants for lands selected under the soldiers' additional homestead law are not entitled to a hearing under the Administrative Procedure Act where the right of the applicant to select an additional entry is recognized and the sole issue is whether the lands selected can be properly classified as suitable for selection under the law.

**Rules of Practice: Hearings**

It is not an abuse of discretion for the Director of the Bureau of Land Management to deny a hearing where the sole issue is the question of the proper classification of lands selected under the soldiers' additional homestead law.

**Soldiers' Additional Homesteads: Classification**

An application for soldiers' additional homestead entry is properly denied where the lands applied for are heavily timbered and rough, mountainous land which could not be rendered suitable for agriculture even if the timber was removed.

**Soldiers' Additional Homesteads: Classification—Taylor Grazing Act: Classification—Public Lands: Classification**

In determining whether to dispose of public lands which have been withdrawn by Executive Order 6910, the Department must, pursuant to section 7 of the Taylor Grazing Act, determine both that the lands are of the type subject to disposition under the Soldiers' Additional Homestead Act and that, if they are, their disposition would be in the public interest.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ferris F. Boothe has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated March 12, 1959, which affirmed a decision of the manager of the Portland, Oregon, land office, dated October 10, 1958, rejecting his soldiers' additional homestead applications, Oregon 05983 and 05984, filed under sec. 2306 of the Revised Statutes (43 U.S.C., 1952 ed., secs. 274, 278) for the reason that the lands had been classified as more valuable for the production of timber than for the production of agricultural crops and improper for acquisition in satisfaction of an outstanding soldiers' additional homestead right.

The lands applied for are heavily timbered and are located within the McKenzie-Willamette Forest Management area. They, along with all other vacant and unappropriated public lands in Oregon and 11 other States, were withdrawn from all forms of entry and reserved for classification by Executive Order No. 6910, dated November 26, 1934 (43 CFR, 1949 ed., 297.11). Section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1952 ed., sec. 315f), authorizes the Secretary of the Interior, in his discretion, to examine and classify such withdrawn land and, when he finds the land proper for acquisition in satisfaction of script rights, to open the land to selection.

The appellant contends that the Director erred both in his classification of the land and in the procedure he employed to reach his classification. Procedurally, the appellant says the Director improperly relied upon field reports not available to him for examination, and refused to hold a hearing under section 5 of the Administrative Procedure Act (60 Stat. 237, 239; 5 U.S.C., 1958 ed., sec. 1004) or, in the alternative, abused his discretion by not ordering a hearing on disputed issues of fact as provided for in the rules of practice (43 CFR, 1954 Rev., 221.6 (Supp.)).

The rules of practice (43 CFR, 1954 Rev., Part 221 (Supp.)) provide that:

> 221.99 *Basis of decisions; record.*
>
> * * * * * * *
>
> (d) In any case, no decision on appeal or in a contest shall be based upon any record, statement, file or similar document which is not open to inspection by the parties to the appeal or contest.

The field reports of examination of the lands involved upon which the Director relied are contained in the case record. However, there is nothing in the record to show that the appellant has ever requested copies of these reports or access to them at any stage of this proceeding or exercised his right to appeal from the denial of a request to inspect the field reports. (43 CFR 1954 Rev., 2.1–2.3.) It should also be noted that the appellant, in his appeal to the Secretary, has likewise failed to request either access to or copies of the field reports. Had a request to see the field reports been filed, it would have been granted.

Therefore, it is concluded that the appellant's contention that the Director's decision was reached on the basis of "secret" field reports is without merit.

The appellant next complains that he was denied a hearing on his application and that such a hearing is required by section 5 of the Administrative Procedure Act (*supra*). He argues that his application is based upon a legislative grant from Congress which vests him with a property right to the lands selected; that procedural due process, therefore, requires a hearing pursuant to section 5 of the Administrative Procedure Act; and that denial of a hearing under the act is a denial of due process.

The appellant's contention is erroneous and without merit.

Section 5 of the act 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 * * *." The Department has pointed out on several occasions that the provisions of the act respecting oral hearings have no applicability to applications for soldiers' additional homestead entry because the statute authorizing such entries does not require that the determinatiton be made on the record after an opportunity for a hearing. *Yakutat and Southern Railway*, A–26438 (September 19, 1952); *Libby, McNeil and Libby. Harold J. Lewis*, A–26268 (November 9, 1951).

The appellant argues that in *United States* v. *O'Leary et al.*, 63 I.D. 341 (1956), the Department has recognized that in actions concerning the validity of mining claims "property" interests are involved so that a hearing is required under section 5 of the act, even though there is no statutory requirement that a hearing be held. It is contended that the property right of the owner of an unpatented mining claim under the mining laws is of no greater stature than the "vested property right" or "unfettered gift" granted by the Soldiers' Additional Homestead Act, *supra*, and therefore if hearings are granted in mining cases a hearing should also be allowed in this case.

The answer to the appellant's argument is that the situation in the *O'Leary* case is clearly distinguishable from that here. A mining claimant is not required to submit any sort of application to the Secretary for his approval. Under the mining laws he is free to go onto any public land subject to the mining laws and remain there so long as he is diligently working to discover valuable minerals and his rights vest at the moment he has complied with all the requirements of the mining law including discovery.

There is no need or requirement to classify the land as suitable for mineral location before the locator can initiate his claim. The appellant's situation is quite different. He is attempting to exercise his scrip on land which has been withdrawn from such entry.

Although a soldier's additional homestead right is a property right and the right may be assigned (*Webster* v. *Luther*, 163 U.S. 331

(1896)), the appellant's argument overlooks the fact that the decisions below did not in any way deny the appellant's right to an additional homestead entry or in any way impair that right. To the contrary, the Bureau recognized the appellant's right as valid. The only action taken by the Bureau was to hold that the particular lands selected could not be properly classified as suitable for selection. The appellant retains his right of selection and is free to apply for any other tract of public land he desires to select.

A comparable situation under the mining laws would arise if a mineral locator were to assert that he had a right to a hearing to determine the propriety of a withdrawal of land from mineral entry made prior to his first attempt to make a location on the withdrawn land. The Department has always rejected such claims without a hearing. *Clinton D. Ray*, 59 I.D. 466 (1947); *James C. Reed et al.*, 50 L.D. 687 (1924); *The Dredge Corporation*, 65 I.D. 336, 338–339 (1958).[1]

The only question, then, is whether an applicant for the revocation of a withdrawal, or specifically here, for the classification of land under section 7 of the Taylor Grazing Act (*supra*), is entitled to a hearing to determine the proper classification of the land applied for. The Department has consistently ruled that he is not. *George V. Franklin et al.*, A–26606, A–26608 (June 26, 1953); *Leonard E. Noren, Harry C. Perry*, A–27147 (August 1, 1955); *Paul B. and Ruth M. Butler*, A–27634 (August 26, 1958). More particularly, the Department has held that the determination as to whether a particular tract of land should be classified as suitable for homestead entry is discretionary with the Secretary and there is no requirement of law that such a determination shall be based upon a record compiled at a hearing. *Max J. Curtis*, A–27843 (August 11, 1959), and cases cited therein. It is felt that as a general rule no useful purpose would be served in permitting oral hearings on land classification, and that applicants have ample opportunities to submit whatever evidence they wish to present to show that an adverse classification is erroneous. Such evidence may be presented at any time, without limitation, under the rules of practice in appeals to the Director, Bureau of Land Management, or to the Secretary.

There remains the question of whether it was correct to refuse to classify the lands applied for as suitable for acquisition in satisfaction of soldiers' additional scrip.

In *David B. Morgan, Assignee*, 60 I.D. 266 (1948), the Department examined in detail the character of lands suitable for entry under section 2306 of the Revised Statutes and the effect of Executive Order 6910 and the Taylor Grazing Act upon the exercise of the right to additional entry.

[1] As to lands withdrawn as powersite reserves (16 U.S.C., 1958 ed., sec. 818), a regulation of the Federal Power Commission provides that hearings on an application for vacation of a reservation may be ordered by the Commission in its discretion (18 CFR, 1949 ed., 25.2).

As to the first point, it held that land must be "subject to entry under the homestead laws of the United States" before it can be entered under Rev. Stat. 2306, a category which includes land presently tillable and land which can be rendered suitable in a broad sense for some farming use, but not land which is unsuitable for an agricultural use.

Turning to the lands applied for, it appears that the applications were rejected by the manager for the following reasons:

1. The land is steep, rough, and mountainous and is broken by stream channels;

2. The land is valuable only for production of timber, watershed protection, and grazing for wildlife;

3. The land could not be rendered cultivable or useful in a broad sense for production of agricultural crops by removal of timber and clearing or any work done thereon;

4. The land contains a valuable stand of Douglas fir timber ranging in age from about 60 to 120 years. It is within the McKenzie-Willamette Forest Management area and forms an integral part of the sustained-yield timber-producing base for the Eugene District.

As to the topography of the land a report dated April 4, 1958, of field examination of the N½NE¼ sec. 26, T. 19 S., R. 1 E., W. M., Oregon, which is the land embraced in Oregon 05983, states as follows:

The terrain is mostly steep and rough and slopes in excess of 70 per cent were noted during the field examination. The topography is broken by deep draws and traversed by a small stream flowing northerly into Winberry Creek. The only flat or rolling land noted was on the ridges and along the stream * * *. The only farming noted in the immediate vicinity was on the privately owned land along the flat areas of Winberry Creek.

The report states that the elevations on this 80-acre tract range from approximately 1,400 feet to 1,900 feet.

A report dated June 30, 1958, of field examination of the N½NW¼ sec. 26, T. 19 S., R. 1 E., W. M., Oregon, the tract applied for in Oregon 05984, states that elevations on that tract range from 1,700 feet to 2,300 feet, and that the tract contains rock outcroppings of considerable size and extent and is in all other respects similar to the land in the N½NE¼ of sec. 26. A Geological Survey topographic map (Appellant's Exhibit A), which includes the lands in the two applications, confirms these approximations of elevation.

In his appeal to the Secretary the appellant presents no new arguments concerning the topography of the tracts, but relies upon his arguments made to the Director. In his appeal to the Director he contended that:

More than 30% of the 80 acres in No. 05984 varies less than 100 feet in elevation; approximately 70% of this acreage varies only 300 feet in elevation. More than 70% of the 80 acres embraced in Application No. 05983 varies only 400 feet in height. The grade variation for the entire mile East to West of the two adjacent tracts is less than 500 feet. The grade of the property from

East to West is gradual with grades of 5 to 15%. Both 80 acre tracts include substantial acreages of level bench land suitable for agricultural purposes.

* * * * * * *

It is, therefore, the contention of the appellant that finding No. 1 as a basis for rejection is wholly at variance with the facts, particularly as it relates to Application Nos. 05983 and 05984.

The appellant's contention is misleading. He states that the grade of the property is gradual from east to west with grades of 5 to 10 percent. However, his own topographic map shows that the maximum slope of the two tracts is from south to north. This slope is a drop of 600 feet overall in a distance of 1,320 feet for the lands in Oregon 05984, and 500 feet overall in 1,320 feet for the lands in Oregon 05983. It is difficult to understand how this land could be characterized as anything but steep and mountainous.

As to the second and third points in the manager's decision, viz, that the land is valuable only for timber production, watershed protection, and wildlife grazing, and that it could not be rendered suitable for cultivation by removal of the timber, the appellant contends that the land is capable of substantial utilization for agricultural purposes, and that owners of neighboring land utilize their land for raising hay and oats, vegetables and fruit, and grazing cattle. In support of his contention he submitted three affidavits of landowners of lands in secs. 8 and 15, T. 19 S., R. 1 E.

It suffices to say that the lands in secs. 8 and 15 are from 1 to 3 miles north and west of the lands here involved, and at lower elevations along the bottom of Winberry Creek. Therefore, these lands are not comparable to the lands here involved. The three affidavits submitted are all on a form. One affiant states that he raises hay and vegetables and grazes cattle. A second does not raise any kind of crop but grazes sheep. The third raises vegetables and livestock. None of the three affidavits states how much land is used for agricultural production, and the two affiants raising vegetables do so only for family consumption. The periods of time engaged in by the affiants in their agricultural activities were ½ year, 3 years, and no statement. On their face the affidavits are practically worthless as evidence of the suitability for agricultural production of the lands applied for. Moreover, it is interesting to note that the appellant makes no mention of the present use of the rest of sec. 26 which is in part patented land and is more nearly of the same character as the lands applied for.

In regard to the manager's point that the land could not be rendered cultivable or useful in the broad sense by removal of the timber, the appellant has presented no evidence tending to show that this point is erroneous. The fact that the land is steep and mountainous appears to confirm the fact that very little of the land applied for could be rendered cultivable for the production of agricultural crops by the removal of the trees thereon.

Furthermore, the *Morgan* case (*supra*, p. 270) also held that land must be "unappropriated" if it is to be obtained under Rev. Stat. 2306 and that land which has been withdrawn by Executive Order 6910 is withdrawn, reserved, and appropriated and not subject to entry until they have been classified as suitable for disposal pursuant to section 7 of the Taylor Grazing Act (*supra*).[2]

In view of the holding that the land applied for is not capable of being put to an agricultural use, the appellant's applications must be rejected. However, it is not necessary to rest the decision entirely on this point, for another equally valid consideration leads to the same conclusion; namely, that to dispose of the lands would be incompatible with the conservation purposes for which they were withdrawn.

In his decision the Director stated that:

> The field examination disclosed that the lands sought are heavily timbered and located within the McKenzie-Willamette Forest Management area and form an integral part of the sustained yield timber management producing base of the Eugene Forest District; that the tracts are located relatively close to the cities of Springfield and Eugene, Oregon, which are heavily dependent upon Federal timber; and that their disposition would be a serious loss to the timber production capabilities of the area. The lands contain approximately 8,750,000 board feet of timber valued at $219,650.00.

In answer to this point, the appellant contends that prior to filing his application he requested information from the Bureau of Land Management as to what lands were available for scrip selection, and the district forester described the lands in question as isolated tracts unnecessary for retention by the Bureau of Land Management in public ownership for any reason whatsoever. The opinion of the district forester is, of course, accorded respect and given every consideration. However, it does not bind his superiors. Significantly, the appellant has made no attempt to dispute the fact that the lands are heavily timbered, and that the timber is of great value.

The appellant contends that the Director improperly ruled that soldiers' additional homestead rights may be rejected on agricultural lands containing timber, that the Director's finding that the land did not qualify as agricultural in fact is erroneous, and that if the lands are subject to entry under the homestead law his application must be allowed. This argument has been carefully considered by the Department several times and each time found unpersuasive.

In adjudicating an application for entry of lands withdrawn by Executive Order 6910 the Department must make two determinations. It must decide, first, whether the lands applied for meet the criteria set by the statute providing for such a form of entry and, next, whether the disposal of them would be compatible with the conservation purposes for which they were withdrawn. *Allison and Johnson, by Ted E.*

[2] To the same effect, *Nelson A. Gerttula*, 64 I.D. 225 (1957); *State of California*, 59 I.D. 451 (1957); *J. C. Aldrich*, 59 I.D. 176 (1946).

*Collins*, 58 I.D. 227 (1942); 58 I.D. 235 (1943); *David B. Morgan, Assignee, supra; Nelson A. Gerttula, supra*, fn. 2; *George L. Ramsey, by Ted E. Collins*, 58 I.D. 272, 297 (1943).

Here the Director has properly ruled that the lands applied for are not subject to entry under the homestead act and that their retention in Federal ownership is in the public interest. On either count the applications were properly rejected.

Therefore, for the reasons stated, the decision of the Director, Bureau of Land Management, is affirmed.

ROGER ERNST,
*Assistant Secretary.*

## APPEAL OF LAND-AIR, INC.

IBCA-192 *Decided November 30, 1959*

**Contracts: Bids: Generally—Contracts: Specifications—Contracts: Interpretation—Contracts: Payments**

Under a contract providing for the installation and leasing by the contractor of an FM radio communications system in the Great Smoky Mountains National Park, the contractor is entitled to rental payments on a 12-month basis for the operation of three repeater stations incorporated by it in the bid schedule, notwithstanding the fact that the repeater stations were subsumed under a general provision of the schedule calling for operation of the relevant control points on a 5-month basis, when it appears that (1) the specifications contemplated that bidders could modify the bid schedule; (2) the communication system would not function without the operation of the repeater stations all 12 months of the year; and (3) this was made clear by a technical proposal accompanying the bid, together with an explanatory covering letter, which was accepted by the contracting officer as part of the contract.

### BOARD OF CONTRACT APPEALS

Land-Air, Inc., of Chicago, Illinois, has filed a timely appeal from findings of fact and decision of the contracting officer in the form of a letter dated November 6, 1958, denying its claim for additional compensation under Contract No. 14–10–117–187 with the National Park Service.

The contract, which was awarded November 15, 1955, was on U.S. Standard Form 33 (Nov. 1949 edition), and incorporated the General Provisions of U.S. Standard Form 32 (Nov. 1949 edition) for supply contracts.

The contract provided for engineering, designing, installing, maintaining, and leasing for a period of 10 years an FM radio communications system in Great Smoky Mountains National Park in accordance with the invitation, which had been issued on July 27, 1955. The invitation requested bidders to submit in quadruplicate, with

their bids, "copies of illustrated literature, specifications, and any letters of transmittal."

Insofar as its general features were concerned, it was specified in the bid schedule that the communication network should be such as would enable Park headquarters to communicate with 8 specific ranger stations; 14 fire lookout locations; a station called Newfound Gap; and mobile units within range on certain specified highways. At some of the specified points, the operations, which consisted of the furnishing of radio service, were to be year-round, while at others they were to be carried on only 5 months a year.

In connection with each particular point (which were referred to as "control points"), there were given in the bid schedule the rental charges, nonrecurring costs, reinstallation costs, and termination charges, in the event the Government should terminate the use of the equipment. Bidders were also required to furnish brief descriptions of the equipment, installation, or component parts to be furnished.

Paragraph 3, on page 11, of the bid schedule, which is of particular relevance to the determination of the controversy involved in the present appeal, consisted of a general provision applicable to 12 named lookouts, designated in 12 subdivisions, A to L, inclusive, one of these, 3B, being Cove Mountain Lookout. This paragraph reads as follows:

> CONTROL POINTS, and/or base stations (Items 3A through 3L), accessible by Jeep Trail, each in use approximately 12 hours per day and approximately 5 months per year, February 15-June 1 and October 15-December 1, except in emergency fire danger.

The appellant submitted its bid with a letter dated September 27, 1955, in which it stated: "In addition to the bid forms, we are submitting a Technical Proposal, a Communications Network Chart and copies of the manufacturers' brochures describing the equipment we propose to furnish." In the course of further explaining its bid, the appellant added: "By referring to the Technical Proposal and the Communications Network Chart it will be noted that Repeater Stations are necessary on Wauchecha Bald and Soco Gap.[1] The installation on Cove Mountain Lookout is proposed to include a Repeater Station with provisions for manual control for fire lookout purposes. Therefore, it has been necessary to include an additional page in the Bid Schedule denoted as Paragraphs 3B1 and 3B2."

The three repeater stations at Cove Mountain, Wauchecha Bald, and Barnett Knob were shown on a chart of the proposed communications system that constituted the first sheet of the technical proposal after the title sheet. The equipment and operation of each of the

[1] By Change Order No. 8, issued September 25, 1957, the location of the Soco Gap Repeater Station was changed to a point known as Barnett Knob, and this station will hereinafter be referred to as the Barnett Knob Repeater Station.

three repeater stations were described on pages 3 and 4 of the technical proposal, and each was stated to be a 12-month operation. The chart and the descriptions made it plain that all three repeater stations would necessarily have to operate on a year-round basis.

In paragraphs 3B1 and 3B2, which the appellant inserted in the bid schedule, it gave the monthly rental charge for the Wauchecha Bald and Barnett Knob repeater stations which was, in each case, in the amount of $62.69. In paragraph 3B of the bid schedule, covering Cove Mountain, the appellant merely inserted the rental charge for the station which was to be $103.08. Opposite paragraph 3B of the bid proposal, however, the appellant typed in the margin in capital letters "SEE ATTACHED NOTES." In accepting the appellant's proposal, the Government referred to the appellant's letter of September 27, 1955, and a telegram of November 1, 1955 (which clarified a point in the letter not material here), as "a part of this contract."

The invitation included also a series of Special Provisions relating to the communication system which was to be the subject of the contract. Paragraphs A–2 and C–1 of Chapter One of these provisions read, respectively, insofar as relevant, as follows:

*DESCRIPTION OF WORK.* The Specifications given herein and in the Bid Schedule establish the communication requirements. The Bidder shall determine the equipment needs, locations, and installations required to accomplish the specified communication system as a "turn-key" job. Data relating to communication requirements and existing local conditions may be obtained from the Superintendent, Great Smoky Mountains National Park, Gatlinburg, Tennessee. Systems so designed will not relieve the contractor of his responsibility for meeting the requirements of these Specifications as to operation, adequate functioning and/or coverage, during the term of this contract.

*SPIRIT AND INTENT OF SPECIFICATIONS.* It is the spirit and intent of these Specifications to provide that the work and all parts thereof shall be fully completed and suitable in every way for the purposes for which they are designed. The Contractor shall supply all materials (except those as may be specified elsewhere as being furnished by the Government) and do all work which is described or which may be reasonably implied as being incidental to the work of this Contract. Anything not herein specifically mentioned that may be required to provide a complete structure or system that will satisfactorily perform the required services shall be furnished the same as if it were specifically mentioned herein * * *.

In addition paragraph E–2 of the same chapter in effect extended an invitation to each bidder to modify items of the bid schedule if the requirements of the system being proposed by the bidder necessitated any modifications.

The dispute between the parties is with respect to the rental payments for the three repeater stations at Cove Mountain, Wauchecha Bald, and Barnett Knob. The appellant wishes to be paid for the operation of Cove Mountain as a repeater station at the rate of $103.08 per month, the rate specified in the bid schedule, for 12 months of each year, and in addition for radio service at Cove Mountain at the same

rate per month for 5 months of each year. The Government wishes to pay for the operations at Cove Mountain, both for its use as a repeater station and for radio service, at the rate of $103.08 per month for only 5 months of each year. With respect to Wauchecha Bald and Barnett Knob, the parties are in dispute only with respect to the use of these stations as repeaters, the appellant wishing to be paid at the rate of $62.69 per month, the rate specified in its insert in the bid schedule, for 12 months of each year, while the Government wishes to limit this payment to 5 months of each year.

The position of the appellant is that rentals may be charged for these three stations on the basis of 12 months of operation, since an operation of such duration was indicated in the technical proposal for all three repeater stations, while that of the Government is that rentals for the three repeater stations are chargeable only for 5 months of operation, since no rental rates were indicated in the technical proposal, and the rental rates indicated on the bid schedule for each of the repeater stations were subsumed under the general provision of paragraph 3 of the bid schedule which expressly provides for an operation of "approximately 5 months per year."

When one seeks in the record for evidence of the practical construction which the parties gave to their contract, a rather anomalous situation is revealed. At various times, representatives of the parties performed actions that seem to be irreconcilable with the present positions of the appellant and the Government.

In a document headed "Analysis of Bid," which is included in the record, an analysis was made by the Government of the various items included in the contract. In the case of each item, the "Unit of Use (in months)," "Unit costs," and "Rental per Year" were given in parallel columns. In the case of item 3B, which is Cove Mountain, the unit of use was given as 5 months, and the unit cost as $103.08 per month, which is consistent with the Government's present position but, in the case of items 3B1 and 3B2, the unit of use was given as 12 months for each station, and the unit cost as $62.69 per month, which is inconsistent with the Government's present position.

The record shows also that for a period of approximately a year prior to the acceptance of the communications system for which provision was made in the contract, the Government made use at various times of certain items of the equipment being installed. During this period, the Government itself suggested the billings which the appellant was to render, and bills were sent by the appellant in accordance with the Government's suggestions. When one looks at the billings for the Cove Mountain, Wauchecha Bald, and Barnett Knob repeater stations, it is found that the billing was on a 12-month basis. This appears to be inconsistent with the Government's present position!

After acceptance of the system on July 25, 1957, the appellant itself began to bill the Government directly for its use. But the record also shows that from July 25, 1957, through September 30, 1958, the appellant billed the Government for the use and operation of the Cove Mountain, Wauchecha Bald, and Barnett Knob repeater stations on a 5-months' basis! This appears to be inconsistent with the appellant's present position.

In an effort to secure some explanation of these seeming inconsistencies, the Board held an informal conference on August 5, 1959, which was attended by representatives of the appellant and the Park Service. Subsequent to and as a result of this conference, a series of questions were addressed to the superintendent of the Great Smoky Mountains National Park by the Assistant Director of the Park Service. But there had been a change in the superintendency of the park since the contract was made, and the personnel responsible for its administration had been transferred elsewhere. What the Board received, therefore, as a result of the inquiry was only various theories entertained by the present park superintendent with respect to the origins of the anomalies in the administration of the contract.

Thus, the present park superintendent surmises that the inconsistency in part between the Government's present position and the bid analysis, which contained also various mathematical errors, may have represented an example of varying interpretations of the contract on the part of changing Park Service personnel. The billing on a 12-month basis prior to the acceptance of the system is explained by him as part of an interim emergency arrangement which should be accorded no weight as an interpretation of the contract. On the other hand, he refuses to cencede that the billing on a 5-months' basis subsequent to the acceptance of the system represents billing errors, and argues that such billing demonstrates the correctness of his findings and conclusions as contracting officer.

The Board cannot, however, accept these explanations. While there is no way of explaining all of the inconsistencies entirely, the Board believes that a preponderance of the evidence in the record favors the appellant's contention that the three repeater stations at Cove Mountain, Wauchecha Bald, and Barnett Knob were not only intended to operate on a 12-month basis but that payment was to be made for the service at them on the same basis. It is possible, of course, to conceive of an arrangement under which the repeater stations were to operate the year round but were to be paid for only on a 5-months' basis. However, the circumstances of the present case would hardly justify a conclusion that such a scheme was contemplated by the parties.

Paragraphs A–2, C–1 and E–2 of Chapter One of the specifications, as well as the terms of the invitation, plainly envisaged that the bidders

should be responsible for devising a workable communications system, and that if the Government's proposal did not entirely embody such a system, the bidders would propose such additions or changes as might be necessary. In modifying the bid schedule by providing for the three repeater stations, the appellant was only doing what it was permitted to do. While it did so in a form that was somewhat confusing, it made its intentions reasonably clear in its covering letter of September 27 and the technical proposal, to which it doubtless intended to call special attention by endorsing in the margin of the bid schedule the words "SEE NOTES ATTACHED." The contracting officer undoubtedly understood that the letter of September 27 was to be regarded as part of the contract, for he so stated in accepting the bid. Indeed, quite apart from this express acknowledgment, the contracting officer must have known that the communication system being installed would not function unless the three repeater stations operated all 12 months of the year. Such being the case, it would be unreasonable to assume, in the absence of consistent evidence of a contrary practical construction, that payment was to be made on a 5-month basis only. The Board does not find it possible to dismiss the pre-acceptance billing on a 12-month basis as a mere interim arrangement, for normally the parties would pay on the contract basis, even though the system was not yet fully operative, and actually reference was always made to the contract item numbers in these billings. On the other hand, it is easier to understand how in the accounting department of the appellant, which must have had other accounts, bills could be rendered in a particular instance on an erroneous basis.

The Board holds, therefore, that the appellant was entitled to be paid on a 12-month basis for the operation of the three repeater stations at Cove Mountain, Wauchecha Bald, and Barnett Knob, and should be paid on this basis in the future. It is clear that in the case of the Wauchecha Bald and Barnett Knob repeater stations payment should be made at the rate of $62.69 a month, as stipulated by the appellant. The case of Cove Mountain presents, however, a special difficulty, in view of the fact that the technical proposal of the appellant did not state any prices for the equipment or services which it outlined, and the appellant did not in this instance quote any separate price for the 5 months of radio service for which it is now seeking payment. The Board cannot remedy this lack, for it is axiomatic that it cannot supply an element of the contract which the parties did not make for themselves; nor can it even be said to be necessary to do so on equitable grounds, since the price in this instance, which was $103.08 a month, was so much higher than that quoted for Weuchecha Bald or Barnett Knob (or other stations that operated with existing power sources) that it is explicable only on the assump-

tion that the difference in price was due to the absence of radio service at the last two named stations. Indeed, the difference between the $103.08 price quoted for Cove Mountain and the $62.69 price quoted for Wauchecha Bald and Barnett Knob, which is $40.39, is very close to the price of $39.44 quoted for control points to be operated on a 12-month basis, with existing power sources, for the provision of radio service only. The appellant was entitled to payment, therefore, on a 12-month basis at the rate of $103.08 a month for all the facilities at the Cove Mountain station, and will be entitled to payment on such basis in the future. It is not entitled to any monthly rental payment beyond this, however, whether for radio service or otherwise.

## CONCLUSION

Therefore, the findings of fact and conclusions of the contracting officer are reversed, to the extent indicated in this opinion, and he is directed to proceed as outlined above.

WILLIAM SEAGLE, *Member.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

GEORGE W. TOMAN, *Alternate Member.*

PAUL H. GANTT, *Acting Chairman*, disqualified himself from participation in this appeal (43 CFR 4.2).

U.S. GOVERNMENT PRINTING OFFICE: 1960

*December 3, 1959*

## APPEAL OF OCEAN TOW, INC.

**IBCA-105** *Decided December 3, 1959*

**Contracts: Appeals—Rules of Practice: Appeals: Dismissal**

The Board lacks jurisdiction in absence of a disputes provision in the contract.

**BOARD OF CONTRACT APPEALS**

This case concerns an appeal from a determination in the form of a letter of June 14, 1956, in which Mr. R. N. Whitman, then general manager of The Alaska Railroad, rejected a claim of Ocean Tow, Inc., allegedly arising under the above-identified contract.[1] The general manager wrote as follows:

This has reference to your letter of December 15, 1955 to the Claims Division of the United States, General Accounting Office, Washington, D.C.[2] wherein you, as attorneys for Ocean Tow, Inc. of Seattle, submitted a claim against The Alaska Railroad for $5256.01.[3] Inasmuch as the claim is one against the Alaska Railroad, an agency of the Department of the Interior, it would seem that the claim should be first for determination by the Railroad and then by the Secretary of the Interior. Accordingly, I have reviewed the claim and conclude as far as the Railroad is concerned, it must be denied.

The General Manager then discussed the claim and concluded:

If you desire to appeal the foregoing, such appeal should be taken to the Board of Contract Appeals in the Office of the Secretary of the Department of the Interior. I enclose herewith a copy of rules and regulations governing such appeals, and you should be guided by them.

About 7 months later, in February 1957, Ocean Tow, Inc. appealed. The appeal file, which reached the Board about 32 months later, on

[1] It represented a type of contract commonly entered into by The Alaska Railroad under authority of the act of March 12, 1914 (38 Stat. 305, 306; 48 U.S.C., 1952 ed., Supp. V, sec. 301), under which the Railroad could "make contracts or agreements with any railroad or steamship company or vessel owner for joint transportation of passengers or property over the road or roads" of such entities.

The contract between The Alaska Railroad and Ocean Tow, Inc., of December 22, 1952, was a Joint Traffic Agreement under which through-rates were established for traffic between Seattle and Tacoma, Washington, or other ports served by Ocean Tow, and stations on the Railroad. The claim of Ocean Tow is for a refund of an alleged overcharge in connection with a cargo carried by the appellant on the vessel, Adak Island from Seattle, Washington, to Seward, Alaska, in March 1953. The Railroad applied its local tariffs on the ground that there had been no through billing on this shipment, as required by the contract.

[2] The occasion for writing this letter is not apparent. The appeal file does not indicate the disposition of the matter by the Comptroller General, nor does it explain how the claim was referred by the Comptroller General to The Alaska Railroad.

[3] In the notice of appeal appellant claims only $2,320.09.

November 1, 1959,[4] contains a copy of the above-referenced contract. The contract contains, however, no disputes provision.

Department Counsel has moved to dismiss the appeal for lack of jurisdiction. One of the grounds of his motion is that the contract does not contain "an appeal provision of any type."

The jurisdiction of the Board in deciding appeals rests on its charter, the delegation of authority from the Secretary of the Interior to it by section 24 of Order No. 2509, as amended, 19 F.R. 9428, and on the regulations governing the procedures before the Board, specifically 43 CFR, 1954 Rev., 4.4.

The order of delegation provides in material part, as follows:

> The Board of Contract Appeals in the Office of the Solicitor may exercise, pursuant to the provisions of 43 CFR Part 4, *all of the authority of the Secretary of the Interior in deciding appeals to the head of the Department* from findings of fact and decisions by *contracting officers* of any bureau or office of the Department, wherever situated, or any field installation thereof. Decisions of the Board on such *contract appeals* shall be final for the Department. (Italics supplied.)

Except for the reference to the regulations, the first sentence of 43 CFR 4.4 is identical.

43 CFR, 1954 Rev., 4.5, headed "Notice of Appeal," requires that the notice "shall be mailed to or filed with the contracting officer, *within the time allowed by the contract.*" (Italics supplied.)

It is apparent that all three of these provisions are predicated on the assumption that the jurisdiction vested in the Secretary, and delegated by him to the Board is not statutory, but rests upon some provision of a contract, giving a right of appeal to the contractor within a stated time.

The provision for an appeal is customarily spelled out in what is commonly referred to as a "disputes" clause. It can be either in the form of one of the standard disputes clauses[5] or in any other form evidencing an agreement of the parties that the decision of the contracting officer shall be final and conclusive unless an appeal is taken

[4] The Board was notified on April 11, 1957, that the original Department Counsel, George R. Hise, had died. From that date until September 1959, neither appellant nor the contracting officer communicated with the Board. The Acting Chairman of the Board contacted the parties on September 3, 1959, inquiring whether or not the appeal had been abandoned or disposed of by negotiation. Appellant asked the Board on September 29, 1959, that it "consider the appeal now. Our attorneys in this matter are Fey, Wheeler and LaBissoniere * * * and any further correspondence concerning same should be addressed to that office." The Board has received, however, no further communication from this law firm.

[5] For instance, Clause 6 of Standard Form 23A, General Provisions (Construction Contracts); Clause 11, Standard Form 32, General Provision (Supply Contract). In *Commercial Metals Company,* 66 I.D. 298 (1959), there was a disputes provision in the standard form for the sale of surplus property, and "the escrow agreement explicitly provided for the determination of the dispute between the parties * * *." In *Georgia Power Company,* IBCA–31 (April 22, 1955), there was included a provision approximating a standard disputes clause.

to the Secretary of the Interior or his duly authorized representative.

The contract between The Alaska Railroad and the appellant did not contain a disputes provision of any type, and, of course, no time limitation for taking an appeal was, therefore, fixed. Such a right of appeal could not be conferred by the manager of The Alaska Railroad when none existed under the contract. There is also nothing in the record to indicate that the Secretary of the Interior had delegated his own general supervisory authority to the manager of The Alaska Railroad.

In the absence of a disputes provision, the Board lacks jurisdiction.[6] Therefore, the appeal is dismissed for lack of jurisdiction.

PAUL H. GANTT, *Acting Chairman.*

MR. WILLIAM SEAGLE, *Member*, participated in the drafting of this opinion, concurred in the result, but left on official duty prior to its release.

MR. HERBERT J. SLAUGHTER, *Member*, absent on sick leave.

## ESTATE OF MILTON HOLLOWAY, DECEASED OSAGE ALLOTTEE

IA-742 *Decided December 8, 1959*

**Indian Lands: Descent and Distribution: Wills**

A close confidential relationship existing between a major beneficiary of a will and the testator may give rise to a presumption of undue influence, but in any event only slight evidence is required to establish undue influence when such close relationship is shown.

**Indian Lands: Descent and Distribution: Wills**

A will may be approved in part and disapproved in part where the undue influence is apparent only with respect to a portion of the will, and such portion is clearly separable from the rest of the instrument which is unaffected by the undue influence.

### APPEAL FROM THE SUPERINTENDENT OF THE OSAGE INDIAN AGENCY

The heirs at law of Milton Holloway, deceased Osage allottee No. 1353, have appealed to the Commissioner of Indian Affairs from a decision of the Superintendent of the Osage Indian Agency, dated January 6, 1956, approving, with the exception of item 3, the last will and testament of the decedent which was dated December 9, 1952.[1]

[6] Compare Appeal of *New Amsterdam Casualty Co.*, ASBCA No. 304 (January 24, 1950).

[1] Although 25 CFR, 1958 Rev., 17.14 provides for an appeal from the Superintendent's action to the Commissioner, and for a further appeal to the Secretary of the Interior, for administrative reasons the Commissioner has referred the present appeal directly to the Secretary for action.

The heirs at law consist of nine children, and two grandchildren who are the children of a deceased son.

Item 3 of the will is as follows:

(3) I give, devise and bequeath to my friend of long standing, who has assisted me in various ways. Roy Friend of Pawhuska, Oklahoma, one-half (½) of my Osage Indian Headright originally allotted to me under Allotment Number 1353, and the income therefrom.

This provision of the will was disapproved on the ground that it had been procured by means of undue influence exercised upon the testator by the above-mentioned Roy Friend. Mr. Friend was decedent's guardian at the time of the execution of the will, having been appointed as such on August 5, 1952.

Mr. Friend is also represented in an appellate capacity in this appeal. He seeks reversal of the Superintendent's decision as to item 3, and asks that the will stand as originally written.

A third interest in the case is represented by H. Gene Seigel, guardian ad litem of Rosetta Marie Holloway and Carolyn Sue Holloway, minor grandchildren of the decedent and the principal beneficiaries under the will. They ask that the decision of the Superintendent be upheld. In the event of such a result the minor children would receive, in addition to their own interest, that portion of the estate left to Mr. Friend.

There seems to be no serious contention that the decedent lacked testamentary capacity at the time of the execution of his will. Although ill and at an advanced age he appears to have been in full possession of his mental faculties and knew the nature and extent of his property as well as the persons who would be the natural objects of his bounty. All such persons were specifically mentioned in the will. In addition to the bequest to the grandchildren, the children, ten in all at the time of the execution of the will, were left $25 each.

Where a close confidential relationship exists there is, if not an actual presumption of undue influence, a rule that only slight evidence is required to establish that fact. In *Anderson, et al.* v. *Davis*, 256 P. 2d 1099 (Okla., 1952), a decision which is discussed by all of the parties and the Field Solicitor, this statement is made in the third paragraph of the syllabus:

3. That confidential relationship existed between testator and beneficiary is not in itself sufficient to vitiate a will, in absence of evidence indicating that beneficiary exercised undue influence, but where confidential relationship is shown to have existed, and will is inconsistent with claims of duty and affection, slight evidence that beneficiary abused testator's confidence is sufficient to invalidate the will. In re Lobb's Will, 177 Or. 162, 160 P. 2d 295.

The evidence in the present case is sufficient to show that Roy Friend exercised undue influence over the testator. Mr. Friend was in a con-

fidential relationship with decedent, not only as guardian but through other circumstances as well. He had loaned him money and provided lodging for him at his hotel and meals at his cafe. One of the attesting witnesses of the will was an employee of Mr. Friend's and another was the husband of an employee. The third witness was Mr. Friend's lawyer and the scrivener of the will. These facts constitute what we believe to be the "slight evidence" required. Although Mr. Friend argues that he did not participate in the making of the will, he was at least a participant by indirection. His relationship with the active participants was such that one could hardly reach any other conclusion. Moreover, it is important also to note that the testator had no independent advice in the execution of his will. In fact, at the time such will was executed, there were present only those persons who were intimately associated with the beneficiary, Mr. Roy Friend. On this point, we again find the following pertinent observation by the Oklahoma Supreme Court in *Anderson* v. *Davis*, *supra:*

> A controlling point in this case, or a strong point, is the fact that there is no showing that Mr. Anderson had any independent advice in connection with this will which gives the principal part of his estate to a person with whom he had this highly confidential relationship.
>
> * * * * * * * * * All the circumstances would imply or indicate that the testator did not have independent advice. 3 p. 1102, 1103.

The next question which arises is whether the undue influence can be pinpointed and said to apply to only a portion of the will, thus permitting the will to be approved in part and disapproved in part. The answer here must be in the affirmative. In this respect the Oklahoma laws provide as follows (84 Okl. St. Ann., sec. 43) :

> A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation procured by the same means, may be declared void. R.L. 1910, § 8340.

The principle arising in this respect is unusually well stated in the California case of in *Re Webster's Estate*, 110 P. 2d 81, 86, (1941), as follows:

> The general rule is that if the whole will is the result of the presence of undue influence, probate of the whole will must be refused. If only a part of it is affected by undue influence, that part may be rejected as void, but the remainder, which is the outcome of the free action of the testator, ought to be sustained if it is not inconsistent and can be separated from the part which is invalid, and should be admitted to probate.

This case is cited with approval by the Oklahoma Supreme Court in the case of *In the matter of the Estate of Frank Herrley*, 276 P. 2d 247 (1954).

Again, this principle was recognized in effect by the Solicitor in his decision of April 21, 1958 *In the Matter of the Will of Kenneth Strikeaxe, Deceased Unallotted Osage Indian* (65 I.D. 157, 163). However, in that case the undue influence was found to extend throughout the entire will, with no part being separable.

The Superintendent of the Osage Indian Agency determined that the undue influence on the part of Mr. Friend was limited to that portion of the will wherein he was named a beneficiary as to a headright interest. In this we think the Superintendent was correct. On the other hand, there was no reason why Mr. Friend should have exercised any undue influence as to the bequests to decedent's children and the minor grandchildren, and it is concluded that he did not. Regardless of the fairness or unfairness of these bequests to the decedent's family generally, they were no concern to Mr. Friend.

Although the contestants feel that the allowance to them of only $25 each was an unnatural disposition of testator's property, there are persuasive reasons why the testator should have wanted these two grandchildren to have the bulk of his property. In the first place they were kind and companionable to him. Secondly, they had grown up in an insecure atmosphere and, if dependent on their father, faced an uncertain future, as he was both physically incapacitated and apparently financially irresponsible. The Superintendent's partial approval of the will should be allowed to stand.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(3)(a), Departmental Manual; 24 F.R. 1348), the action of the Superintendent of the Osage Indian Agency in disapproving the bequest to Roy Friend in the will of Milton Holloway, and approving the remainder of the will, is affirmed.

EDMUND T. FRITZ,
*Deputy Solicitor.*

## APPEAL OF STUDER CONSTRUCTION COMPANY

**IBCA-95** *Decided December 11, 1959*

**Contracts: Notices**

Appeal will not be dismissed on motion in case of substantial compliance with notice requirement of "delays-damages" clause of the construction standard form.

### BOARD OF CONTRACT APPEALS

The Government has moved to dismiss an appeal from the contracting officer's findings of fact and decision dated November 20, 1956,

which denied the appellant's request for an extension of time for the performance of its contract dated August 1, 1955, with the Bureau of Reclamation.

The contract provided for the surfacing of the powerplant service road from the Hungry Horse Power Plant to Station 32+22, including the parking area in the vicinity of the powerhouse and furnishing and installing a wire guardrail along the road on the riverbank at the Hungry Horse Dam, in the County of Flathead, State of Montana. It was on U.S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts. The contract price was $6,276.

The General Provisions of the contract included the usual "delays-damages" provision (Clause 5), under which the contractor was not to be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor," including, but not restricted to, certain named causes, among which was "unusually severe weather."

Because of the failure to perform the contract work on time, the appellant was assessed liquidated damages for the period from September 18, 1955, to August 10, 1956 (327 calendar days). Appellant's counsel, however, only seeks relief from the assessment of liquidated damages for the period from October 16, 1955, to June 6, 1956 (234 calendar days).

The Government contends that appellant's claim for an extension of time is wholly barred by reason of the provision in the "delays-damages" clause which calls for the giving of written notice of causes of delay "within 10 days from the beginning of any such delay." This contention overlooks the appellant's letter of October 15, 1955, addressed to the Bureau of Reclamation, wherein it is stated: "If we encounter the same miserable wet weather we did when we started, we will lay the mat so that it will not interfere with the use of the road as usual, and agree to reprocess and lay it again in the Spring." We construe this language as notice of unusually severe weather and regard the letter as compliance with the 10-day notice rule.[1]

[1] In *Raylaine Worsteds, Inc.*, ASBCA No. 1842, 6 CCF par. 61,728 (1955), principles of law applicable to such a situation as this were summarized as follows: "In cases in which there has been 'substantial compliance' with the '10-day rule,' or in which a timely investigation of the facts and circumstances has been made by the contracting officer, we and our predecessor Boards have declined to sustain motions for dismissal, based on the absence of formal notice."

In *Sanders*, BCA No. 955, 3 CCF 862, 866 (1945)], where timely notice of a claim was not given, but where evidence was available to enable the contracting officer to determine its merits, it was held that: "* * * the Board is justified in ignoring the contracting officer's ruling based upon the 10-day rule as an adherence merely to the letter but not the reason of the rule. In other words, even though the contractor is late in notifying

Moreover, in the Acting Project Superintendent's letter of October 13, 1955, to the appellant, it is stated: "Since you failed to properly prosecute your contract during the allotted 45 days, it now becomes your responsibility to prepare for such an eventuality (referring to a heavy snow storm) as having to wait until spring to complete your contract." This Board has held that failure of a contractor to prosecute work with efficiency and expedition does not, in and of itself, disentitle a contractor to extensions for such parts of ultimate delay as are excusable under the terms of a standard form construction contract.[2]

Accordingly, the motion to dismiss is denied.

The request of Department Counsel that he be permitted to file a statement of the Government's position on the merits is hereby granted (43 CFR 4.16). This statement must be filed within 30 days of the date of receipt of the Board's decision on the motion.

PAUL H. GANTT, *Acting Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

*Board Member* WILLIAM SEAGLE is absent on official duty.

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the contracting officer of the error of which he complains it is not intended that the Government should take advantage of the 10-day limitation merely for the sake of applying the rule. Its true purpose is for protection against delays that are injurious to the Government's interest. If not injurious then, of course, there is no object in applying the rule."

A most recent case involving the invocation of the 10-day rule is *Progressive Builders, Inc.* v. *District of Columbia,* 258 F. 2d 431 (D.C. Cir.), *cert. denied* 358 U.S. 881 (1958). There the court quoted with approval the following statement from *United States* v. *Cunningham,* 125 F. 2d 28 (D.C. Cir., 1941): "Obviously, the intent of this provision is to inform the government of the cause of delay and afford an opportunity to remove it, and likewise to warn the government of the intention of the contractor to insist upon it as a means of prolonging the stipulated time for completion of the work."

[2] *Chas. I. Cunningham Co.,* 64 I. D. 449, 57-2 BCA par. 1541 (1957); *Merz,* IBCA-64, 59-1 BCA par. 2086 (1959).

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