

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, *Secretary*

Frank J. Barry, *Solicitor*

**DECISIONS  
OF THE  
UNITED STATES  
DEPARTMENT OF THE INTERIOR**

Edited by  
E. M. Kimball  
Vera E. Burgin



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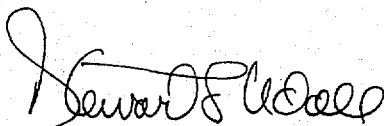
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## PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1963, to December 31, 1963. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Stewart L. Udall served as Secretary of the Interior during the period covered by this volume; Mr. James K. Carr served as Under Secretary; Messrs. Frank P. Briggs, John A. Carver, Kenneth Holum, and John M. Kelly served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; Mr. Frank J. Barry served as Solicitor of the Department of the Interior. Mr. Edward Weinberg served as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "70 I.D."



*Secretary of the Interior.*



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## ERRATA

- Pages 13-15—Where the words *Public Law 11* and *Public Law 27* appear, the words should read *PL 11* and *PL 27*; page 15—paragraph 2, line 3 the word *notice* should read *statement*.
- Page 72—Footnote 2, line 2—Some of the pending applications for selection will attach, should read Some of the pending applications for selection *will not* attach.
- Page 82—An additional topical heading for paragraph, should read *State Selections—Words and Phrases*.
- Page 102—Paragraph 1, line 4—the word *decreased* should read *deceased*.
- Page 151—*IBC A-1275* should read, *IA-1275*.
- Page 163—Appeal of Earl B. Bates Nursery, 1st syllabus *Oil and Gas—Statutory Construction: Generally*, should read *Contracts: Appeals—Contracts: Contracting Officer*.
- Page 393—Syllabus—line 2—the word *etsablished* should read *established*.
- Page 411—Paragraph 1—line 6—the word *decuments* should read *documents*.
- Page 478—Addition to lines 1 and 2, Ernest J. Ackermann, Clifford V. Young. A-29349 (July 26, 1963), 70 *I.D.* 378.

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*Max Barash, The Texas Company*, 63 I.D. 51 (1956)

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*Franco Western Oil Company et al.*, 65 I.D. 316, 427 (1958)

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*Gabbs Exploration Co.*, 67 I.D. 160 (1960)

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*Raymond J. Hansen et al.*, 67 I.D. 362 (1960)

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*W. Dalton La Rue, Sr.*, 69 I.D. 120 (1962)

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*Wade McNeil v. Stewart L. Udall*, Civil Action No. 678-62. Judgment for defendant, December 13, 1963 (opinion).

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*C. W. Parcell et al. v. Fred A. Seaton et al.*, Civil Action No. 2261-55. Judgment for defendants, June 12, 1957 (opinion). No appeal.

*Paul Jarvis, Inc.*, 64 I.D. 285 (1957)

*Paul Jarvis, Inc. v. United States*, Court of Claims No. 40-58. Stipulated judgment for plaintiff, December 19, 1958.

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*The Texas Company, Thomas G. Dorough, John Snyder*, 61 I.D. 367 (1954)

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*Joe Hayes v. Fred A. Seaton, Secretary of the Interior*, Civil Action No. 859-581. On September 18, 1958, the court entered an order granting defendant's motion for judgment on the pleadings or for summary judgment. The plaintiffs appealed and on July 9, 1959, the decision of the District Court was affirmed, and on October 5, 1959, petition for rehearing en banc was denied, 270 F. 2d 319. A petition for a writ of certiorari was filed January 28, 1960, in the Supreme Court. The petition was denied on October 10, 1960, rehearing denied November 21, 1960.

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*United States v. Alonzo Adams*, United States District Court for the Southern District of California, Civil Action No. 187-60-WM. Judgment for plaintiff, January 29, 1962 (opinion). Judgment modified, 318 F. 2d 861 (1963).

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*Weardco Construction Corp.*, 64 I.D. 376 (1957)

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*Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah v. Stewart L. Udall*, Civil Action No. 2595-60. Judgment for defendant, June 5, 1962. Remanded 312 F. 2d 358 (1962).

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- Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305.
- Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674.
- \*Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222. (See 35 L.D. 399).
- Brown v. Cagle (30 L.D. 8); vacated, 30 L.D. 148. (See 47 L.D. 406.)
- Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342.
- Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D. 454.
- Bundy v. Livingston (1 L.D. 152); overruled, 6 L.D. 284.
- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472.
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321.
- Burkholder v. Skagen (4 L.D. 166); overruled, 9 L.D. 153.
- Burnham Chemical Co. v. United States Borax Co. et al. (54 I.D. 183); overruled in substance, 58 I.D. 426, 429.
- Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454.
- Burns v. Vergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268.
- Buttery v. Sprout (2 L.D. 293); overruled, 5 L.D. 591.
- Cagle v. Mendenhall (20 L.D. 447); overruled, 23 L.D. 533.
- Cain et al. v. Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62.
- California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453.
- California, State of (14 L.D. 253); vacated, 23 L.D. 230.
- California, State of (15 L.D. 10); overruled, 23 L.D. 423.
- California, State of (19 L.D. 585); vacated, 28 L.D. 57.
- California, State of (22 L.D. 428); overruled, 32 L.D. 34.
- California, State of (32 L.D. 346); vacated, 50 L.D. 628. (See 37 L.D. 499 and 46 L.D. 396).
- California, State of (44 L.D. 118); overruled, 48 L.D. 98.
- California, State of (44 L.D. 468); overruled, 48 L.D. 98.
- California, State of v. Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- California, State of v. Pierce (9 C.L.O. 118); modified, 2 L.D. 854.

- California, State of *v. Smith* (5 L.D. 543); **overruled**, 18 L.D. 343.
- Call *v. Swain* (3 L.D. 46); **overruled**, 18 L.D. 373.
- Cameron Lode (13 L.D. 369); **overruled** so far as in conflict, 25 L.D. 518.
- Camplan *v. Northern Pacific R.R. Co.* (28 L.D. 118); **overruled** so far as in conflict, 29 L.D. 550.
- Case *v. Church* (17 L.D. 578); **overruled**, 26 L.D. 453.
- Case *v. Kupferschmidt* (30 L.D. 9); **overruled** so far as in conflict, 47 L.D. 406.
- Castello *v. Bonnie* (20 L.D. 311); **overruled**, 22 L.D. 174.
- Cate *v. Northern Pacific Ry. Co.* (41 L.D. 316); **overruled** so far as in conflict, 43 L.D. 60.
- Cawood *v. Dumas* (22 L.D. 585); **vacated**, 25 L.D. 526.
- Centerville Mining and Milling Co. (39 L.D. 80); **no longer controlling**, 48 L.D. 17.
- Central Pacific R.R. Co. (29 L.D. 589); **modified**, 48 L.D. 58.
- Central Pacific R.R. Co. *v. Orr* (2 L.D. 525); **overruled**, 11 L.D. 445.
- Chapman *v. Willamette Valley and Cascade Mountain Wagon Road Co.* (13 L.D. 61); **overruled**, 20 L.D. 259.
- Chappell *v. Clark* (27 L.D. 334); **modified**, 27 L.D. 532.
- Chicago Placer Mining Claim (34 L.D. 9); **overruled**, 42 L.D. 453.
- Childress et al. *v. Smith* (15 L.D. 89); **overruled**, 26 L.D. 453.
- Chittenden, Frank O., and Interstate Oil Corp. (50 L.D. 262); **overruled** so far as in conflict, 53 L.D. 228.
- Christofferson, Peter (3 L.D. 329); **modified**, 6 L.D. 284, 624.
- Clafin *v. Thompson* (28 L.D. 279); **overruled**, 29 L.D. 693.
- Claney *v. Ragland* (38 L.D. 550). (See 43 L.D. 485.)
- Clark, Yulu S. et al. (A-22852) February 20, 1941, unreported; **overruled** so far as in conflict, 59 I.D. 258, 260.
- Clarke, C. W. (32 L.D. 233); **overruled** so far as in conflict, 51 L.D. 51.
- Clayton, Phebus (48 L.D. 128) (1921); **overruled** to extent inconsistent, 70 I.D. 159.
- Cline *v. Urban* (29 L.D. 96); **overruled**, 46 L.D. 492.
- Clipper Mining Co. (22 L.D. 527); **no longer followed** in part, 67 I.D. 417.
- Cochran *v. Dwyer* (9 L.D. 478). (See 39 L.D. 162, 225.)
- Coffin, Edgar A. (33 L.D. 245); **overruled** so far as in conflict, 52 L.D. 153.
- Coffin, Mary E. (34 L.D. 564); **overruled** so far as in conflict, 51 L.D. 51.
- Colorado, State of (7 L.D. 490); **overruled**, 9 L.D. 408.
- Condict, W. C. et al. (A-23366) June 24, 1942, unreported; **overruled** so far as in conflict, 59 I.D. 258-260.
- Cook, Thomas C. (10 L.D. 324). (See 39 L.D. 162, 225.)
- Cooke *v. Villa* (17 L.D. 210); **vacated**, 19 L.D. 442.
- Cooper, John W. (15 L.D. 285); **overruled**, 25 L.D. 113.
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27). (See 39 L.D. 574.)
- Copper Glance Lode (29 L.D. 542); **overruled** so far as in conflict, 55 L.D. 348.
- Corlis *v. Northern Pacific R.R. Co.* (23 L.D. 265); **vacated**, 26 L.D. 652.
- Cornell *v. Chilton* (1 L.D. 153); **overruled**, 6 L.D. 483.
- Cowles *v. Huff* (24 L.D. 81); **modified**, 28 L.D. 515.
- Cox, Allen H. (30 L.D. 90, 468); **vacated**, 31 L.D. 114.
- Crowston *v. Seal* (5 L.D. 213); **overruled**, 18 L.D. 586.
- Culligan *v. State of Minnesota* (34 L.D. 22); **modified**, 34 L.D. 151.
- Cunningham, John (32 L.D. 207); **modified**, 32 L.D. 456.
- Dailey Clay Products Co., The (48 L.D. 429, 431); **overruled** so far as in conflict, 50 L.D. 656.
- Dakota Central R.R. Co. *v. Downey* (8 L.D. 115); **modified**, 20 L.D. 131.

- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.
- DeLong v. Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.
- Denison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.
- Deseret Irrigation Co. et al v. Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27.
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429.
- Dickey, Ella I. (22 L.D. 351); overruled, 32 L.D. 331.
- Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128.
- Dowman v. Moss (19 L.D. 526); overruled, 25 L.D. 82.
- Dudymott v. Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56.
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188.
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.
- East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.
- \*Elliott v. Ryan (7 L.D. 322); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Emblem v. Weed (16 L.D. 28); modified, 17 L.D. 220.
- Epley v. Trick (8 L.D. 110); overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406.
- Esping v. Johnson (37 L.D. 709); overruled, 41 L.D. 289.
- Ewing v. Rickard (1 L.D. 146); overruled, 6 L.D. 483.
- Falconer v. Price (19 L.D. 167); overruled, 24 L.D. 264.
- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 L.D. 348.
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 473.
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.
- Federal Shale Oil Co. (53 L.D. 213); overruled so far as in conflict, 55 L.D. 290.
- Ferrell et al. v. Hoge et al. (18 L.D. 81); overruled, 25 L.D. 351.
- Fette v. Christiansen (29 L.D. 710); overruled, 34 L.D. 167.
- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 473.
- Filtrol Company v. Brittan and Echart (51 L.D. 649); distinguished, 55 L.D. 605.
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511.
- Fisher v. Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.
- Fitch v. Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43.
- Fleming v. Bowe (13 L.D. 78); overruled, 23 L.D. 175.
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.
- Florida Railway and Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.

- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181.
- Gallihier, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Garriss *v.* Borin (21 L.D. 542). (See 39 L.D. 162, 225.)
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Glassford, A. W. et al. (56 I.D. 88) (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy et al. *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg et al. *v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnell *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- \*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568. (See R.R. Rousseau, 47 L.D. 590.)
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
- Gwyn, James R. (A-26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 689.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427. (See 49 L.D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman et al. *v.* Letrodec's Heirs et al. (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.

- Heirs of Philip Mulnix (33 L.D. 331); overruled, 43 L.D. 532.
- \*Heirs of Stevenson v. Cuninghame (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Heirs of Talkington v. Hempffing (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenberg et al. v. Orr et al. (25 L.D. 232); overruled, 38 L.D. 253.
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey v. Coil (49 L.D. 624); overruled, Dennis v. Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106. (See 44 L.D. 112 and 49 L.D. 484.)
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 537); distinguished, 66 L.D. 275.
- Henry, D. Mikesell, A-24112 (Mar. 11, 1946); rehearing denied (June 20, 1946), overruled to extent inconsistent 70 L.D. 149.
- Herman v. Chase et al. (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M. A., et al. (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696), decided April 26, 1934; overruled in part, 55 L.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman v. Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon v. Martinas (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284.
- Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126.
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92). (See 39 L.D. 411.)
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- Hughes v. Greathead (43 L.D. 497); overruled, 49 L.D. 413. (See 260 U.S. 427.)
- Hull et al. v. Ingle (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 L.D. 5); distinguished, 65 L.D. 316.
- Hunter, Charles H. (60 L.D. 395); distinguished, 63 L.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 L.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. et al. (40 L.D. 284); overruled, 43 L.D. 381.
- Hyde et al. v. Warren et al. (14 L.D. 576; 15 L.D. 415). (See 19 L.D. 64.)
- Ingram, John D., (37 L.D. 475). (See 43 L.D. 544.)
- Inman, v. Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 L.D. 228.
- Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 L.D. 365; Lillian M. Peterson et al. (A-20411), August 5, 1937, unreported. (See 59 L.D. 282, 286.)



- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.
- Jacks *v.* Belard et al. (29 L.D. 369); vacated, 30 L.D. 345.
- Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.
- Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.
- Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold E., et al. (A-21845); February 1, 1939; unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger *v.* Peck (11 L.D. 202). (See 39 L.D. 162, 225.)
- Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B., et al. (30 L.D. 227); overruled, 31 L.D. 64.
- Knight *v.* Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461); overruled, 43 L.D. 242.
- Kniskern *v.* Hastings and Dakota R. R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45. (See 280 U.S. 306.)
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B., et al. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459.
- \*Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284. (See 43 L.D. 536).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonergran *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.

- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather et al. v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 L.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- \*McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- \*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)
- McFadden et al. v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 L.D. 340.
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- \*McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)
- McMicken, Herbert, et al. (10 L.D. 97; 11 L.D. 96); distinguished, 58 L.D. 257, 260.
- McNamara et al. v. State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck v. Sullivan et al. (25 L.D. 281); overruled, 36 L.D. 26.
- \*Mee v. Hughart et al. (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- \*Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.

- Meyer v. Brown (15 L.D. 307). (See 39 L.D. 162, 225.)
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 L.D. 371.
- Mikesell, Henry D. A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 L.D. 149.
- Miller, D. (60 L.D. 161); overruled in part, 62 L.D. 210.
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller v. Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* v. Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner v. Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- \*Mitchell v. Brown (3 L.D. 65); overruled, 41 L.D. 396. (See 43 L.D. 520.)
- Monitor Lode (18 L.D. 353); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 L.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan v. Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan v. Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz v. Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al.* v. State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mt. Whitney Military Reservation (40 L.D. 315). (See 43 L.D. 33.)
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen v. Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 L.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- \*Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 224; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 L.D. 242. (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 177 U.S. 435.)
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196. (See 52 L.D. 58.)
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. v. Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.

- Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. *v.* Walters et al. (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
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- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
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- Olson *v.* Traver et al. (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony). (See 58 I.D. 149, 154-156.)
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397). (See 58 I.D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, Feb. 11, 1957 (M-36410).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331. (See 59 I.D. 346, 350.)
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 58.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.
- Opinion of Solicitor, 64 I.D. 393 (1957); no longer followed, 66 I.D. 366.
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110.
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110.
- Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264.
- Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480); overruled, 18 L.D. 543.
- Owens et al. *v.* State of California (22 L.D. 369); overruled, 38 L.D. 253.
- Pace *v.* Carstarphen et al. (50 L.D. 369); distinguished, 61 I.D. 459.
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518.
- Papina *v.* Alderson (1 B.L.P. 91); modified, 5 L.D. 256.
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- Paul *v.* Wiseman (21 L.D. 12); overruled, 27 L.D. 522.

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- Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66.
- Perry v. Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.
- Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 L.D. 159.
- Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854.
- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424.
- Phillips v. Breazale's Heirs (19 L.D. 573); overruled, 39 L.D. 93.
- Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374.
- Pierce, Lewis W. (18 L.D. 328); vacated, 53 L.D. 447; overruled so far as in conflict, 59 L.D. 416, 422.
- Pietkiewicz et al. v. Richmond (29 L.D. 195); overruled, 37 L.D. 145.
- Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204.
- Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204.
- Popple, James (12 L.D. 433); overruled, 13 L.D. 588.
- Powell, D.C. (6 L.D. 302); modified, 15 L.D. 477.
- Prange, Christ C. and William C. Braasch (48 L.D. 448); overruled so far as in conflict, 60 L.D. 417, 419.
- Premo, George (9 L.D. 70). (See 39 L.D. 162, 225.)
- Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287.
- Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599.
- Provansal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399.
- Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409.
- Pugh, F. M., et al. (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotments (20 L.D. 157); modified, 29 L.D. 628.
- Ramsey, George L., Heirs of Edwin C. Philbrick (A-16060), August 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290.
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- Rankin, James D., et al. (7 L.D. 411); overruled, 35 L.D. 32.
- Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404.
- Rebel Lode (12 L.D. 633); overruled, 20 L.D. 204; 48 L.D. 523.
- \*Reed v. Buffington (7 L.D. 154); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- Regione v. Rosseler (40 L.D. 93); vacated, 40 L.D. 420.
- Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355.
- Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250.
- Rico Town Site (1 L.D. 556); modified, 5 L.D. 256.
- Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421.
- Roberts v. Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174.
- Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1.
- Rogers, Fred B. (47 L.D. 325); vacated, 53 L.D. 649.
- Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321.
- Rogers v. Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165.
- \*Rogers v. Lukens (6 L.D. 111); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- Romero v. Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244.
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- \*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354. (See 32 L.D. 21.)

- St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86.
- St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191.
- Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93.
- Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- Sante Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383.
- Satisfaction Extension Mill Site (14 L.D. 173). (See 32 L.D. 128.)
- \*Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797. (See 37 L.D. 330.)
- Schweitzer *v.* Hilliard et al. (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639.
- Serrano *v.* Southern Pacific R.R. Co. (6 C.L.O. 93); overruled, 1 L.D. 380.
- Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 L.D. 416, 422.
- Shale Oil Company. (See 55 I.D. 287.)
- Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424.
- Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202.
- Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63.
- Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205.
- Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152.
- Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135.
- Snook, Noah A., et al. (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364.
- Sorli *v.* Berg (40 L.D. 259); overruled, 42 L.D. 557.
- Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275.
- Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51.
- Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.
- Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272); vacated, 37 L.D. 243.
- South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523.
- Spaulding *v.* Northern Pacific R.R. Co. (21 L.D. 57); overruled, 31 L.D. 151.
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- Standard Shales Products Co. (52 L.D. 522); overruled so far as in conflict, 53 I.D. 42.
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- State of California (22 L.D. 428); overruled, 32 L.D. 34.
- State of California (32 L.D. 346); vacated, 50 L.D. 628. (See 37 L.D. 499 and 46 L.D. 396.)
- State of California (44 L.D. 118); overruled, 48 L.D. 98.
- State of California (44 L.D. 468); overruled, 48 L.D. 98.
- State of California *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- State of California *v.* Pierce (3 C.L.O. 118); modified, 2 L.D. 854.
- State of California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343.
- State of Colorado (7 L.D. 490); overruled, 9 L.D. 408.
- State of California (17 L.D. 355); reversed, 19 L.D. 76.
- State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (8 L.D. 126); modified, 9 L.D. 157.
- State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5.
- State of Louisiana (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358.

- State of Nebraska *v.* Dorrington (2 C.L.L. 467) ; overruled so far as in conflict, 26 L.D. 123.
- State of New Mexico (46 L.D. 217) ; overruled, 48 L.D. 98.
- State of New Mexico (49 L.D. 314) ; overruled, 54 L.D. 159.
- State of Utah (45 L.D. 551) ; overruled, 48 L.D. 98.
- \*Stevenson, Heirs of *v.* Cunningham (32 L.D. 650) ; overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Stewart et al. *v.* Rees et al. (21 L.D. 446) ; overruled so far as in conflict, 29 L.D. 401.
- Stirling, Lille E. (39 L.D. 346) ; overruled, 46 L.D. 110.
- Stockley, Thomas J. (44 L.D. 178, 180) ; vacated, 260 U.S. 532. (See 49 L.D. 460, 461, 492.)
- Strain, A. G. (40 L.D. 108) ; overruled so far as in conflict, 51 L.D. 51.
- Streit, Arnold (T-476 (Ir.)), August 26, 1952, unreported ; overruled, 62 I.D. 12.
- Stricker, Lizzie (15 L.D. 74) ; overruled so far as in conflict, 18 L.D. 283.
- Stump, Alfred M. et al. (39 L.D. 437) ; vacated, 42 L.D. 566.
- Sumner *v.* Roberts (23 L.D. 201) ; overruled so far as in conflict, 41 L.D. 173.
- Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394) ; overruled, 28 L.D. 174.
- \*Sweet, Eri P. (2 C.L.O. 18) ; overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Sweeten *v.* Stevenson (2 B.L.P. 42) ; overruled so far as in conflict, 3 L.D. 248.
- Taft *v.* Chapin (14 L.D. 593) ; overruled, 17 L.D. 414.
- Taggart, William M. (41 L.D. 282) ; overruled, 47 L.D. 370.
- Talkington's Heirs *v.* Hempfing (2 L.D. 46) ; overruled, 14 L.D. 200.
- Tate, Sarah J. (10 L.D. 469) ; overruled, 21 L.D. 211.
- Taylor, Josephine, et al. (A-21994), June 27, 1939, unreported ; overruled so far as in conflict, 59 I.D. 258, 260.
- Taylor *v.* Yates et al. (8 L.D. 279) ; reversed, 10 L.D. 242.
- \*Teller, John C. (26 L.D. 484) ; overruled, 36 L.D. 36. (See 37 L.D. 715.)
- The Clipper Mining Co. *v.* The Eli Mining and Land Co. *et al.*, 33 L.D. 660 (1905) ; no longer followed in part, 67 L.D. 417.
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- Thorstenson, Even (45 L.D. 96) ; overruled so far as in conflict, 47 L.D. 258.
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- Toles *v.* Northern Pacific Ry. Co. et al. (39 L.D. 371) ; overruled so far as in conflict, 45 L.D. 96.
- Tomkins, H. H. (41 L.D. 516) ; overruled, 51 L.D. 27.
- Traganza, Mertie C. (40 L.D. 300) ; overruled, 42 L.D. 612.
- Traugh *v.* Ernst (2 L.D. 212) ; overruled, 3 L.D. 98.
- Tripp *v.* Dumphy (28 L.D. 14) ; modified, 40 L.D. 128.
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- Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414) ; overruled, 25 L.D. 233.
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- Turner *v.* Cartwright (17 L.D. 414) ; modified, 21 L.D. 40.
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- Tyler, Charles (26 L.D. 699) ; overruled, 35 L.D. 411.
- Ulin *v.* Colby (24 L.D. 311) ; overruled, 35 L.D. 549.
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- United States *v.* Bush (13 L.D. 529) ; overruled, 18 L.D. 441.
- United States *v.* Central Pacific Ry. Co. (52 L.D. 81) ; modified, 52 L.D. 235.
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- United States *v.* Keith V. O'Leary et al. (63 I.D. 341) ; distinguished, 64 I.D. 210, 369.
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- Veatch, Heir of Natter (46 L.D. 496) ; overruled so far as in conflict, 49 L.D. 461. (See 49 L.D. 492 for adherence in part.)
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- Virginia-Colorado Development Corp. (53 I.D. 666) ; overruled so far as in conflict, 55 I.D. 289.
- Vradenburg's Heirs et al. *v.* Orr et al. (25 L.D. 323) ; overruled, 38 L.D. 253.
- Wagoner *v.* Hanson (50 L.D. 355) ; overruled, 56 I.D. 325, 328.
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- Walker *v.* Prosser (17 L.D. 85) ; reversed, 18 L.D. 425.
- Walker *v.* Southern Pacific R.R. Co. (24 L.D. 172) ; overruled, 28 L.D. 174.
- Walters, David (15 L.D. 136) ; revoked, 24 L.D. 58.
- Warren *v.* Northern Pacific R.R. Co. (22 L.D. 563) ; overruled so far as in conflict, 49 L.D. 391.
- Wasmund *v.* Northern Pacific R.R. Co. (23 L.D. 445) ; vacated, 29 L.D. 224.
- Wass *v.* Milward (5 L.D. 349) ; no longer followed. (See 44 L.D. 72 and unreported case of Ebersold *v.* Dickson, September 25, 1918, D-36502.)
- Waterhouse, William W. (9 L.D. 131) ; overruled, 18 L.D. 586.
- Watson, Thomas E. (4 L.D. 169) ; recalled, 6 L.D. 71.
- Weathers, Allen E., Frank N. Hartley (A-25128), May 27, 1949, unreported ; overruled in part, 62 I.D. 62.
- Weaver, Francis D. (53 I.D. 179) ; overruled so far as in conflict, 55 I.D. 290.
- Weber, Peter (7 L.D. 476) ; overruled, 9 L.D. 150.
- Weisenborn, Ernest (42 L.D. 533) ; overruled, 43 L.D. 395.
- Werden *v.* Schlecht (20 L.D. 523) ; overruled so far as in conflict, 24 L.D. 45.
- Western Pacific Ry. Co. (40 L.D. 411 ; 41 L.D. 599) ; overruled, 43 L.D. 410.
- Wheaton *v.* Wallace (24 L.D. 100) ; modified, 34 L.D. 383.
- White, Anderson (Probate 13570-35) ; overruled, 58 I.D. 149, 157.
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws, edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—  
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# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

## DUNCAN MILLER

A-28709

*Decided January 31, 1963*

### Oil and Gas Leases: Applications

It is proper to reject an offer for a noncompetitive oil and gas lease where the lands applied for are (1) in a producing lease, or (2) in a lease which was, during its extended term, further extended by reason of a discovery made on a lease out of which the extended lease was segregated by partial assignment.

### Oil and Gas Leases: Extensions

An oil and gas lease in its extended term is extended for two years from the date of discovery of oil or gas in paying quantities on land in the lease out of which the extended lease was segregated by partial assignment.

### 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 October 11, 1960, wherein the Acting Director affirmed, as modified, a decision by the Santa Fe, New Mexico, land office rejecting Miller's offer (New Mexico 078744), filed on January 4, 1960, to lease, non-competitively, the NW $\frac{1}{4}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 3, N $\frac{1}{2}$ SW $\frac{1}{4}$  sec. 15, NE $\frac{1}{4}$  sec. 17, the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 20, all in T. 19 S., R. 31 E., N.M.P.M., New Mexico, under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The land office held that when the Miller offer was filed the lands applied for were embraced in oil and gas leases Las Cruces 063642, 063642-A, 063642-C, 064577-A, and 064577-E, all of which had been extended by production.

In his appeal to the Director, Miller contended that there was no evidence that the leases had been productive of oil or gas in paying quantities and contended that the leases had terminated by operation of law.

The Acting Director stated that the Geological Survey had notified the land office that a discovery of oil and gas in paying quantities had been made on December 19, 1959, on Las Cruces 064577-A, and that a discovery in paying quantities had been made on Las Cruces 063642-A on December 24, 1959. He held that those two leases had been ex-

tended by production. He held, however, that the other three leases had not been extended by production but that each had been extended for two years because of the discovery on one or the other of the two producing leases. He accordingly held that Miller's offer was in conflict with existing leases and affirmed the rejection of the offer.

Miller contends that the leases in conflict with his offer were unlawfully extended and that the lands were available for leasing when he filed his offer.

An examination of the records relating to the five leases reveals that Miller's contentions are entirely without foundation.

The 120 acres in sec. 3 for which Miller applied were originally held under Las Cruces 064577, issued as of February 1, 1948. During the primary term of that lease, the land in sec. 3 was segregated by partial assignment as Las Cruces 064577-A. Under the provisions of section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, the record titleholder of Las Cruces 064577-A applied for and received a five-year extension of his lease, thus extending the term of that lease until January 31, 1958. By partial assignment filed on December 26, 1957, effective January 1, 1958, 40 acres, the NW $\frac{1}{4}$ SW $\frac{1}{4}$ , was segregated out of Las Cruces 064577-A. The lease covering this acreage was designated Las Cruces 064577-E. This partial assignment had the effect of extending the two leases until December 31, 1959, and so long thereafter as oil or gas should be produced in paying quantities. This was by virtue of section 30(a) of the Mineral Leasing Act, as amended by the act of July 28, 1954 (30 U.S.C., 1958 ed., sec. 187a). *Solicitor's opinions*, 64 I.D. 127, 135 (1957).

It was during these extended terms of the two leases that a discovery was made on land held under Las Cruces 064577-A. That initial discovery, made on December 19, 1959, was determined by the Geological Survey to have been in paying quantities. The discovery had the effect of extending Las Cruces 064577-A for so long as production in paying quantities continued. A supplemental report from the Geological Survey shows that production in paying quantities was being obtained in March 1960. Thus there can be no question that the land included in Las Cruces 064577-A for which Miller applied was in a producing lease on January 4, 1960, and that that land was not available for leasing by others at that time.

The Acting Director held that Las Cruces 064577-E was extended by virtue of the discovery on Las Cruces 064577-A under that provision in section 30(a) of the Mineral Leasing Act which provides:

\* \* \* Any partial assignment of any lease shall segregate the assigned and retained portions thereof, \* \* \* and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease.

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This provision has been construed to apply to leases which are in their extended terms when a discovery is made and to grant a further extension of two years from the date of discovery to other leases segregated out of the original lease. Associate Solicitor's opinion M-36472 (November 20, 1957); see 43 CFR 192.144 (a) relating to the extension of leases segregated by assignment. Thus it is apparent that the NW $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 3, segregated out of Las Cruces 064577-A as Las Cruces 064577-E, was in a properly extended, existing lease on January 4, 1960, when Miller's offer was filed.<sup>1</sup>

The situation with respect to the remaining 440 acres in secs. 15, 17, and 20, is much the same. Those lands were originally leased as a part of Las Cruces 063642, issued as of February 1, 1948. After the record titleholder of that lease had obtained a five-year extension, effective until January 1, 1958, he made a partial assignment of 200 acres, the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 20. The segregated lease covering those lands became Las Cruces 063642-A. Both the original lease and the A lease were thereafter partially assigned, effective January 1, 1958, thus extending both leases for two years, or until December 31, 1959. After the partial assignment out of Las Cruces 063642, there remained subject to that lease the 240 acres in secs. 15 and 17 applied for by Miller and after the partial assignment out of Las Cruces 063642-A, the 160 acres designated as the SW $\frac{1}{4}$  sec. 20 remained subject to that lease while the SE $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 20 was segregated as Las Cruces 063642-C.

The first productive well on Las Cruces 063642-A was completed on December 24, 1959. That well, like the one covered by Las Cruces 064577-A, continued to produce in paying quantities, thus extending Las Cruces 063642-A by production, and extending Las Cruces 063642 and Las Cruces 063642-C for two years from December 24, 1959.<sup>2</sup>

Accordingly, none of the lands for which Miller applied was available for noncompetitive leasing when Miller filed his offer and it was proper to reject that 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 Acting Director, Bureau of Land Management, is affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

<sup>1</sup>The discovery in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 3 was determined by the Geological Survey to be a further extension of the Shugart field. Based on the completed well on that land and other development in the area, the W $\frac{1}{2}$ SE $\frac{1}{4}$  and the SW $\frac{1}{4}$  sec. 3 were, effective December 19, 1959, added to the known geologic structure of that field. Thus the NW $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 3 would not have been subject to noncompetitive leasing on January 4, 1960.

<sup>2</sup>The record titleholders of Las Cruces 063642 and Las Cruces 063642-C submitted their rentals for the balance of the 12th year and for the 13th year of their respective leases in December 1959.

## NETTIE M. LEWIS

A-28737

*Decided January 31, 1963***Administrative Practice—Oil and Gas Leases: Noncompetitive Leases**

When, subsequent to the filing of a noncompetitive offer to lease for oil and gas, a determination is made that a portion of the lands is thereafter to be considered within the known geologic structure of a producing field, the administrative practice of issuing separate leases for the lands within and without the structure is proper and not in conflict with the mineral leasing laws and regulations.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Nettie M. Lewis has appealed to the Secretary from a decision dated October 27, 1960, whereby the Director, Bureau of Land Management, affirmed an Eastern States land office decision dated May 5, 1960, that required her to accept two separate leases for land included in her noncompetitive oil and gas lease offer since part of the land is within the known geologic structure of a producing gas field.

In 1954 the appellant filed a noncompetitive offer for certain lands, including tracts 707a and 304 in the Monongahela National Forest, West Virginia, under the provisions of the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., sec. 351 *et seq.*). At that time the lands were not within the known geologic structure of a producing field, but before final action was taken on the proposed lease, specifically, effective as of June 15, 1959, tract 304 was declared to be within the known geologic structure of the Gladly field.

The land office decision tendered two leases to the offeror for execution, one covering tract 707a at 50 cents per acre for the first year's rental since that land was outside the structure and the other for tract 304 at \$1 per acre, inasmuch as it was then within the known geologic structure of a producing field. The offeror appealed to the Director, contending that only one lease was required and there existed "\* \* \* no provision in the law or regulations which provides for or requires that two separate leases be issued \* \* \*". The Director affirmed the land office decision.

The offeror's appeal to the Secretary is based on the same premise, adding only that she is not bound by a procedure adopted by the Bureau for administrative purposes and intimating that she was being deprived of a statutory preference right for failure to comply with the procedure.

The procedure followed here is no novelty. In other similar situations the Department has long followed the practice of issuing two leases in response to one application. When the act of August 21, 1935 (49 Stat. 674), authorized persons holding prospecting permits



to exchange their permits for noncompetitive leases, the Department stated that if part of the acreage covered by the prospecting permit was within the known geologic structure of a producing oil or gas field the permittee was to be issued two leases, one for five years for the lands not within the known geologic structure and one for ten years for the area within the structure. Letter dated April 6, 1939, from the Under Secretary to the Commissioner, General Land Office (Denver 034622).

Several years later the Department considered the problem of what leases to issue in response to noncompetitive applications where part of the land applied for had been determined to be within the known geologic structure of an oil or gas field after the applications had been filed but before any leases had issued. Again it was held that, in accordance with the established departmental practice, separate leases should be issued for the lands within and without the known geologic structure of a producing oil or gas field. Memorandum from Solicitor to Assistant Secretary, dated November 19, 1942 (Salt Lake City 063408, etc., 063534, etc.).

The now long-established departmental practice was founded upon sound administrative reasons. By statute and regulation different rental rates and lease terms were fixed for leases covering lands on a known geologic structure and those not so situated. Because of these differences and other considerations it was deemed desirable not to attempt to issue a single lease covering lands in both categories. Substantially the same differences exist today.

The appellant contends that no provision of law or of the regulations requires or authorizes the practice and that it is unlawful. Why it is unlawful she does not say. On the contrary, it is established law that the issuance of leases under section 17 of the Mineral Leasing Act (which applies to acquired lands leases as well) is vested wholly in the discretion of the Secretary. *Haley v. Seaton*, 281 F. 2d 620 (D.C. Cir. 1960). The administrative practice discussed here is deemed to be a reasonable exercise of that discretion.

The appellant complains that if two leases are issued to her it will be necessary for her to make two discoveries in order to extend the leases beyond their primary term. This may be true, but it does not result that the practice is unlawful. There is no guaranty in the Mineral Leasing Law that an applicant is entitled to receive a single lease for as much acreage as he may lawfully hold so that he need make only one discovery to perpetuate it.

Inasmuch as the filing of appellant's offer predated the determination that a part of the lands described therein was within a known producing structure, the appellant enjoyed, and continues to enjoy,

a preference right to receive a lease *over a later applicant* and to receive such a lease *without competitive bidding*. 30 U.S.C., 1958 ed., 226 (c). Those rights are not denied her by the application of an administrative procedure that resulted in the tender of two leases instead of one; consequently her allegation of "deprivation of statutory rights" has not been substantiated.

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 affirmed.

FRANK J. BARRY,  
*Solicitor.*

### ANAWALT RANCH & CATTLE CO. ET AL.

A-28888

*Decided January 31, 1963*

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

The failure of a licensee of the federal range to request grazing privileges or nonuse to the extent of earlier licenses supported by the same base property for two consecutive years reduces the qualification of the base property to the extent that it has not been covered by the requests for two consecutive years, even though the qualifications of the base property have not been formally adjudicated.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Anawalt Ranch & Cattle Co. has appealed to the Secretary of the Interior from a decision of the Appeals Officer of the Bureau of Land Management dated February 20, 1961, by which he affirmed a decision of a hearing examiner dismissing its appeal from a decision of the district manager dated February 24, 1959, rejecting in part its application for grazing privileges for the 1959 grazing season.

The manager's decision found that the condition of the federal range in the Cow Creek Unit of Oregon Grazing District No. 3 required a reduction of 70 percent in grazing use; that 20 percent of such reduction was imposed in 1954; and that it was necessary to make a further reduction of 50 percent. He made a reduction in both the period to be spent upon the range and the number of animals to be allowed on the range. The reduction was made from Anawalt's base property qualifications as determined in a notice dated February 19, 1958, which announced that Anawalt had a qualified demand in the Cow Creek unit of 840 AUs, or 4400 AUMs. Anawalt's appeal from the decision of February 24, 1959, did not challenge the necessity for or the extent

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of the 50 percent reduction but alleged that the computation of the reduction on the basis of 840 AUs and 4400 AUMs<sup>1</sup> was erroneous. The manager's position, as disclosed at the hearing on the appeal, seems to be that the Anawalt base property is qualified to a greater extent than the limit announced on February 19, 1958, but that the appellant cannot claim grazing privileges on the federal range in excess of that limit because of a provision of the Federal Range Code which became effective January 23, 1956, and which provides:

Class 1 base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:

(i) To offer base property which is not covered by an outstanding current term permit to the full extent of its qualification in an application for a license or permit or renewal thereof, or to apply for nonuse thereof in whole or in part or

(ii) To accept a license or permit issued pursuant to such application. (43 CFR, 1957 Supp., 161.6(e) (9) ; 20 F.R. 9912, 9915.)<sup>2</sup>

The appellant concedes that, since 1955, it has not requested grazing privileges in excess of the limit set forth in the decision of February 19, 1958,<sup>3</sup> but contends that it was not required to do so because the Bureau stated annually in its approvals of Anawalt's request for licenses that the approval thereby given was "subject to change by the final adjudication of the Cow Creek Unit." The appellant contends that the two-year period runs only from an adjudication of its qualifications and that the first official announcement of its qualifica-

<sup>1</sup> The Bureau concedes that this figure is incorrect and that the correct figure is 4430 AUMs.

<sup>2</sup> This provision was effective throughout the period that is material to this appeal. On January 9, 1959, reference to Class 1 privileges was dropped (24 F.R. 362) and on January 28, 1962, the language was changed to require an applicant "to include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse" subject to certain exceptions. (26 F.R. 12698.)

<sup>3</sup> The hearing examiner's decision of January 19, 1960, on Anawalt's appeal from the manager's decision of February 24, 1959, summarized Anawalt's applications after 1955 as follows:

"The evidence adduced at the hearing discloses that appellant's first application after the effective date of the regulation was filed December 7, 1956. This application applied for permission to graze livestock upon the Federal range in 1957 the 'same as last year.' The 1956 license referred to by the application authorized the grazing of 709 cattle upon the Federal range in the Cow Creek Unit from April 1, 1956, to August 31, 1956, for a total of 3,545 animal-unit months [footnote omitted]. The application, therefore, constituted an offering of the base property for 3,545 animal-unit months. The district manager issued a 1957 license authorizing the requested Federal range use.

"The appellant's next application was filed November 6, 1957. This application requested permission to graze 830 cattle on the Cow Creek Unit from April 1, 1958, to August 31, 1958, for a total of 4,150 animal-unit months. The district manager refused to issue a license for greater Federal range use than was authorized the preceding year. The appellant filed no appeal from this decision. It is apparent from these facts that the appellant failed for two consecutive years to offer his base property to the full extent of the qualifications which he now claims. Furthermore, the following application, filed on December 6, 1958, upon which his appeal was based, requested licensed use in Cow Creek Unit of only 4,150 animal-unit months during 1959." (P. 3.)

tions occurred at a meeting held on November 21, 1957. Consequently, it asserts, its appeal from the 1959 decision rejecting its request for more extensive grazing privileges was taken within the two-year period.

The hearing examiner held that "There is no basis whatsoever for concluding that Section 161.6(e) (9) applies only after an adjudication of grazing privileges" since it is applicable by its terms to "all regular licenses and permits" without any suggestion that "an adjudication is a prerequisite to application of the regulation."

In its appeal to the Secretary, the appellant contends that it had no reason to suppose that it had any obligation to protect its base property qualification because the Bureau informed it annually that its qualification had not been determined by stating that any license granted was subject to change in the event of adjudication. However, the fact that base property qualifications may be changed upon a formal adjudication and thus affect the grazing privileges for which a license or permit may be issued does not mean that an applicant need not offer his base property to the fullest extent that he believes it to be qualified. As the hearing examiner stated, there is nothing in the provision of the range code under consideration which limits its application in that fashion.

Assuming, as the appellant contends, that the qualification of its base property had not been formally determined until 1958, this fact would be significant, if at all, only if the appellant had no basis for determining the probable qualification of its property and thus did not know that its applications were insufficient to cover that qualification. But the company knew that, in previous years, it had asked for and been granted more extensive privileges on the federal range on the basis of the same base property and it had a precise evaluation of the qualification assumed in 1954 for the purpose of computing the 20 percent reduction that was then imposed. Also, in some earlier years it had applied for nonuse on some land. Because the appellant thus had the knowledge which an adjudication would impart, it cannot claim that a formal adjudication was necessary to provide the information necessary to enable it to protect its rights. It knew both that more extensive grazing privileges on the federal range had been granted to it in connection with the same land and that it had protected its rights at an earlier time by applying for nonuse of certain land. In this state of affairs, the decision establishing base qualification at a limit commensurate with the extent to which it was covered by the appellant's applications for 2 years immediately preceding was correct and the rejection of its subsequent application for grazing privileges in excess of that limit was also correct.

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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 appealed from is affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

**SAWYER PETROLEUM COMPANY**

**H. BYRON MOCK**

**A-23916**

*Decided January 31, 1963*

**Potassium Leases and Permits: Permits**

An application for a potassium prospecting permit is properly rejected when the land described in the application is determined to contain valuable deposits of potassium as of a time after the filing of the application.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Sawyer Petroleum Company and H. Byron Mock have appealed to the Secretary of the Interior from a decision dated March 29, 1961, by which the Appeals Officer of the Bureau of Land Management affirmed a decision of the land office at Salt Lake City, Utah, rejecting Mock's application<sup>1</sup> for a potassium prospecting permit for certain public land in San Juan County, Utah, on the ground that the Geological Survey had classified the land described in the application as known to contain valuable deposits of potassium and therefore subject only to leasing.

Mock's application for a potassium prospecting permit was filed on August 11, 1959. It conflicted as to some land with two other applications filed simultaneously. At a public drawing of the three simultaneously filed applications, Mock's application was drawn third. On June 15, 1960, the land office rejected the application as to land included in permits issued pursuant to prior applications and stated that action would be taken toward issuing a permit as to the remaining lands provided Mock complied with new regulations which became effective on October 5, 1959. Subsequently, the land office discovered that the Geological Survey had classified all the land offered to Mock and other land as known to contain valuable deposits of potash as of February 1, 1960. Accordingly, on September 14, 1960, the land office rescinded its previous decision and rejected Mock's application in its entirety, holding that the land was subject only to leasing.

<sup>1</sup> Mock assigned to Sawyer his interest in the permit to be issued pursuant to his application.

The appellants contend that the Geological Survey did not make a determination that the land was subject to leasing rather than prospecting until May 18, 1960, effective as of February 1, 1960, well after Mock's application was filed. They also assert that a permit was issued on November 2, 1959, to the one of the simultaneously filed applications in conflict which was drawn first and that it would be arbitrary and discriminatory to refuse a permit to the appellants.

Section 3 of the act of February 7, 1927 (30 U.S.C., 1958 ed., sec. 283), provides that:

Lands known to contain valuable deposits \* \* \* [of potassium and other minerals] and not covered by permits or leases shall be held subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix \* \* \*.

The appellants do not dispute the finding of the Geological Survey in this instance that there are valuable deposits of potassium in the land which they desire to prospect; they merely seek an exception from the plain language of the statute which denies the Secretary of the Interior authority to issue permits when valuable deposits of mineral are known to exist. In view of the clear language of the statute it is not necessary to consider the effect of decisions which relate to other matters. The land office and the Appeals Officer were clearly 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 appealed from is affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

UNITED STATES

v.

JOE DRIEAR

A-28925

*Decided January 31, 1963*

### **Mining Claims: Determination of Validity**

A mining claim is properly declared null and void where evidence supports the conclusion that there has been no discovery of valuable mineral deposits on the claim such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine.

### **Rules of Practice: Hearings—Administrative Procedure Act: Hearings**

Where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing, and the ruling on each finding and conclusion is clear, there is no

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requirement that the examiner rule separately as to each of the proposed findings and conclusions individually.

**Rules of Practice: Hearings—Administrative Procedure Act: Hearings—  
Administrative Procedure Act: Decisions**

Where the factual findings upon which an examiner's decision are based are stated clearly in a decision, it is not essential that a separate part of the decision be designated "findings of fact."

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Joe Driear has appealed to the Secretary of the Interior from a decision of April 4, 1961, by the Appeals Officer, Bureau of Land Management, which affirmed a hearing examiner's decision declaring null and void the appellant's lode mining claim in Johnson County, Wyoming, within the Bighorn National Forest.

A contest against the validity of the claim was initiated on charges brought by the Forest Service, Department of Agriculture. To validate a mining claim it has been consistently held that there must have been a discovery of valuable minerals of such a character as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). A review of the record discloses no error in the decision declaring this claim null and void for lack of discovery.

The contention on this appeal that the examiner did not rule upon the proposed findings and conclusions submitted for the contestee at the close of the hearing in this case is erroneous. The examiner's decision of September 30, 1960, expressly states that the examiner considered the contestee's findings and conclusions and that nothing therein warranted changing the conclusions in the decision. In the circumstances, this statement amounts to a ruling, negative to the contestee's position, upon each of the proposed findings and conclusions submitted for the contestee to the examiner and complies with the governing departmental regulation, 43 CFR 221.76(b), the ruling on each finding and conclusion being clear. *National Labor Relations Bd. v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 652 (6th Cir. 1954); see *National Labor Relations Bd. v. State Center Whse & Cold Storage Co.*, 193 F. 2d 156, 158 (9th Cir. 1951).

Contrary to the assertions of the appellant, the requirement that the examiner include in his decision a statement of his findings and conclusions does not necessarily require that in all cases a statement designated "findings of fact" must be set forth in the examiner's decision, particularly where the factual findings upon which the examiner's conclusion is based are stated clearly in the decision. *Southern Railway Company v. United States*, 180 F. Supp. 189 (D. Va. 1959).

The examiner's action with respect to these two matters did not prejudice the contestee and the contentions on appeal provide no basis for modifying the decision declaring the appellant's mining claim null and void.

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 Appeals Officer, Bureau of Land Management, is affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

### R. D. COMPTON AND EDNA COMPTON

A-28927

*Decided January 31, 1963*

#### Mining Claims: Surface Uses—Surface Resources Act: Verified Statement

A verified statement filed pursuant to section 5 of the act of July 23, 1955, asserting surface rights in mining claims which does not designate the section or sections of the public land survey which embrace most of the claims and contains only metes and bounds descriptions of such claims tied to points on the boundaries of certain sections fails to meet the statutory requirement that it "shall set forth \* \* \* [t]he section or sections" which embrace the claims and must be rejected as an incomplete statement as to such claims.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

R. D. Compton and Edna Compton have appealed to the Secretary of the Interior from a decision dated March 30, 1961, by which the Appeals Officer of the Bureau of Land Management affirmed, as modified, a decision of the land office at Sacramento, California, accepting in part and rejecting in part their verified statement asserting surface rights in 11 mining claims in Sierra County, California, filed pursuant to section 5 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613). The land office accepted the statement insofar as it applied to all of one claim and portions of 4 others located in the area for which a notice had been published inviting mining claimants to assert their rights in surface resources by filing such statements and rejecting it insofar as it applied to claims or parts of claims outside this area. The Appeals Officer affirmed the rejection as to claims entirely outside the area designated in the applicable published notice but held the statement effective as to all of the 5 claims any portion of which is within the area of the notice.

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 their claims and requires holders of claims previously located to respond to a published notice requiring such action by filing a verified



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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 to file 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 Bureau of Land Management published two notices to mining claimants relating to land in Sierra County, at the instance of the Forest Service. The first, designated as Public Law 11, related to specified subdivisions of land in Townships 19 and 20 North, Ranges 8, 9, 10, 11 and 12 East, Mount Diablo Meridian. The land described therein in T. 20 N., R. 12 E., was limited to all of sections 30 and 31. This notice was published for the first time on March 14, 1957. The second notice, Public Law 27, related to land in Townships 19, 20, 21 and 22 North, Ranges 11, 12 and 13 East, Mount Diablo Meridian. The land described therein in T. 20 N., R. 12 E., included secs. 4 to 9, incl., 13, 16 to 22, incl., 25 to 29, incl., and 32 to 36, incl. This notice was published for the first time on September 12, 1957. Both notices were mailed to the appellants.

On June 12, 1957, the appellants filed a statement covering 11 claims described by metes and bounds, 9 of the descriptions being tied by course and distance to points on the boundaries of sections 19 and 30, T. 20 N., R. 12 E., M.D.M.

The partial rejection of the statement by the land office and the Appeals Officer was justified on the ground that the statutory requirement for the filing of a verified statement in response to a notice to mining claimants had not been met as to the portion of the statement relating to the claims and portions of claims not in section 30 and thus located in the area covered by Public Law 27 because the statement was filed before Public Law 27 was first published and not within 150 days thereafter.

It is unnecessary to decide whether the decisions below were correct for the reason given because another point is dispositive of the case.

Section 5(a) of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613(a)), the applicable part of which is quoted in the applicable departmental regulation, 43 CFR, 1961 Supp., 185.126(a), provides that a verified statement filed by a mining claimant "shall set forth", in addition to the information which the appellants included in their statement:

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

Paragraph 2 of Public Law 11 set forth the same requirement.

Since the land on which their claims are located has been surveyed, the appellants were required to designate the sections including their mining locations for the purpose, of course, of providing the land office with the information necessary for identification of the statement with the proper public notice and a determination of the necessity or nonnecessity for a hearing. That the appellants are aware of this requirement is evidenced by the following statement from the statement of reasons filed by them on their present appeal:

The six mining claims [held by the Appeals Officer not to be effectively covered by the verified statement] were listed in the verified statement by reference to the sections of the public land surveys which embrace such mining claims, *as required by subdivision numbered (3) of paragraph numbered 2 of both of the Notices to Mining Claimants* affecting the claims in question. (Appellants' *Italics*.)

The appellants, however, did not designate the sections in which their claims are located; they merely tied the metes and bounds descriptions of 9 of the 11 claims to points on the boundaries of sections 19 and 30, T. 20 N., R. 12 E., M.D.M. It required the actual plotting of the 9 claims on the plat of the public land survey to establish in what sections the claims are located. Only on the basis of the information thus obtained was the land office in a position to determine that the statement filed by the appellants referred in part to land described in notice Public Law 11 and that as to that land it had been filed within the period established by that notice.

That the mere ties in the descriptions to surveyed sections were insufficient to indicate in what sections the 9 claims are located is demonstrated by the following:

1. The Bullion Extension No. 1 Mine is tied to the  $W\frac{1}{4}$  corner of sec. 19, but only part of the claim is in sec. 19; the remainder is in sec. 24.
2. The Bullion Extension No. 2 Mine is tied to the same corner but the greater part by far of the claim is located in sec. 24.
3. The Bullion Northwest Extension No. 3 Mine is also tied to the same corner, but all of the claim lies in sec. 24.

The language of the statute declaring that a verified statement "shall set forth" the designation of the sections of public land, which makes possible a simple check with the land listed in the published notice to mining claimants, is clearly mandatory. It obligates a mining claimant who wishes to assert rights to the surface resources of his claims to identify the source of the asserted rights by naming the section or sections of land to which they pertain in the statement which he files. Where a claim is included in more than one section, he is at the very least required to designate a section listed in the published notice so

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that his statement can be related to the notice. The mining claimant is required to offer a statement which meets statutory requirements and the land office is not at liberty to accept an incomplete statement which does not meet these requirements and which requires the land office to undertake the laborious task of identifying the location of his claims by plotting them out. The land office should have rejected the appellants' incomplete statement as to 9 claims in this case as not in compliance with the statutory requirements for such statement. But the fact that the land office did accept this statement and ascertain the location of the claims cannot affect the appellants' rights because nothing the land office did or caused to be done in determining the effect of the statement altered its incomplete state at the time of filing.

As noted above, the descriptions of two of the mining claims, the Bullion Southeast Extension Mine and the Bullion Southwest Extension Mine, are free from this defect. The description of the former reads: "Beginning at Corner No. 1 \* \* \* in the NW $\frac{1}{4}$  of section 30, T. 20 N. R. 12 E. MDM \* \* \*," and that of the latter: "Commencing at point of discovery at the northwest end of lode line in section 30 T. 20 N. R. 12 E. \* \* \*," indicating in each instance that at least part of the mining claim is within the pertinent section and thus satisfying the requirement of the statute.

Since the statement was ineffective as to 9 claims, including all those covered by Public Law 27, it is not necessary to consider at this time whether a notice filed before the publication of the applicable notice to mining claimants which remains on file during the permissible filing period specified in the subsequently published notice can be accepted.

Accordingly, for the reasons given herein, the verified statement was properly rejected as to the 6 claims situated entirely outside the area described in Public Law 11 and properly allowed as to the 2 claims partly or entirely in Public Law 11 which adequately stated the section in which they are situated. For the same reason the allowance of the verified statement for the other 3 claims partly or entirely in Public Law 11 was improper and must be set aside.

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 appealed from is affirmed in part and reversed in part and remanded for further proceedings consistent herewith.

EDWARD W. FISHER,  
*Deputy Solicitor.*

**KNIFE RIVER COAL MINING COMPANY**

A-28953

*Decided January 31, 1963***Trespass: Measure of Damages**

Where there has been an innocent trespass in the mining and removing of coal belonging to the United States in a State which fixes the measure of damages as the amount which will compensate for all the detriment proximately caused thereby, it is proper to call upon the trespasser for the value of the coal in place and not merely the royalty that would have been derived by the United States for the coal mined had the coal been mined under a lease issued to the trespasser.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Knife River Coal Mining Company has appealed to the Secretary of the Interior from a decision dated March 10, 1961, by which the Appeals Officer, Bureau of Land Management, held that the State Supervisor at Billings, Montana, had, on November 10, 1959, properly called upon the company for the payment of \$272,305.94 in satisfaction for the damages resulting from the trespass committed by the company in the mining of 326,505.92 tons of coal belonging to the United States. The Appeals Officer again called on the company for payment.

In this appeal the company contends that it is liable only for the amount of royalty which it would have paid to the United States under a coal lease and has offered to pay \$32,650.60; or ten cents a ton for the coal mined.<sup>1</sup>

The coal was removed from the S $\frac{1}{2}$ SW $\frac{1}{4}$  sec. 27, T 131 N., R 99 W., 5th P.M., North Dakota, which had been patented with a reservation of the coal to the United States. The company mined and removed the coal under a lease from the surface owner.

Investigation made by the Bureau of Land Management, including an examination of the records of the company, revealed that the company had mined the coal under the mistaken belief that it was acting within its rights; that during the period from September 1951 through August 1957 the company had mined 326,505.92 tons of coal from the property; that the average selling price of the coal was \$1.734 per

<sup>1</sup> By letter dated August 1, 1962, more than a year following its appeal to the Secretary, the company submitted a check made payable to the Regional Mining Supervisor, U.S. Geological Survey, in the amount of \$33,786.80 "in full payment of 337,868.01 tons of coal mined from the South half of the Southwest quarter of Section 27, Township 131 North, Range 99 West, Bowman County, North Dakota, during the period September 1, 1951, to November 1, 1957, a period prior to the time said lands were included in the coal lease referred to in the caption above. The royalty to the government was computed at the rate of 10 cents per ton, the same as that provided for in the lease of which said lands are now a part'.

ton; and that the actual mining expenses directly related to the coal-extraction process averaged \$.90 per ton. Because the trespass was deemed to be an innocent, rather than a willful, trespass, the amount of the damages due to the United States was based on the value of the coal in place, which was determined to be \$.834 per ton, or a total for all of the coal removed of \$272,305.94.

There is no dispute as to the amount of coal removed but the company contends that \$.834 per ton does not represent the value of the coal in place, "but rather the value of the coal plus the profit from the mining and sale of the coal."

The company contends that the measure of damages to be applied in this case under the Department's trespass regulations (43 CFR, Part 288) is the measure of damages prescribed by the laws of the State of North Dakota, where the trespass was committed (43 CFR 288.1), and that it was error to compute these damages for innocent coal trespass under 43 CFR 288.6, which provides that for innocent coal trespass in a State where there is no State law governing such trespass payment must be made for the value of the coal in place before severance. The appellant points to the following provisions of the North Dakota law as set forth in the North Dakota Revised Code of 1943, as amended:

§ 32-0320. Measure of Damages for Tort. For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by law, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

§ 32-0337. Damages Must be Reasonable. Damages in all cases must be reasonable and when an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.

The appellant states that the North Dakota courts have clearly recognized that damages are limited to compensation for the detriment suffered; that the measure of damages applied in this case would result in a benefit to the United States; and that the only detriment suffered by the United States is the loss of royalty at the rate of ten cents per ton on the coal removed.

The North Dakota case cited in support of its position is *Peterson v. Conlan*, 119 N.W. 367 (1909), wherein the Supreme Court of North Dakota said:

Appellant's counsel give it as their opinion, however, that under the weight of authority the owner of a trespassing animal is liable in an action of trespass for any injury done by such animal while trespassing, \* \* \* [citations omitted]. However this may be, we are very firmly impressed with the justness, as well as soundness, on principle, of the rule that only such damages may be recovered.

where the trespass is not willful, as will compensate the injured party for all the detriment proximately caused by such trespass, and such is the statutory rule in this state. \* \* \* [citations omitted] The fact that the detriment could, or could not, have been anticipated is not controlling, but the test is whether the injury was the proximate result of the breach of duty owing by defendant to plaintiff. If so, he is liable; otherwise not.

However, that statement, which is dicta since the court held that plaintiff had no cause of action for trespass, does not support the appellant's contention that the only detriment suffered by the United States is the loss of royalties.

The cases cited by the appellant involving mineral trespass are from other jurisdictions which appear to have adopted the rule that the measure of damages for innocent trespass in removing minerals from the land of another not himself engaged in mining is the usual and customary royalty. These cases do not help the appellant. It has not pointed to any North Dakota cases wherein any such "royalty" rule has been applied. Thus the appellant has failed to show that the North Dakota statute sets forth a different rule for the measure of damages for an innocent coal trespass from the rule applied by the State Supervisor. Consequently, the rule prescribed in 43 CFR 288.6 is applicable.

It is, of course, completely unrealistic to say that the detriment suffered by the United States is to be measured by its loss of royalty alone. To accept damages on such a basis would be to completely disregard the detriment suffered by the Government in having its coal deposits, which it administers under the terms of the Mineral Leasing Act (30 U.S.C., 1958 ed., Supp. III, sec. 181 *et seq.*), for the good of the Nation, taken from it without regard to whether it deems it administratively desirable to dispose of them at any particular time, without regard to whether the taking of coal from this 80-acre tract would permit the most economical mining of the coal, without regard to the advantage to be gained from the selection of a qualified lessee to mine the coal, and without regard to the loss of the bonus which would have been received through competitive bidding for the property (30 U.S.C., 1958 ed., Supp. III, sec. 201). In addition to the above, such a settlement would place a trespasser in a preferred status and would penalize those who complied with the law. For example, the trespasser is not bound by the coal mining operating and safety regulations of the Department (30 CFR, Part 211) as is the lessee.

In the circumstances of this case and in view of the fact that the state of the North Dakota law is such that it cannot be said with certainty that the State has prescribed any measure of damages for coal trespass different from that applied in this case, it must be held that the demand made upon the appellant was proper.

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That demand, for the payment to the Bureau of Land Management of \$272,305.94, is hereby renewed. If payment is not forthcoming within 60 days of the receipt of this decision by Knife River Coal Mining Company, proper steps will be initiated looking toward the recovery of the damages through legal action.<sup>2</sup>

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 appealed from is affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

**MARTHA FEATHERSTONE**

A-29138

*Decided January 31, 1963*

**Oil and Gas Leases: Generally—Oil and Gas Leases: Extensions**

In order for an oil and gas lessee to be entitled to the extension or suspension benefits provided by the act of September 21, 1959, or section 27(j) of the Mineral Leasing Act Revision of 1960, respectively, as to a given lease, the lease must have been included in a "proceeding" within the meaning of those acts, which entails at least some specific, direct action against the lease discernible from the departmental records, and there must have been a suspension by the Secretary of the lessee's rights under the lease pending a decision in the proceeding or a waiver of such rights by the lessee; a mere failure to take action to approve or deny a pending assignment of the lease prior to the expiration of its term is not sufficient to entitle the lessee to the extension benefits.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Martha Featherstone has appealed to the Secretary of the Interior from a decision by the Acting Chief, Division of Appeals, Bureau of Land Management, dated July 18, 1961, affirming the Cheyenne land office decision declaring that oil and gas lease Cheyenne 075978 had expired October 31, 1960, in the absence of production or other continuation, and also declaring that the lease was not entitled to the benefits of the act of September 21, 1959 (73 Stat. 571), or the Mineral Leasing Act Revision of 1960 (30 U.S.C., 1958 ed., Supp. III, sec. 184(j)).

The act of September 21, 1959, provided for certain rights of bona fide purchasers in leases subject to proceedings for cancellation or

<sup>2</sup>The check referred to in footnote 1 is returned to the company as completely unacceptable in settlement of the damages suffered by the United States as the result of this trespass.

forfeiture of such leases for violations of the provisions of the Mineral Leasing Act. The act also provided:

\* \* \* If during any such *proceedings* with respect to a violation of any provisions of this Act a *party to those proceedings* files with the Secretary of the Interior a waiver of his *rights under the lease* to drill or to *assign* his interests thereunder or if such rights *are suspended by order of the Secretary* pending a decision in such proceedings, he shall, if he is found in *such proceedings* not in violation of such provisions, have the right to have his interest extended for a period of time equal to the period between the filing of the waiver or *the order of suspension* by the Secretary and the *final decision*, without the payment of rental. (Italics supplied.)

That provision was amended September 2, 1960, by the Mineral Leasing Act Revision, 74 Stat. 789 Sec. 27(3) (j) as follows:

(j) If during any such *proceeding*, a party thereto files with the Secretary a waiver of his rights under his lease (including particularly, where applicable, rights to drill and to assign) or if such rights *are suspended* by the Secretary *pending a decision in the proceeding*, whether initiated prior to enactment of this Act or thereafter, payment of rentals and running of time against the term of the lease or leases involved shall be suspended as of the first day of the month following the filing of the waiver or *suspension of the rights* until the first day of the month following the *final decision* in the proceeding or the revocation of the waiver or suspension. (Italics supplied.)

In concluding that Mrs. Featherstone's lease Cheyenne 075978 is not entitled to the extension or suspension benefits of these acts, the Bureau decisions held that the lease had never been involved in a contest proceeding as required by the acts and thus was excluded from their operation.

The oil and gas lease in question was issued to Mrs. Featherstone effective November 1, 1950, and extended to October 31, 1960. An assignment of the lease from her to the Carter Oil Company was filed in the Cheyenne land office on October 16, 1957. Subsequently, on September 24, 1959, a reassignment of the lease was filed from Carter Oil Company to Mrs. Featherstone. No action was ever taken by the land office to deny or to approve either of those assignments. The appellant has referred to two decisions rendered by the land office in 1956 which affected certain offers and leases of Olen F. Featherstone III, Mrs. Featherstone, and others, but which were later vacated by a 1959 decision on appeal to the Director. She does not state that lease Cheyenne 075978 was specifically included in those decisions but does allege that it was "within the scope of them." She also refers to a contest proceeding (No. 4949) against the Featherstones and others which was initiated by the recordation of the filing of a complaint on the land office records June 2, 1959. She alleges that although the lease in question here was not included in this contest she



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was a party in the contest and that the lease has been suspended since October 16, 1957. Apparently, that date was chosen as it was the day the assignment of the lease from her was filed.

Although appellant admits that under the literal language of the statutes involved they may be construed as inapplicable to this lease, she urges that they be construed "liberally" to cover this lease. She contends that the statutes are remedial in nature and that the Department has an affirmative duty to construe them liberally. She asserts that the result of the Bureau's decisions, that there must be some formal departmental "proceeding" against a lease before those acts apply, is unfair and produces an "unreasonable result plainly at variance with the policy of the legislation." In construing the word "proceeding" she states that the acts use it as a "special" or "particular" expression, but that as the reason for the legislation was general the expression of Congress must also be deemed general. She states that "Presumably Congress did not foresee that the Department of the Interior would attempt to negate its statutory grant of benefits by depriving a lessee of his rights and then failing to include the lease within a 'proceeding'." She concludes that if the fact situation involved here had been considered by Congress, it would have intended this situation to be covered by the acts as the lease was subject to the "exact type of attack and inequity which Congress was attempting to remedy."

The appellant's statement that the Department would "attempt to negate" the benefits of the acts by failing to include this lease in the contest proceeding is fallacious as the particular contest action referred to by appellant was commenced prior to their enactment.

Although appellant claims inequities in the "harsh" decisions of the Bureau she does not refer to any action by her or her assignee requesting that action be expedited on the assignments or making inquiry as to why this particular lease was not included in the contest. Case record Cheyenne 075978 shows no such requests or inquiries, nor does it show that a request for an extension of the lease under the 1959 act was filed. Such a request was to be filed prior to the expiration of the lease term as required by regulations promulgated under that act. 43 CFR, 1960 Supp., 191.15(c).

The 1959 act and regulations under it have been superseded by the 1960 act and new regulations under it as to leases in existence when the 1960 act was enacted. 43 CFR, 1961 Supp., 191.15(e). Therefore, any benefits of the 1959 act cannot be invoked by the appellant as she did not meet the requirements of the regulations under that act, and, more importantly, as her lease had not expired prior to the

passage of the 1960 act. Furthermore, the 1959 act clearly specifies that the party in the "proceedings" must be found not in violation of the provisions of the act in order to be entitled to the extension benefits which are granted therein. Thus, it is evident from the 1959 act that in order for a lessee to be entitled to the benefits provided there had to be some direct action by this Department resulting in a determination as to whether or not the party was in violation of the act in connection with the lease or leases in question. Of course, as no direct action was taken against this particular lease of Mrs. Featherstone, there could not be such a determination made.

Moreover, under the 1959 act, there had to be an "order" of the Secretary suspending the rights of the appellant to drill or to assign her lease. The appellant has pointed to no such "order."

The appellant has quoted excerpts from the legislative history of the 1959 act to support her contentions regarding the intent of Congress. Of course, as applicable here, any consideration of the 1959 act and its legislative history is helpful simply to consider the meaning and proper application of the 1960 act. It is evident from that legislative history that there was concern over a party's being deprived of his rights to assign or develop a lease during the course of a proceeding against the lease. This concern is manifest in the language of both statutes. It is also evident from the specific language that a "final decision" would be rendered in the proceeding as that term is used in relation to the computation of time for the extension or suspension benefits of the acts. Appellant makes no suggestion as to what "final decision" should be considered if the acts were to be construed as she suggests. She does suggest that the suspension of the lease began the day that the assignment was filed. However, she points to no order or directive by the Secretary or his delegate on that day which suspended her rights under her lease. Such a suspension would have been necessary to give her the benefits of section 27(j) in the absence of her filing a waiver of her rights under the lease.

To overcome the absence of these essentials, the appellant has attempted to equate the inaction of the Bureau as a suspension of the lease and as a proceeding under these acts. The logical conclusion of appellant's reasoning may be pointed out. Suppose that a formal proceeding against the appellant listing specific leases in violation of the Mineral Leasing Act concluded with an adverse decision canceling the leases. A lease not specifically designated in the proceedings could not be considered as canceled by such action but some further action would have to be taken against it if it were to be canceled. Under appellant's rationale, a party could claim the suspension bene-

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fits of the 1960 act as to that lease on the ground he was a party to the proceeding, but then later argue that the lease was not subject to the adverse decision. Obviously, Congress did not intend that such a result could be achieved by this legislation.

One portion of the legislative history which appellant has not cited is the report of the Senate Committee on Interior and Insular Affairs on the 1960 amendment which specifically refers to the 1959 act provision here as one wherein the " \* \* \* Secretary of the Interior has initiated a contest action \* \* \*." S. Rept. No. 1549, 86th Cong., 2d sess., p. 4. This further demonstrates that Congress was contemplating those cases where specific, direct action against a lease was taken.

The word "proceedings" is susceptible to several different meanings depending upon the context in which it is used, although it generally refers to all of the steps taken in a judicial action from the commencement of the action to the final decree or, likewise, to all of the steps taken in an administrative action. See cases cited in *Words and Phrases*, "Proceeding," Vol. 34 (Perm. Ed. 1957). As used in the 1959 and 1960 acts the word, together with its qualifying adjective "such," has been considered in light of the other related provisions of section 27 of the Mineral Leasing Act (30 U.S.C., 1958 ed., Supp. II and III, sec. 184), the legislative history of the acts, and reasonable principles of statutory construction. I am not persuaded, despite appellant's contentions, that this Department is under any "duty" to construe these acts as she wishes. The legislative history, the language of the acts, and their context support a conclusion that the word was intended to be used in its most usual manner involving a situation where specific, direct action had been commenced against a particular lease or leases. See *United States v. Stewart*, 311 U.S. 60, 63 (1940), stating that Congress is presumed to have used a word in its usual and well-settled sense. Thus, it appears that there must be at least some specific ruling adverse to a particular lease, or the initiation of some formal administrative or judicial action, in order for a lease to be considered to be in a "proceeding" within the purview of those acts. A mere delay in taking action on a pending assignment or complete inaction during the lease term by the Bureau, whether due to an investigation pending a determination as to whether to take direct action against a lease, a mistake, or some other reason, is not sufficient as the conditions set forth in the acts could not be satisfied without some direct action taken. It thus appears from this case record that the conclusions of the Bureau were correct that lease Cheyenne 075978 is not entitled to the extension or suspension benefits of the 1959 and 1960 acts.

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 appealed from is affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

### ESTATE OF LIZZIE ARTHUR

IA-1236

*Decided February 25, 1963*

#### Indian Lands: Descent and Distribution: Wills

Devises and bequests of restricted Indian property to a board of trustees of a foundation established to promote religious work among Indians are not invalid as an attempt to establish a private trust of restricted Indian property.

#### APPEAL FROM AN EXAMINER OF INHERITANCE

Johnson Little Wounded and Helen Little Wounded Bad Male have appealed from an order dated October 4, 1960 by an Examiner of Inheritance denying their petition for rehearing in the estate of Lizzie Arthur, deceased Fort Peck Allottee No. 1130.

Lizzie Arthur died March 14, 1956, at the age of 86 years. On April 25, 1960, the Examiner entered an order approving, in part, the decedent's will dated July 22, 1954, and codicil thereto dated January 19, 1955. Following hearings, the Examiner found that the will and codicil were both executed while the testatrix was of sound mind and disposing memory and not actuated by fraud, undue influence, coercion, or duress, and that these instruments expressed her true wishes as to the disposition of her estate. The Examiner concluded, however, that the Fourth paragraph of the will as well as the residuary clause<sup>1</sup> failed because they provided for bequests and devises of restricted Indian property to private trustees. The Examiner found that those bequests and devises were invalid because, "The Department does not recognize or give control of trust property to a private

<sup>1</sup>The fourth paragraph and the residuary clause read respectively:  
"FOURTH—I give, devise, and bequeath to—The Board of Trustees, composed of five members: J. D. Crawford; H. B. Phillips; O. C. Johnson; Kenneth Lehman; and Harry Walker, or their successors, of the Chester Arthur Memorial Foundation, the Mineral Rights only of the following allotments: FP #991, 1129, 1730, and of my own allotment. Bonuses, rentals, or any other income derived from such mineral rights to be used by the Trustees to establish and perpetuate the above named foundation for the purpose of promoting Presbyterian Indian work on the Fort Peck and Fort Belknap Reservations in Montana.

I give, devise, and bequeath all of the rest and residue of my estate, real, personal and mixed to: The Board of Trustees of the Chester Arthur Memorial Foundation named in the Fourth clause or devise."

February 25, 1963

trustee under the opinion of Attorney General Mitchell in 1929 \* \* \*".<sup>2</sup> Therefore, the Examiner concluded that as to the property covered by the Fourth paragraph and residuary clause the deceased died intestate and determined that Margaret Taken Alive and Lucy Sheppard, as first cousins twice removed, inherited the property covered by the provisions of the will in question.

Under the second paragraph of the will, as modified by the codicil, the devise of a  $\frac{1}{10}$ th share in certain other property of the decedent was approved for each of the appellants.

Appellants' petition for rehearing, which was denied and from which denial they appeal, gave but two reasons for requesting a rehearing. They are:

The original Last Will and Testament of the decedent Lizzie Arthur, did not mention Margaret Taken Alive and Lucy Sheppard, Little Eagle, South Dakota, and we feel that they should not be considered as heirs.

The relationship between the decedent and the heirs, Margaret Taken Alive and Lucy Sheppard, as mentioned in the probate findings, are not correct to our knowledge, and we feel that these two individuals should not share in the estate of Lizzie Arthur.

On appeal, appellants allege "that the Decree of Distribution is erroneous in that they [appellants] are of the same relationship to Lizzie Arthur, Deceased, and entitled to the same share as Margaret Taken Alive and Lucy Sheppard."

Nothing appears in the record which shows any attack by the parties on the validity of the Fourth paragraph and residuary clause of the decedent's will. Indeed, appellant Johnson Little Wounded has indicated his approval of them.<sup>3</sup> It is only because of the Ex-

<sup>2</sup>The following quotation from that opinion states its conclusion:

"I regard the control and supervision over Indian funds so committed to the Secretary of the Interior and the Department of the Interior as an imposition of a specific duty by Congress, and am of the opinion that it cannot lawfully be transferred by the Secretary of the Interior to agencies outside of his Department. The suggested creation of a trust, in which the custody and control of the trust funds would be in a private trustee, would be an abdication on the part of the Secretary of the control of restricted Indian funds which Congress has vested him. I believe that this would be improper in the absence of specific congressional authority to that end, and I do not find that such authority has been given by Congress by existing statutes." 36 Op. A. G. 98, 100

<sup>3</sup>At the hearing conducted July 12, 1957, in this matter he testified with respect to the will as follows:

Q. You were present when this will was read several months ago, weren't you?

A. Yes.

Q. Do you object to the approval of this will and codicil as a last will and testament of Lizzie?

A. I approve of the will, yes.

Q. According to what you told me before, the youngest daughter your father had would be Helen [the other appellant], wouldn't it?

A. Helen.

Q. Is there anything else you wish to say?

aminer's ruling that the Fourth paragraph and residuary clause of the will are invalid that the heirship determination appealed from was made. Whether a determination of heirs needs to be made must now be decided.

We conclude such a determination does not have to be made, since we find that the Attorney General's ruling is not applicable here. His opinion is to the effect that restricted Indian funds for which the Secretary of the Interior retains trustee's responsibility may not be placed in the hands of a private trustee for management for the benefit of the Indian owner. An altogether different situation is presented here. The decedent made a testamentary gift of some of her restricted property to establish and perpetuate a foundation for the purpose of promoting Presbyterian Indian work on the Fort Peck and Fort Belknap Reservations in Montana. There is nothing in the will which requires the conclusion that the decedent was attempting to provide that the restricted Indian character of the property would continue in the hands of the trustees of the foundation and so subject it to continued supervision by the Secretary of the Interior.<sup>4</sup> Furthermore, the fact that some or even all of the trustees of the Chester Arthur Memorial Foundation may be Indians would still not result in the retention of a Federal trust or restrictions on the devised and bequeathed property. The gift is not to the trustees personally but to them as representatives of a foundation, and Federal restrictions do not continue to exist on property which comes into the hands of a non-Indian.<sup>5</sup> Thus, as far as the validity of the devises and bequests is concerned, we see no difference between the gift to the Board of Trustees of the Chester Arthur Memorial Foundation and the bequests to the Cook Training School and the Minisda or Chelsea Montana Presbyterian Church, which the Examiner ruled failed as far as the trust estate was concerned only because there was insufficient Indian trust estate funds to pay them. Consequently, we find the Fourth paragraph and residuary clause of the decedent's will valid devises and bequests of the decedent's property.

Therefore pursuant to authority delegated by the Secretary of the Interior to the Solicitor, 210 Departmental Manual 2.2A(3)(a), the decision of the Examiner that the decedent died intestate with respect

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A. I want to say this. I had this in mind before I left. Lizzie Arthur, she made a will. Well, that will she made in July 22, 1954, and that will is supposed to be true all the way through, because other missions and the American Legion and Welfare, and all, that's supposed to be true.

Q. As far as you are concerned, the will is O.K.?

A. O.K. I like this will, but if it's carried on further till next year, well, I'll have an attorney too."

<sup>4</sup> Cf. *First National Bank of Holdenville, Okla. v. Ickes*, 154 F. 2d 851 (D. C. Cir., 1946).

<sup>5</sup> *Balless v. Paukune*, 344 U.S. 171 (1952).

to her property covered by the Fourth paragraph and the residuary clause of the will is reversed, and the case is remanded to the Examiner for further proceedings in accordance with this determination. As it is not necessary to pass upon the heirship question presented by the appellants, the heirship findings of the Examiner have not been considered and so they do not constitute a final determination of the heirs of Lizzie Arthur.

H. E. HYDEN,  
*Acting Solicitor.*

## STATE OF UTAH

A-29043

*Decided February 18, 1963\**

### Accretion—Constitutional Law—Public Lands: Riparian Rights—Reliction—State Lands

The rights acquired by the United States in the public domain are determined by the common law. Under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it is a littoral or riparian proprietor of public domain, has a vested right to future accretions and relictions. Because of the nature of the Federal system, and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its right to relictions or accretions.

### Surveys of Public Lands: Generally

Where the high-water mark of a navigable lake is not capable of being deduced from physical evidence, the lake shall be meandered along the water's edge as of the time of the survey.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Utah has appealed to the Secretary of the Interior from a decision of May 31, 1961, by the Director of the Bureau of Land Management regarding the Bureau's proposed survey of certain lands bordering Great Salt Lake, including lands in Davis and Box Elder Counties located between the water's edge and the surveyed uplands which are public lands of the United States. The proposal for survey followed requests for withdrawal of these lands by the Bureau of Reclamation and the Fish and Wildlife Service. Presumably, the lands were formerly a part of the bed of Great Salt Lake, but the waters of the lake have receded, exposing an undetermined amount of dry land or alluvion said to have formed by accretion and reliction to surveyed public lands in the area. A decision that this Department should survey these lands amounts to a claim that they are public lands of the United States. *Kirwan v. Murphy*, 189 U.S. 35 (1903).

\*Not in chronological order.

In the area here under consideration, meander lines outlining Great Salt Lake were established by the survey of the public lands in Davis and Box Elder Counties in 1855 and 1856. During the 40 years between the time of survey of the public land in this area and statehood, the high-water line of the lake receded, leaving an expanse of dry land between the meander line established in 1855 and 1856 and that water's edge. There also may be an additional expanse of dry land formed between the line which was the mean high-water mark of Great Salt Lake at the time of statehood and the present water line of the lake, as the waters of the lake apparently have continued to recede, exposing an undetermined quantity of land which presumably constituted part of the lake bed at statehood and which, as dry land, now fronts public lands of the United States.<sup>1</sup>

The question raised on this appeal is what portion, if any, of the lands which were formerly part of the bed of Great Salt Lake and which front public lands of the United States is subject to survey by this Department as public land of the United States because of its formation by accretion or reliction to the federally owned uplands. The State of Utah contends that the doctrines of accretion and reliction are not applicable to the bed of Great Salt Lake.

The Bureau's plan of survey first contemplated that the lakeward boundary of the lands included in the survey would be established along a contour representing the height of the lake on January 4, 1896, the date on which Utah became a State. The actual elevation of the lake on that date, as determined by the Geological Survey, was to limit the lakeward boundary of the lands claimed by the United States. This plan of survey was based upon the premise that the land now lying between the meander line established by surveys in 1855 and 1856 and the high-water mark at the time of statehood in 1896 is Federal land since it was exposed dry land adjoining public domain and not part of the lake bed in 1896 when Utah became a State. The plan assumed further that lands below the high-water mark at the time of statehood belong to the State as part of the bed of the lake.

<sup>1</sup> Available records show the annual fluctuation of Great Salt Lake from 1851 to 1950 and also the elevation of the lake surface on or near the first day of the month from 1875 through 1950.

A memorandum of October 8, 1958, of the Director to the Area Administrator, Area 2, Salt Lake City, discussing various aspects of surveying land bordering Great Salt Lake indicates that, since statehood, the lake has moved above and below statehood level probably fifteen times and that for approximately three-quarters of this period the level has been higher, though in 1958 it was lower than at statehood.

It appears also that the lake is nearly flat-bedded, that wide noncyclical fluctuations in level occur in addition to generally uniform yearly variations, and that these conditions make difficult the application of such concepts as "mean high waterline" as of a given date.



Thus, the limits of the survey were to be determined by the high-water mark at the time of statehood.

The Director of the Utah State Land Board objected to the proposal on the ground that the level of the lake was abnormally low at the date of statehood and his objection was treated as a protest and dismissed by decision of July 18, 1960, of the Area Administrator, Area 2. The State thereupon appealed to the Director who modified the Area Administrator's decision by holding, in effect, that the Bureau is entitled to survey as land of the United States all of the alluvial land located between the meander lines run in 1855 and 1856 and the high-water mark of Great Salt Lake, wherever it may be at that time in the future when the alluvial land fronting the public land is surveyed. The Director's decision disregarded the high-water mark at statehood (which the Area Administrator's decision had recognized as being the line below which the Federal Government made no claim) and held, in effect, that the Federal Government owns all alluvial or accreted land fronting upland of the United States, i.e., all land which is situated between the meander lines established in 1855-1856 and the high-water mark of the lake at its level on the date when the proposed survey is executed.

The Director's lengthy and carefully reasoned decision held that the United States is entitled to alluvion formed by accretion and reliction to uplands owned by the Federal Government, inasmuch as the rights acquired by the United States in the public domain are determined by common law; that as a littoral proprietor of the public domain, the United States has a vested right to future accretions and relictions; and that, because of the nature of the Federal system and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its right to future relictions or accretions where the United States owns the riparian estate to which they attach.

The Director then considered the problem of where to run the meander line marking the limits of land permanently above water and concluded that, in the circumstances, neither the mean high-water mark nor the line of vegetation would be proper but that the correct procedure would be to run the meander along the water's edge.

On appeal, the State contends that the doctrine of accretion and reliction is inapplicable between two sovereigns and that the Constitution did not intend to apply it as between the States and the Federal Government, that the Director erred in concluding that the vegetation test is not suitable to determine the appropriate meander line of

Great Salt Lake, and that the Submerged Lands Act (43 U.S.C., 1958 ed., sec. 1301 *et seq.*) was intended to confirm the States' sovereignty and title to lands which were within the high-water mark of the Great Salt Lake at the time Utah was admitted to statehood.

Although the Director's decision contains a complete and exhaustive discussion of the reasons underlying the conclusions it reaches, the appeal contents itself with three brief assertions of error unsupported by any attempt to demonstrate that its contentions are correct and the Director's incorrect.

I have carefully considered the Director's decision, which treats in detail the points raised by the State, and find that the conclusions it reaches are correct. In view of the fact that the State has not submitted any rebuttal, there is no need to repeat the Director's analysis of the problems. It is sufficient to state that for the reasons given by him, his decision is correct.

In addition, the position of the Director has been sustained in the case of *United States v. State of Washington*, 294 F. 2d 830 (9th Cir. 1961), *cert. den.*, 369 U.S. 817 (1962), decided after the date of the Director's decision. In that case the United States brought an action to quiet title to accretions to ocean uplands owned by the United States. Trust patent to the uplands had been issued to an Indian. The lower court quieted title of the United States to the accretions formed prior to November 11, 1889, when Washington became a State, but quieted title in the State to all accretions formed after that date. On appeal by the United States, the Court of Appeals reversed, holding that all the accretions belonged to the United States, subject to the rights of the Indian heirs. The court agreed with the contention of the United States that Federal law instead of State law controls as to whether title to accretions pass to the owner of the uplands when title to the uplands is in or derived from the Federal Government. The court stated that the Federal law follows the common law in determining the measure of title to lands retained by the United States and that at common law the person whose land is bounded by sea, lake, or river owns any additions thereto resulting from imperceptible accretion.

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 affirmed.

EDWARD W. FISHER,  
*Deputy Solicitor.*

**PUBLIC LANDS**    2 *Accretion*  
                       3 *Boundaries and Surveys*  
                       6 *Navigable and Nonnavigable Waters*

The rights acquired by the United States in the public domain are determined by the common law.

Under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it is a littoral or riparian proprietor of public domain, has a vested right to future accretions and relictions.

Because of the nature of the Federal system, and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its right to relictions or accretions.

Where the high water mark of a navigable lake is not capable of being deduced from physical evidence, the lake shall be meandered along the water's edge as of the time of the survey.

*Utah State Land Board*

(May 31, 1961)

On December 7, 1959, Mr. Frank J. Allen, Director of the Utah State Land Board, was informed that this Bureau intended to survey Federal lands bordering Great Salt Lake, and that the boundary of these lands would be established along a contour representing the height of the lake on January 4, 1896, the date on which Utah was admitted into the Union. Mr. Allen was further informed that, from a correlation of a reading of the United States Geological Survey gauge at Garfield Landing on January 1, 1896, with the gauge now at Lake Point, it had been determined that on the day of statehood, the surface of the lake stood at 4200.8 feet above sea level at Lake Point, and, because of variations occasioned by the earth's curvature, at certain other levels at other locations along the shore of the lake.<sup>2</sup>

Mr. Allen objected to the Bureau's proposed action, and in a letter dated December 16, 1959, he wrote:

We assume the purpose of the survey is to establish a line which the State and the United States can agree is the limit of state ownership. We cannot agree that the water line on January 4th limited the lakebed on that date. We contend that lakebed includes that land which is denuded of the vegetation normal for the area by usual or frequent or recent inundation.

On January 4, 1896, Great Salt Lake's level was at a thirty year low. Its bed, on that date, must have included some land which had been, until shortly before that date, inundated. We believe the water line as it existed at high

<sup>2</sup>The latitude of the gauge at Lake Point is 40°43'04". At whatever level the lake is at the gauge, its level will be higher by 0.00639 feet per minute for points south of Lake Point, and lower by 0.00639 feet per minute for points north of Lake Point.

water in 1895 would include all the land which was lakebed on January 4, 1896, and would be a more realistic line to survey. The water data is complete enough so that the 1895 water line would be as easy to survey as the actual water line on January 4.

This letter was treated as a protest against the proposed survey, and was dismissed by the Area Administrator in a decision dated July 18, 1960. In his decision, the Area Administrator stated that the Bureau of Land Management has the responsibility for determining what are public lands subject to survey, and that no reason had been presented warranting a departure from the decision to survey as public lands those areas above the level of the lake on the date of statehood.

Mr. Allen has appealed from the Area Administrator's decision, and contends that when Utah was admitted into the Union, it obtained title to the bed of Great Salt Lake up to the high water mark, and that the Bureau's proposal to establish the boundary of the lake bed at the water level of January 4, 1896, when the lake was unusually low, is an unlawful attempt to limit Utah's ownership of Great Salt Lake to the low water mark.

Thus, the Area Administrator's decision and the appeal are concerned with the proper method of determining the level of Great Salt Lake on the date of statehood, with both the Area Administrator and the Utah State Land Board proceeding upon the unstated premise that the lands covered by the water of the lake on that date may not now be surveyed by the Government as public domain. But the validity of that premise must first be ascertained, before the question of the level of the lake can assume any significance.

It was early established that the State is the owner of the lands under the navigable waters within its boundaries. In *Martin v. Waddell*, 41 U.S. 367, 410, 416 (1842), the Supreme Court stated:

\* \* \* For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

\* \* \* And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.

States admitted into the Union after the adoption of the Constitution have the same rights as the original States in the lands underlying navigable waters, subject to the rights surrendered by the Con-

stitution to the United States. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224, 228 (1845).<sup>3</sup>

As a seemingly logical extension of this principle, various Attorneys General of the State of Utah have held, in opinions rendered in their official capacities, that the title to the beds of navigable waters which inured to the State as an incident of sovereignty upon the attainment of statehood cannot be affected by the fact that such beds may later have ceased to be submerged. These opinions view the State's title to lake beds as being forever fixed by the physical conditions existing on the date of statehood, and conclude that land subsequently appearing either as a result of accretion or reliction is owned by the State, to be disposed of by the proper agency as the Legislature of the State may determine and direct. *Biennial Report of the Attorney General to the Governor of the State of Utah, 1932-34*, pp. 97, 240; *ibid.*, 1954-56, pp. 167, 170. Cf. *United States v. John Stanley Castagno*, A-23668 (May 10, 1944).

If this view is correct, and if we assume Great Salt Lake to be a navigable body of water,<sup>4</sup> then the Area Administrator's postulate that the public land surveys may not be extended today over areas covered by the lake in 1896 is valid.

A determination of the correctness of this position requires an examination of those decisions where the issue is whether the Federal government, or the State, has title to lands which, either by reliction or accretion, have ceased to be located on the beds of navigable bodies of water, and have become attached to, and a part of, the federally owned upland bordering those bodies of water. Although no Supreme

<sup>3</sup> Although *Martin v. Waddell* and *Pollard's Lessee v. Hagan* relate to tide-water, they enunciate principles which are equally applicable to all navigable waters. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

<sup>4</sup> Whether the lake is navigable need not here be determined. The Supreme Court of Utah has taken judicial notice of the fact that the lake is navigable. *Robinson v. Thomas*, 286 Pac. 625 (1930); *Deseret Livestock Co. v. State*, 171 P. 2d 401 (1946). However, "since the effect upon the title to \* \* \* [the beds of navigable waters] is the result of federal action in admitting a State to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the laws and usages recognized and applied in the federal courts \* \* \*." *United States v. Oregon*, 295 U.S. 1, 14 (1935). It appears that no Federal court has ever passed upon the question of the navigability of the lake. It is settled Federal law that a water body is only navigable if used or usable "in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 86 (1922); *Navigable Waters in Alaska*, M-36596 (March 15, 1960). The Utah Supreme Court has stated that navigability should not be determined without regard to practical considerations: "Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation." *Monroe v. State*, 175 P. 2d 759, 761 (1946).

Court decision can be found dealing precisely with a claim by the Federal government to such increments, there are a number of decisions where the question is whether a patentee received title to lands which, before patent, accreted to the public domain described in the patent. A determination that a patent to riparian land conveyed the accretions thereto is necessarily a determination that such accretions belonged to the United States, for obviously, the United States can convey no more than it owns. *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 18 (1935).

Ordinarily, patents issue only to public lands which have been surveyed. When a navigable body of water is encountered during the course of a survey of the public domain, it is segregated from the Federal lands by a meander line. Thus, the question whether a patent to public lands conveys accretions usually appears before the Court as a question whether a patentee acquires title to the land lying between the meander line as it appears on the plat of survey, and the body of water as it actually exists.

In *Railroad Company v. Scharmeir*, 74 U.S. 272, 286 (1868), the Supreme Court said:

Meander-lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary.

This principle, that the water line, and not the meander line, is the boundary of the public domain included within a patent, was followed and extended in *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890), where the Supreme Court was required to construe the effect of a patent to a tract of land which was depicted on the plat of survey as bordering on the Missouri River. After the land was surveyed, approximately 40 acres of new land were formed by accretion between the meander line as it appeared on the plat of survey, and the actual bank of the river. The Court held that the water line, not the meander line, was the true boundary of the lot, and that the government patent had conveyed to the patentee the title to all accretion which had formed up to the date of the patent. The Court repeated with approval the statement of the lower court from whose decision the appeal had been taken, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and

a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed line. It should be observed that the land was in Iowa, which had been admitted into the Union on December 28, 1846 (9 Stat. 117); that the original survey had been conducted in 1851, and that the accretions had been formed between 1853 and 1870. Thus, the State's ownership of the bed of the river in 1846 did not preclude the United States from subsequently acquiring title to lands formed therefrom by the process of accretion.

There are numerous decisions of the Department of the Interior which, on the authority of the *Schurmeir* and *Jefferis* decisions, hold that grants by the Government of lands depicted on plats of survey as adjoining navigable waters are not limited to the meander line, but extend at least to the water line: *James H. May*, 3 L.D. 200 (1884); *James Hemphill*, 6 L.D. 555 (1888); *John W. Moore*, 13 L.D. 64 (1891); *Watson H. Brown*, 20 L.D. 315 (1895); *Harvey M. La Follette*, 26 L.D. 453 (1898); *R. M. Snyder*, 27 L.D. 82 (1898); *John J. Serry*, 27 L.D. 330 (1898); *French-Glenn Live Stock Company v. Marshall*, 28 L.D. 444 (1899); *Alaska United Gold Mining Company v. Cincinnati-Alaska Mining Company*, 45 L.D. 330 (1916); *Clayton Phebus*, 48 L.D. 128 (1921); *Arthur Savard*, 50 L.D. 381 (1924).<sup>5</sup>

*Harvey M. La Follette, supra*, contains a particularly thorough review of the cases, and concludes (p. 473) :

The decisions of the supreme court cited herein cover every material point involved in this case and the rulings are so clear and conclusive as to leave no doubt of the status of this land. It is clearly established that lines run along permanent bodies of water are run as meander lines and that the water itself, and not such meander line, constitutes the true boundary of the land to be sold, and that all accretion after the date of the survey upon which the sale is made and prior to the date of the patent passes under such patent, and that the plat of public lands when referred to in a patent becomes a part of such instrument and is to be considered in determining what land is sold.

Obviously, the Area Administrator's assumption that the State has a fixed, unchangeable estate in the bed of a navigable body of water is

<sup>5</sup> There are a number of exceptions to this rule. Thus, if the meander line was run where no lake or stream calling for it exists, or where it is established so far from the actual shore line as to indicate fraud or mistake, the meander line is held to be the true boundary line. *Producers Oil Co. v. Hansen*, 238 U.S. 325, 339 (1915). Or if, after survey, a large body of land has been formed by accretion between the meander line and the water line, then a patent to a meandered lot will be construed to convey only lands within the meander line. *R. M. Stricker*, 50 L.D. 357 (1924). But these exceptions are of no consequence to this discussion, for whereas the cases following the *Schurmeir* case hold that accretions are public land which do pass to a grantee, the cases following the exceptions hold either that there were no accretions, because there was no riparian estate, or that the accretions are public land which do not pass to a grantee. In any event, the meander line is not treated as the boundary of the *public land*, although in the exceptions noted, it is treated as the boundary of a patent.

inconsistent with the *Jefferis* decision, and the Departmental decisions which have devolved from it, holding that the United States, as owner of the upland, has a shifting freehold, subject to enlargement or diminution, depending upon the actual location of the water line. A review of the cases reveals that the principle embodied in the Area Administrator's decision never obtained at common law, which viewed the extent of the upland owner's estate, and the extent of the Crown's estate, as not forever fixed by conditions existing at the time of their creation, but rather, as subject to change by the action of the elements: forces over which, at an early date, King Canute demonstrated the Crown had no control. Where these changes resulted in gradual accumulations to the upland, the owner of the upland had a right to such accumulations, even as against the Crown. Cf. *Stevens v. Arnold*, 262 U.S. 266, 270 (1923). Thus, in *Rex v. Lord Yarborough*, 1 Dow and Clarke 178, 6 Eng. Rep. 491 (1828), after a thorough consideration of the question, it was held that accreted or relicted lands become the property of the upland owner, even though they had been the *fundus maris*, and as such, the property of the king. Although this decision has not the controlling authority it would have had it been made before the Revolution yet, being a judicial decision of the highest authority in the British Empire, it is entitled to the greatest consideration on a question of pure common law, and has, in fact, often been cited with approval by the Supreme Court. *Hardin v. Jordan*, 140 U.S. 371, 392 (1891); *County of St. Clair v. Lovington*, 90 U.S. 46, 69 (1874); *Jefferis v. East Omaha Land Co.*, *supra*, p. 192; *Shively v. Bowlby*, 152 U.S. 1, 35 (1894). This last named case has a particularly illuminating discussion of the problem:

The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water. [Citations omitted; italics supplied.]

Again in *St. Clair County v. Lovington* (1874) 23 Wall. 46, the right of a riparian proprietor in St. Louis, which was upheld by this court, affirming the judgment of the Supreme Court of Illinois in 64 Illinois 56, and which Mr. Justice Swayne, in delivering the opinion, spoke of as resting in the law of nature, was the right to alluvion or increase of the upland by gradual and imperceptible degrees. And, as if to prevent any possible inference that the decision might affect the title in the soil under the water, the learned justice after quoting the opinion in *Jones v. Soulard*, above cited, expressly reserved the

<sup>6</sup>The States have title to the beds of navigable waters by virtue of their succession to the interests of the Crown, and the States' title to such beds is the same as was the Crown's. *Hardin v. Jordan*, 140 U.S. 371, 382 (1891).



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expression of any opinion upon the question whether the limit of the land was low water or the middle thread of the river \* \* \*.

Thus, under the common law, the State's ownership of the beds of navigable waters does not defeat the right of an upland owner to accretions and relictions.

However, a proponent of State ownership of accreted or relicted lands might argue that the common law as it is understood by the Supreme Court does not prevail in all states. Conceivably, he might be able to show that the Supreme Court decisions holding that the United States owns to the water line, however that line may shift as a result of erosion, accretion, or reliction, merely applied the common law rules in those States where the common law is followed, and that the results might be different in those States where the common law has been changed or abolished. In support of his argument he would be able to cite Departmental holdings that the United States does not acquire title to relictions or accretions where the State has, by statute, directed the disposition of such lands in some manner other than that provided for by the common law.<sup>7</sup> But, balancing this argument, would be the fact that the Department just as often, and in the same situations, has held that State laws do not govern title to accretions to public lands.

The task here is to study the reasoning behind, and choose between, the two lines of decisions. Before doing this, however, one Supreme Court decision having no real bearing on the question of whether State or Federal law governs title to relictions to public domain, should be discussed, if only to be distinguished. This is *Hardin v. Jordan*, 140 U.S. 371 (1891), which deals with the ownership of the beds of meandered, *nonnavigable* bodies of water, *after the adjoining uplands have been patented*.

Unlike the beds of navigable bodies of water, the soils underlying nonnavigable bodies of water did not pass to a State upon its admission into the Union, but title to them remained in the United States. *Hardin v. Shedd*, 190 U.S. 508, 519 (1903).

For the most part, nonnavigable bodies of water are not large, and are thus not meandered. When patent issues, the beds of streams or ponds pass as a part of the legal subdivisions described in the patent. But sometimes bodies of water, although nonnavigable, are of considerable size, and these are meandered, the lands bordering the water

<sup>7</sup> See also, *Manual of Instruction for the Survey of the Public Lands of the United States*, Washington, 1947, (hereafter cited as *Survey Manual*), p. 370:

"If the original subdivisions were disposed of prior to the formation of the accretion, or if the accretions that are formed along navigable waters are reserved by State law, the Government has no jurisdiction."

being divided into lots on the plat of survey, and numbered. In *Hardin v. Jordan*, *supra*, it was held that where a lot bordering on a meandered, nonnavigable body of water is patented by the Federal Government, and there is nothing in the patent or in other circumstances to indicate that the Government intended to reserve to itself title to the land underlying the adjacent waters, then the United States must be deemed to have parted with that part of the water bed which can be allocated to the tract, and whether title to the underwater land vests in the patentee of the upland, or in the State, is a matter of State law.

That the United States could, if it wished, reserve to itself title to the beds of nonnavigable waters beyond the meander line, is made clear in *Mitchell v. Smale*, 140 U.S. 406, 413, 414 (1891), where it is stated:

\* \* \* Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. \* \* \*

Whether the United States retained title to the bed of a nonnavigable lake was the issue in *United States v. Oregon*, 295 U.S. 1 (1935). In 1908, by Executive order, a meandered nonnavigable lake in Oregon was set aside as a bird reserve. The United States had parted with title to the uplands bordering on the meander line, in part by patents to private individuals, and in part by statutory grant to the State of school and indemnity lands in the act admitting Oregon to statehood. The State of Oregon, in a 1921 statute, claimed title to the beds of meandered lakes, and contended that upon the grant by the United States of uplands bordering the lake, title to the adjacent lake beds vested in the State by operation of the statute.

The court emphatically rejected this claim, stating (p. 27):

The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control. \* \* \*

Thus, it is clear that *Hardin v. Jordan*, *supra*, does not hold that State law operates to divest the United States of property, but only holds that, if the United States has parted with its full title in favor of a patentee, then State law can determine, and limit, the estate acquired by the patentee. And this is no more than was said in the very early case of *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839):

\* \* \* We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the

title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

This decision disposed of, consideration may now be given to those Departmental decisions involving the applicability of State law to the question of ownership of accretions and relictions to public domain bordering on navigable bodies of water. This review may well begin with *Etoile P. Hatcher and W. M. Palmer*, 49 L.D. 452 (1923), where the question was whether the United States owned certain lands along the margin of Cross Lake, in Louisiana, these lands having been uncovered by the recession of the waters of the lake after the date of the admission of Louisiana into the Union. Although it does not appear from the facts as reported in the decision that the United States was the owner of any upland, the records of this office reveal that the relictions were in fact attached to federally owned land. The Department declined to assert title to the uncovered lands, and stated (p. 459):

The question as to how far the title of a riparian owner extends, being one of State law, is best and authoritatively determined by decisions of its highest court. *St. Louis v. Rutz* (138 U.S. 226, 1891); *Packer v. Bird* (137 U.S. 661, 1891).

However, neither of the cases cited by the Department was authority for its conclusion. *St. Louis v. Rutz*, 138 U.S. 226 (1891) is concerned only with title to alluvial additions to land in private ownership, these additions occurring after the issuance of patent.<sup>8</sup> In such a situation, that State law governs title to the accretions cannot be questioned.

Nor does the second Supreme Court decision cited in the *Hatcher* case, *Packer v. Bird*, 137 U.S. 661 (1891), involve the question of a patentee's title to relictions, but only the question of his title to the bed of a navigable river, that bed being under water at the time of the litigation. The Court merely held, consistent with decisions from *Martin v. Waddell*, *supra*, on, that, the patentee owning to the water's edge, whatever incidents or rights beyond the water's edge which might attach to the ownership of the riparian property will be determined by the law of the State in which the land lies.

<sup>8</sup> Furthermore, *St. Louis v. Rutz*, although it deals with alluvial formations, does not involve the legal doctrine of accretion. The Court held that under the law of Illinois, a riparian owner of lands bordering on the Mississippi River has title to the bed of the river to the middle of the channel. There was thus no occasion for the doctrine of accretion to come into play, for if the bed of the river belongs to the riparian owner, then lands forming on that bed belong to him not by virtue of the doctrine of accretion, but simply because, having before owned the bed, he perforce owns any lands appearing on the bed. Cf. *Nephi Irrigation Co. v. Bailey*, 181 P. 2d 215 (Utah) (1947).

The citation to *Packer v. Bird supra*, in a case involving title to accretions and relictions, illustrates that some of the difficulties in this field are semantic. The phrase "riparian rights" is used—and properly—to designate rights in the beds of navigable waters, and rights in the water itself, as well as the right to relictions and accretions. Thus, a decision may contain statements about riparian rights based upon a consideration of the principles governing title to *beds* of navigable waters and, because of the broad language in which they are couched, the statements may in subsequent decisions be incorrectly applied to factual situations involving accretions and relictions. Much of the uncertainty in Departmental decisions with respect to title to accreted and relicited lands is attributable to this confusion of principles.

In any event, it is clear that the holding of the *Hatcher case supra*, that State law governs title to accretions or relictions, is based on Supreme Court decisions not involving the question of title to accretions and relictions to the public domain.

This issue was again involved, and an opposite conclusion reached, in *Towl v. Kelly and Blankenship*, 54 I.D. 455 (1934). Several lots bordering on the Nebraska side of the Missouri River had been surveyed in 1857, and were still in existence in 1867, when Nebraska was admitted into the Union. Sometime after 1867, the lots, which had never been patented by the Government, were washed away by the action of the river, but later they reappeared, together with yet more land. The lines of the original survey were then established over the reappeared lots by the Government, which also extended the survey to the additional land in front of those lots, on the theory that the area had been added by accretion to the undisposed of Government lots.

There was, however, a decision of the Nebraska Supreme Court, *Yearsley v. Gipple*, 175 N.W. 641, holding that if nonriparian land becomes riparian by the imperceptible erosion of the intervening land and subsequently the water recedes and land is formed by accretion extending over the original boundaries of the intervening tract, such accreted land becomes, nevertheless, a part of the remote tract.

The Department stated that—

\* \* \* because the land in dispute lies in Nebraska it is necessary first to dispose of the *Yearsley case, supra*.

In the case of *Widdecombe v. Rosemiller* (118 Fed. 295), it was held that land reserved by the Government, until disposed of by it, was governed by the common law with respect to riparian rights and the effect of erosion and submergence, and not by the law of the State. The court there declined to follow the rules established by the Missouri courts, relating to the disappearance and reappearance of an island within the area of the original island located in a navigable river. It was conceded that the State had the right to establish and maintain

its own rules of property with respect to land ceded to it or its citizens, but it was denied that such local rules controlled the question while the land was the property of the Government, it then being held subject to the recognized laws and rules of the United States and, in the absence of express legislation by Congress, subject to common law rules. \* \* \*

Accordingly, in the *Towl* case, the Department applied the common law rule, and not the law of the State, to determine the question of title to the reappeared lands.

The next case to consider this point was *Myrtle White*, 56 I.D. 300 (1938), where the status of certain lands which had accreted to War Department lands along the Missouri River in North Dakota was in issue. The decision here was noncommittal: the Department pointed out that under the laws of North Dakota, a riparian owner obtains title to accreted lands, and concluded, accordingly, that whether title to accretions be governed by the common law, or the laws of the State, the result would be the same: the accreted lands would come under the jurisdiction of the War Department and, like the original uplands, be reserved from entry under the public land laws.

Four years later, in *Rex Baker*, 58 I.D. 242 (1942), the Department was confronted with a factual situation identical with that of the *Towl* case, except that the lands were along the Mississippi River, in Arkansas. The Department this time commenced with the proposition that title to the beds of navigable rivers is in the States in which the rivers are situated, or, if State law so provides, in the owners of lands bordering upon such rivers. The Department then quoted the following language from *Arkansas v. Tennessee*, 246 U.S. 158, 175, 176 (1918):

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. \* \* \*

From this, the Department deduced:

It follows that when the land in question here was eroded in the progress of the Mississippi River westward and became a part of the bed of that river, the title thereto became vested in the State or States within whose boundaries the land was situated, and upon the reappearance of the land, the question of title thereto is governed by the law of the State in which the land reappeared. \* \* \* [I]f the reappeared land is owned by the United States, it owns it by operation of the State law.

For this reason, the Department expressly refused to follow the *Towl* case in applying the common law, but instead held that the law of the State governed the factual situation presented.

However, the language from *Arkansas v. Tennessee, supra*, relied upon to reach the conclusion that State law governed the disposition of lands emerging on either side of an interstate boundary stream was a statement of the law governing lands emerging as a result of an *avulsive* change. As the Supreme Court specifically pointed out in the same decision, the law with respect to lands uncovered by avulsion is different from the law with respect to lands created by accretion, or left bare by reliction:

\* \* \* [W]here the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. *Arkansas v. Tennessee, supra*, 175.

It was in this context that the Court stated that how the land emerging on either side of the boundary shall be disposed of is a matter to be determined according to the law of each State. What is really involved in *Arkansas v. Tennessee* is title to the beds of navigable waters, not title to the accretions to the upland, and the decision directs how title to such beds, avulsively uncovered, shall be determined. The case is inapplicable to questions involving title to accretions and relictions. Furthermore, the "public . . . ownership" referred to in the portion of *Arkansas v. Tennessee* quoted in the *Baker* decision is the ownership of the State, not the Federal government; the right or title of the United States to any lands was not before the Court. *Arkansas v. Tennessee*, 310 U.S. 563, 571, 572 (1940).

Thus, both because it is not concerned with the question of title to accretions and relictions, and because it is limited to a consideration of the effect of an avulsive change on other than federally owned lands, *Arkansas v. Tennessee* is not authority for the holding of the *Baker* decision.

In addition, the decision in the *Baker* case referred to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and quoted from it this language:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of

common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

The Department stated that the doctrine of *Erie Railroad Co. v. Tompkins* was a further reason for holding that State law is controlling in matters of title to real property.

However, subsequent decisions of the Supreme Court have made it clear that *Erie Railroad Company v. Tompkins* requires the application of State law only where there is involved a cause of action given by State law, and the disputants are in a Federal court because of their diversity of citizenship. As was said in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) :

\* \* \* In essence, the intent of that decision [*Erie Railroad Company v. Tompkins*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.

Accordingly, in the next decision involving the issue of whether State or Federal law governs title to land between a meander line on a plat of survey and the waters of a navigable stream, the Department pointed out that since this was a Federal question, it did not come within the ambit of the *Erie* decision, and held accordingly that Federal, and not State, law governed the question of title. *Madison v. Basart*, 59 I.D. 415 (1947).<sup>9</sup> This case did not expressly overrule the *Rea Baker* decision, nor did it discuss the first reason advanced in that decision for concluding that State law governed.

In *Edwin J. Keyser*, 61 I.D. 327 (1954), the Department adopted the same approach used in the *Myrtle White* case, and held, without protracted discussion, that both under the general common law, and the law in force in the State of Montana, title to land accreting to public land bordering on the Missouri River in the State of Montana vested in the United States.

The most recent case on the subject is *Rayford W. Winters, A-28125* (January 15, 1960). It appears that the lands involved in this case

<sup>9</sup> Whether an original patent conveys (and hence, whether the Federal Government owns) lands, including accretions, between a meander line, as it appears on a plat of survey, and the actual margin of a body of water, as it exists on the ground, is a Federal question. *Producers Oil Company v. Hansen*, 238 U.S. 325, 338 (1915); *French-Glenn Live Stock Company v. Springer*, 185 U.S. 47, 54 (1902). Federal questions are not decided by State law, but are decided according to the general rules recognized and applied in the Federal courts. *United States v. Holt Bank*, 270 U.S. 49, 55 (1926).

were uncovered artificially as the result of drainage operations, and the Department correctly held that "such operations do not result in the transfer of title to the now dry land from the State to the United States, even though the United States may still retain land bordering on the lake as it existed in 1812." Cf. *United States v. Holt State Bank et al.*, 270 U.S. 49 (1926).

Having decided that the lands remained in State ownership, the Department went on:

Under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them (*Arkansas v. Tennessee*, 246 U.S. 158, 175, 176 (1918)), we must look to the laws of Louisiana to determine the riparian rights of those whose lands border upon a navigable lake. \* \* \*

After a consideration of a decision of the Louisiana Supreme Court, *State v. Aucoin*, 20 So. 2d 136 (1944), the Department concluded that under Louisiana law, the State retained title to lands which, covered by navigable waters on the date of the admission of Louisiana into the Union, had since become exposed. If, as seems likely, the drainage of the lake effected a rapid recession of the waters, then the *Winters* case is not inconsistent with the general principle that relict lands belong to the owner of the upland, for, by definition, sudden recessions of water do not create relictions and accretions, and thus do not, under the common law, work a change in title: ownership of the waterbed after the sudden change remains the same as before. *Arkansas v. Tennessee, supra; Rex v. Lord Yarborough, supra*. In this situation, resort to State law was proper, not to determine the title of the United States as upland owner to relictions (for there was no gradual recession of the water, and hence no reliction), but to determine the location of title to a State-owned lake bed suddenly left dry by the drainage of the lake. Thus, the *Winters* case, like *Arkansas v. Tennessee*, cited in the *Winters* case, and discussed previously, is not authority for the proposition that State law governs title to relictions and accretions to the public domain.

If the conflict between the two lines of Departmental decisions—one line holding that a federally interpreted common law governs title to accretions and relictions to public domain, and the other line holding that State laws govern title to such increments—if this conflict might be resolved simply on the basis of which line has the greater weight of authority behind it, then clearly, those decisions in accord with the Supreme Court's holding that under the common law the public domain extends to the high water mark, however that may shift, would prevail over those decisions holding that under State law the



State never loses title to lands covered by navigable waters on the date of statehood.<sup>10</sup> Such, indeed, is our conclusion, and no more would be said save that, except to assert that it is a Federal question, the Supreme Court has never given a rationale for its consistent application of the common law, and some there are who ask why title to lands formed after the date of statehood along navigable waters should not be controlled by the laws of the government having jurisdiction over the water beds on which the new lands were formed.

The answer to this rests in a consideration of what interests the United States possessed in the public domain before it became incorporated within a State, and what powers over the public domain were acquired by the States created out of it.

Great Salt Lake is in an area once belonging to the Republic of Mexico. This territory, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the Government, in its diplomatic relations, had seen fit to accept relating to the rights of the people then inhabiting the territory. After acquiring the territory, the United States Government was the only one which could impose laws upon it, and its sovereignty over the territory was complete.

No State of the Union had any such right of sovereignty over it, nor did any other country or government have any such right. *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890).

On September 9, 1850, Congress passed an Act establishing a territorial government for Utah (9 Stat. 453). By that action, the common law was extended over the territory to the exclusion of all other law. *Pollard's Lessee v. Hagan*, *supra*, 227; *Church of Jesus Christ of Latter-Day Saints v. United States*, *supra*, 62.

With respect to the lands owned by it, the United States, within the Territory of Utah, had a status at least equal to that of any proprietor of private land. *Camfield v. United States*, 167 U.S. 518,

<sup>10</sup> Congress also has recognized that physical changes can cause a State to lose title to lands which were under navigable waters at the date of statehood. Section 3 of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C., 1953 ed., sec. 1311(a), states that "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, \* \* \* be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States \* \* \*."

In section 2 of the Act (43 U.S.C., 1958 ed., sec. 1301(a)(1)) the "lands beneath navigable waters," ownership of which is declared to be in the State, are defined as "all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction \* \* \*." (Italic supplied.)

525 (1897); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Alabama v. Texas*, 347 U.S. 272 (1954). Accordingly, those incidents of title which at common law pertained to land in private ownership, pertained also to land in Federal ownership.

At common law it is well settled that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold by the same boundary, including the accumulated soil. *New Orleans v. The United States*, 35 U.S. 662, 717 (1836). And Blackstone, whose *Commentaries* have been characterized by the Supreme Court as being the most satisfactory exposition of the common law of England,<sup>21</sup> wrote:

And as to the lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex* (the law takes not cognizance of small things): and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. \* \* \* Book II, Chapter 16, § 351.

The right of a riparian or littoral landowner to future accretions is a vested right; it is an inherent and essential attribute of the original property. *County of St. Clair v. Lovington*, *supra*. Therefore, when the United States acquired the public domain, it acquired also, under the common law, as an incident of its ownership of riparian or littoral property, the right to all lands which might in the future, by alluvion or dereliction, accrete to the public domain.

Rights of property created by the common law cannot be taken away without due process, although the law itself, of course, may be changed by the will of the legislature. *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912). But with respect to the public lands, what agency is it which can, by due process, take away the Federal government's vested right to accretions and relictions, and what legislature is it which can change the law conferring that right upon the United States?

The State of Utah, when it was admitted into the Union on January 4, 1896, did not acquire control over the public lands within the State. *Pollard's Lessee v. Hagan*, *supra*. The people of Utah specifically disclaimed all right and title to the unappropriated public lands lying within its boundaries, and agreed that "until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States

<sup>21</sup> *Schick v. United States*, 195 U.S. 65, 69 (1904).

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\* \* \*," 28 Stat. 107. Even without this disclaimer, the State would still have no control over the public lands. Article IV, section 3, clause 2, of the Constitution states:

The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States \* \* \*.

The power over the public lands entrusted to Congress is without limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise. *Gibson v. Chouteau*, 80 U.S. 92, 99 (1871). Repeated decisions of the Supreme Court have rested on the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be recognized. In *Utah Power and Light Company v. United States*, 243 U.S. 389, 404 (1917), the Court said:

\* \* \* True, for many purposes a State has Civil and Criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as livestock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them. [Citations omitted.] From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. [Citations omitted.] And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in *Camfield v. United States*, *supra*, "would place the public domain of the United States completely at the mercy of state legislation."

Although the Constitution does not define the "territory or other property" which Congress alone has power to dispose of, it is clear that insofar as this phrase refers to land, it includes that packet of

rights which, under the common law as it was known to the framers of the Constitution, was inseparable from ownership of real property. It has been said that the language of the Constitution could not be understood without reference to the common law: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898); *Schick v. United States*, 195 U.S. 65, 69 (1904). Since a riparian landowner's right to future accretions and relictions was, at common law, a vested right, it follows that the word "property" as used in Article IV, section 3, clause 2 of the Constitution includes the rights to such increases.

Thus, Congress alone has plenary power to dispose of accretions and relictions to the public domain, and no State can appropriate unto itself, or vest in others, any rights in such property. *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Oregon, supra*, 295 U.S. 27 (1935).<sup>12</sup>

It is therefore concluded that the rights acquired by the United States in the public domain are determined by the common law; that under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it was a riparian or littoral proprietor, was vested with the right to future accretions and relictions, and that, because of the nature of the Federal system, and by virtue of the express provisions of the Constitution, no State can, by legislation or otherwise, deprive the United States of title to accretions or relictions, where the United States owns the riparian estate to which they attach.

Although this conclusion obviates the necessity of considering the law of the State of Utah on the subject, the decisions and statutes of that State have nevertheless been reviewed, and it appears that, the opinions of the Attorneys General of that State to the contrary notwithstanding, it is not the settled law of Utah that accretions and

<sup>12</sup> Cf. the language of the Supreme Court in *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690, 702 (1899):

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream."

\* \* \* \* \*

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of flowing waters for such purposes as it deems wise. \* \* \*"

"Although this power of changing the common law rule as to streams within its dominions undoubtedly belongs to each State, yet \* \* \* limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters \* \* \*"

relictions belong to the State. A digression to consider this may be of interest.

This question first came before the Utah courts in 1893, in *Poynter v. Chipman*, 32 Pac. 690 (1893). The plaintiff was the successor in interest of an individual who had received a patent for lands bordering on Utah Lake; the defendant had constructed in the waters of the lake several houses used by the public for bathing and social purposes. After a while, the lake receded, leaving the defendant's houses on dry land, between the meander line of the land conveyed to the plaintiff, and the waters of the lake. The plaintiff brought an action of ejectment to recover possession of this land. The jury brought in a verdict for the plaintiff. On appeal, the Court stated,

We think the [trial] court made no mistake in charging the jury that if the plaintiff owned the land to the meander line along the old shore of the lake, by patent from the United States, he would be entitled to recover all the dry land made by the recession of the water between such meander line and the water's edge. \* \* \*

Accordingly, the Court affirmed the judgment of the lower court.

In 1894, an action to quiet title involving an almost identical factual situation came before the Court which, after a review of the authorities, concluded that "the water's edge, and not the meander line itself, is the real boundary of the land, and that the owner of the lands so bounded has a right to follow the water as it recedes, and that he is entitled to all lands which may be added by recession or accretion." *Knudsen v. Omanson*, 37 Pac. 250 (1894). Again, the judgment of the lower court, quieting title to the relicted lands in the owner of the adjoining uplands, was affirmed.

Both *Poynter v. Chipman* and *Knudsen v. Omanson* were decided by territorial courts. However, even after Utah was admitted into the Union, the Supreme Court of the State continued to follow these cases. Thus, in *Hinckley v. Peay*, 60 Pac. 1012 (1900), which again involved Utah Lake, the patentee of land bordering on the lake was held to have title to all lands formed by accretion or reliction below the patented lands, to the water's edge.

In 1927 was decided *State v. Rolio*, 262 Pac. 987. This was an action to quiet title to lands which, although dry and cultivable in 1927, had been part of the bed of Utah Lake at the date of statehood. The State alleged that it had become vested, on the date of statehood, with full title to the beds of navigable waters. The State also alleged that the defendant claimed, by virtue of being a riparian landowner, to have title to the bed to the center of the lake. The State requested that the defendant's claim be adjudged groundless and unfounded.

The defendant demurred to the complaint, and his demurrer was sustained by the court below.

On appeal, the Supreme Court of Utah reviewed the pertinent cases, and concluded that in Utah, the common law doctrine that the owner of land bordering a lake owns to the center of the lake does not prevail, but that the State owns the bed of navigable lakes. The court below was deemed to have erred in sustaining the demurrer, and its judgment was reversed.

However, the Supreme Court stressed that its decision did not adjudicate the possibility that the defendant had acquired title to the exposed lands through the doctrine of reliction:

\* \* \* all we know of the defendant's claim of title and right of possession is the complaint. Therein it is alleged, not that the defendant claims title to the uncovered land on the theory or doctrine of accretion or reliction—that is negatived—but on the theory that the defendant as a riparian owner on the lake claimed title and right of possession to all lands opposite the lands described in his patent and underlying the waters of the lake to the center thereof, including the unwatered strip caused by the alleged pumping operations. The defendant by his demurrer admitted such allegations to be true, and that his claim as so alleged was his claim of title and right of possession. Hence, in such view, the question again of accretion or reliction is not involved.

The next decision having a bearing on the subject was *Robinson v. Thomas*, 286 Pac. 625 (1930). The plaintiff had leased from the State about twelve acres of land containing deposits of salt from Great Salt Lake. The defendants ejected him, and occupied the premises themselves. Pleading these facts, the plaintiff brought an action in ejectment; the defendants filed a general denial. The issue with which the Court was concerned was whether the State was the owner of the lands, and hence whether the plaintiff, by virtue of his lease, had any rights of possession. The conclusion was that the land had been a part of the bed of Great Salt Lake when Utah was admitted into the Union, and that title to it at that time vested in the State. It not being shown that the State had ever parted with title to the land, and the defendants not showing that they had acquired any right, title or interest in the land from any other source, the Court held that the State was the owner of the land, and that the plaintiff, under his lease, was entitled to possession of it.

Since the defendants made no claim to ownership of any land bordering on the lake,<sup>13</sup> this case cannot be considered as relevant to the question of the right to relictions and accretions, for it is fundamental that before there can be such a right, there must be an estate to which the accretions or relictions can attach. *Saulet v. Shepherd*, 71 U.S. 502 (1866).

<sup>13</sup> As a matter of fact, they owned none. See *Thomas v. Farrell*, 26 P. 2d 328 (1933).

But the question of the right to relictions was squarely before the court in a series of cases beginning with *Provo City v. Jacobsen (State, Intervener)* 176 P. 2d 130 (1947). Here, the City brought an action against forty individuals to have adjudicated their right, title and interest to certain lands bordering on Utah Lake. The State of Utah intervened, claiming to own the lands because they were under the waters of Utah Lake on the date of statehood. The defendants were successors in interest of patentees of land bordering the lake, and they claimed ownership to the land subsequently exposed, either by virtue of their patents, or as riparian owners entitled to the lands formed by reliction. The lower court had given judgment for the defendants, and this was affirmed by the Utah Supreme Court. The *ratio decidendi* was not, however, that the defendants had acquired title by reliction; rather the Court reasoned that the State, which claimed to have acquired title to the bed of Utah Lake at the time of statehood, had the burden of proving by a preponderance of the evidence where the high water mark was at that time. The Court held that the State had failed to meet the burden and could not, therefore, prevail.

Shortly thereafter, upon being petitioned for a rehearing, the Supreme Court modified its opinion, and remanded the case to the lower court,

\* \* \* to take further evidence if the parties so desire on the issues herein discussed but not previously determined. And from such evidence and the evidence already received the court shall fix and determine the exact location of the high water mark as it was on these lands at the time Utah became a state, and therefrom fix a boundary line between the state and these defendants on that high water mark, and quiet the title of the lands of the respective parties. *Provo City v. Jacobsen (State, Intervener)*, 181 P. 2d 213, 215 (1947).

Pursuant to this modification, a new trial was held on the issue of the location of the high water mark at the time of statehood. The trial court held that the State failed to establish by a preponderance of the evidence that any of the lands claimed by the defendants had been below the high water mark at the time of statehood. Judgment was entered against the plaintiff. This action was affirmed by the State Supreme Court, *Provo City v. Jacobsen*, 217 P. 2d 577 (1950).

Although it might at first seem that the *Provo City* cases are not indicative as to what the doctrine is in Utah with respect to title to relicted lands, the fact is, as was pointed out in the subsequent case of *Farrer v. Johnson*, 271 P. 2d 462, 467 (1954) that those cases

\* \* \* held in effect that defendants were the owners of the parcels of land they respectively claimed, that is, the lands between the patented lands immediately north of the meander line and the high water mark.

The land between the meander line on the north and the water's edge of Utah Lake on the south has been farmable through most of the years although during some seasons it is covered with water, but by the test applied in the *Provo City* case above, for fixing the high water mark, said high water mark is quite a distance south of the Utah Lake meander line and the property between is popularly known as accretion lands.

We quieted title in the many defendants in the *Provo City* case above, as against the State of Utah, whose claimed property was similarly located as the disputed property in the cases at bar.

We, therefore, concluded that such lands are subject to private ownership, and may be taxed.

Thus, both before and after statehood, the Utah Supreme Court has held that the owners of real estate bordering on navigable lakes acquire title to the lands uncovered by the recession of the waters, and no case can be found where the claim of an upland owner to relicted lands has been rejected.<sup>14</sup>

Nor is there any statute vesting title to such lands in the State. Section 65-1-14, Utah Code Annotated (Replacement Volume 7) provides that "the state land board shall have the direction, management and control of all lands \* \* \* lying below the water's edge of any lake or stream to the bed of which the state is entitled \* \* \*." In an opinion rendered in 1956, the Attorney General of the State held that the phrase "water's edge" is synonymous with the phrase, "high water mark at statehood."<sup>15</sup> But the cases have been decided without so construing this statute. Undoubtedly, if the Utah legislature had intended to do so, it could have passed an act as clear and unambiguous as that passed by the California legislature, and provided for the management or disposal, not only of land below the water's edge, but also of land "uncovered by the recession or drainage of the waters of inland lakes inuring to the State by virtue of her sovereignty." Section 7601, State of California Public Resources Code Annotated. But such a statute is not now a part of the Utah Code, nor could its enactment now divest a riparian landowner of title to accretions and relictions already attached to his estate. In any event, it is not to be inferred from this discussion that the enactment of such a statute could affect the Federal title to relicted lands. The general common law, as interpreted by the Supreme Court of the United States, determines the Federal government's right to accretions and relictions; that the Federal rule, and the Utah rule,

<sup>14</sup> The opinions, already referred to, of Attorneys General of the State of Utah, expressing contrary views, were urged upon the court in the *Provo City* cases, and were rejected.

<sup>15</sup> *Biennial Report of the Attorney General to the Governor of the State of Utah, 1954-1956*, p. 167.



appear to be the same, has been deemed worthy of discussion, but this should not be understood as implying that Utah law does control, or could diminish, the Federal government's right to accretions or relictions.

Thus, the Area Administrator's assumption that the survey of public lands adjoining Great Salt Lake cannot be extended to lands which were below the level of the lake on the date of statehood was incorrect: a survey of public lands should embrace all lands permanently above water *as of the date of the survey*.<sup>16</sup> The Area Administrator's decision is modified accordingly.

The question remaining, then, is how properly to determine what lands should be included within the survey. More specifically, the question is by what criteria should the meander line marking the limit of lands permanently above water be established?

It is the usual practice of cadastral engineers, in deciding where to run the meander line, to study markings on the soil resulting from the action of the water. The official survey manual states that

Practically all inland bodies of water pass through an annual cycle of changes from mean low water to flood stages, between the extremes of which will be found mean high water. \* \* \* The engineer will find the most reliable indication of mean high-water elevation in the evidence made by the water's action at its various stages, which will generally be found well marked in the soil \* \* \*.

Mean high-water elevation will be found at the margin of the area occupied by the water for the greater portion of each average year; at this level a definite escarpment in the soil will generally be traceable, at the top of which is the true position for the engineer to run the meander line.<sup>17</sup>

Also, as the State contends, the presence or absence of vegetation is a guide to marking the boundary of the public domain, for lands covered by navigable waters for sufficient periods of time to deprive them of vegetation should not be surveyed as public lands. *Robert Omar Pennington, Richard L. Oelschlaeger*, Anchorage 024014, 026482 (October 23, 1959); affirmed, *Richard L. Oelschlaeger*, 67 I.D. 237 (1960). The use of these techniques in locating meander lines has grown out of the experiences of over 160 years of conducting public land surveys.

<sup>16</sup> This has, in fact, been the practice in surveys of lands adjoining Great Salt Lake. Instructions issued to the surveyor in 1920 for the survey of certain lands bordering on Great Salt Lake in T. 8 N., R. 2 W., Salt Lake Meridian, state: "\* \* \* at the high water margin of said lake you will establish the proper meander corners and meander the lake \* \* \*." (Group 107, Utah) Instructions issued in 1926, again for lands in T. 8 N., R. 2 W., S.L.M., state: "Survey the shore line of the lake at the present mean high-water mark \* \* \*." Instructions issued in 1927 for lands in T. 6 N., R. 9 W., S.L.M., state: "\* \* \* terminate your lines of survey at the intersections with the mean high-water mark of Great Salt Lake, where you will establish appropriate meander corners." (Group 179, Utah)

<sup>17</sup> *Survey Manual*, pp. 231-232.

But these experiences were with bodies of water different from Great Salt Lake. Over 92% of the United States, including all those areas where the cadastral surveys were first executed, are areas of exterior drainage, where the rainfall, collected in lakes and streams, "winds somewhere safe to sea."<sup>18</sup> However, in the midst of the western cordillera, between the Rocky Mountains and the Sierra Nevada on the east and west, the Columbia and Colorado plateaus at the north and southeast, and the Sonoran Desert on the southwest, there is a large area of interior drainage, called the Great Basin. Actually, it is not a single basin, but an aggregation of hundreds of cup-like basins, into which the waters of the surrounding area flow, and from which there is no outlet.<sup>19</sup>

In one such basin lies Great Salt Lake, a shallow sheet of water about 70 miles long and 50 miles wide, covering over 2000 square miles. This 2000 square miles, in turn, is but a small part of a much more extensive, and very smooth, desert plain. It was early realized that the occurrence of such a plain at an elevation of 4000 feet above the sea, and in the midst of a region characterized by mountains, admitted of only one explanation, that the plain was once the bottom of some huge ancient lake, in which the constant process of sedimentation filled the minor depressions, and reduced the floor of the basin to a level surface.<sup>20</sup>

Through the studies and research of Grove Karl Gilbert of the United States Geological Survey, the history of this ancient inland sea, which he named Lake Bonneville, is known in remarkable detail.

First, the waters were low, occupying, as Great Salt Lake now does, only a limited portion of the bottom of the basin. Then they gradually rose and spread, forming an inland sea, nearly equal to Lake Huron in extent, with a maximum depth of about 910 feet. This stage was undoubtedly in a period of humid climate during which glaciers formed in the neighboring mountains. Then the waters fell, and the lake dwindled in size, and may actually have disappeared, leaving a plain even more desolate than the Great Salt Lake Desert of today. A second high water stage came, during another period of humid climate when glaciers again formed in the mountains and descended into the lake basin. Waters from the melting snows and ice and from the rains that fell directly into the basin caused the lake waters to rise, this time to the maximum height of 1000 feet above the present level of Great Salt Lake. It was at this, the Bonneville stage, that the outlet to the north through Red Rock Pass was encountered, and the

<sup>18</sup> Grove Karl Gilbert, *Lake Bonneville*, Washington, 1890, p. 11.

<sup>19</sup> *Ibid.*, p. 2; Wallace W. Atwood, *The Physiographic Provinces of North America*, Boston, 1940, p. 394.

<sup>20</sup> Gilbert, *op. cit.*, p. 21.

outflowing waters began to lower the channel at the pass and thus to lower the level of the lake. The downward cutting for the first 375 feet was somewhat rapid. At that level the waters met resistant rock and the draining of the lake was halted. This is known as the Provo stage. Broad terraces were developed about the shores of the lake, and these appear today as the most conspicuous of all shoreline features in this ancient lake basin. The shoreline features of this stage are about 625 feet above the present level of Great Salt Lake. The water margin afterwards receded from the Provo shore to its present position, halting occasionally by the way, and longest at the Stansbury shore. The area of the lake at the Bonneville stage was 19,750 square miles, or about ten times the area of the present Great Salt Lake; the area at the Provo stage was about 13,000 square miles, and the area at the Stansbury stage, about 7,000 square miles.<sup>21</sup>

The present lake is thus but the residue of the ancient sea, and occupies a shallow depression in the otherwise remarkably flat plain which once was the bed of that sea. The average depth of the lake in 1850 was 13 feet; the average depth is even less today, for the waters have recently retreated to the lowest levels in recorded history.<sup>22</sup>

That the lake is situated in a flat, closed basin accounts for some of its most striking characteristics: the salinity of its waters, the marked fluctuation in height to which it is subject, and the large areas affected by even the slightest rise or lowering of the water.

Wherever a constant outlet exists, lakes consist of sweet water, but an interrupted outflow always results in a degree of salinity, and the complete absence of an outflow results in concentrations of chemicals to such an extent as to result in dense brines.<sup>23</sup> Great Salt Lake is the most notable example of a saturated brine on the North American continent. The concentration of salt in the lake varies inversely with the volume of the lake: when the lake was at its highest stage in 1873,

<sup>21</sup> Gilbert, *op. cit.*, p. 170; Atwood, *op. cit.*, p. 398; James E. Talmage, *The Great Salt Lake, Present and Past*, Salt Lake City, 1900, p. 116. But see also Bulletin No. 60 of the University of Utah Engineering Experiment Station. *Reappraisal of the History of Lake Bonneville*, Salt Lake City, 1953. The authors of this monograph, Dr. Vasyi Gvosdetsky and Dr. H. Bowman Hawkes, give other versions of the history of the lake, and their own conclusion is that, instead of having a bipartite history, as suggested by Gilbert, with the Bonneville, Provo, and Stansbury shorelines being the products of one lake, the lake rose and subsided four times, each shoreline marking a new high water stage.

<sup>22</sup> New York Times, November 27, 1960, Section II, part 2, p. 13, col. 2.

<sup>23</sup> Isaiah Bowman, *Forest Physiography*, New York, 1911, p. 212. Cf. Atwood, *op. cit.*, p. 396: "Utah Lake, however, has an outlet and is a fresh water lake; it drains by the Jordan River into Great Salt Lake. Klamath Lake, at the foot of the Cascades in southern Oregon, rises to a sufficient height to overflow and thus is kept fresh. Pyramid Lake in Nevada overflows occasionally and thus tends to keep fresh. Carson Lake, also in Nevada, receives large quantities of fresh water from the Sierra Nevada each spring and is forced to overflow, thus keeping fresh."

a sample of its water proved to be 13.7 percent solid matter; when the lake was quite low in 1850, a water sample was found to be 22.4 percent solid matter. This matter is mostly sodium chloride, 400 million tons of which were estimated to be in solution in the lake waters in 1890.<sup>24</sup> In times of extreme low water, the heavily saturated brine precipitates sodium chloride on its bed shores.<sup>25</sup>

The fact that the lake is a closed body of water with no out-flowing stream implies the certainty of variations in its volume. If the lake had an outlet, its ordinary maximum height would be fairly constant, the outlet acting as a regulator, and permitting the escape of surplus water.<sup>26</sup>

But no outlet exists, and the level of the lake, accordingly, depends entirely upon the relationship between the water received, through rainfall,<sup>27</sup> and the water lost, by evaporation.<sup>28</sup> The height of the lake can be stationary only when the gain from inflow and from rainfall on the water surface is precisely balanced by the loss from evaporation. Whenever in any year the total access of water exceeds the evaporation, the surface rises; when the evaporation exceeds the gain, the surface falls.<sup>29</sup>

Other things being equal, the lake should rise during those years in which the precipitation in rain and snow is great, the temperature low, the relative humidity high, or the wind velocity small.<sup>30</sup> But these conditions must exist for more than a short period of time; because of its large size, Great Salt Lake is scarcely influenced by the excessive or deficient rainfall or stream flow of a single year. It responds to the cumulative effect of the runoff of two or more years, and a rise in the lake culminates about two years after the rainfall attains its maximum.<sup>31</sup>

The level of the lake is thus a function of climate, changes in climate producing changes in levels. Since the shoreline is the contour formed by the intersection of the plane of the level of the lake with the plane of the surrounding land, it follows that changes in level produce changes in shorelines. Except at the southeastern shore of

<sup>24</sup> Gilbert, *op. cit.*, p. 251, 253.

<sup>25</sup> Dale L. Morgan, *The Great Salt Lake*, Indianapolis, 1947, p. 389.

<sup>26</sup> Talmage, *op. cit.*, p. 45; Bowman, *op. cit.*, p. 214.

<sup>27</sup> The influx from streams is derived ultimately, of course, from rainfall. Three rivers flow into the lake, all on its eastern shore: the Bear River in the north, emptying into Bear River Bay; the Weber River, with its delta some miles to the south of Bear River Bay, and the Jordan River, which flows north from Utah Lake, and enters Great Salt Lake several miles northwest of Salt Lake City.

<sup>28</sup> Talmage, *op. cit.*, p. 45.

<sup>29</sup> Gilbert, *op. cit.*, p. 244.

<sup>30</sup> *Ibid.*

<sup>31</sup> Ernst Antevs, *Rainfall and Tree Growth in the Great Basin*, Washington, 1938, p. 48.

the lake, the surrounding land is extraordinarily flat, and its slope into the lake is very gentle. Thus, a rise of a few feet in the level of the lake may change its contours amazingly, and add hundreds of square miles to its surface area.<sup>32</sup>

Changes in the levels and shorelines of the lake are well documented. The lake was discovered in the winter of 1824-25 by Jim Bridger, but until 1843 was visited only desultorily by trappers, who did not record for posterity any information relating to the level of the lake, or the location of its shoreline.<sup>33</sup> In September, 1843, John Charles Fremont visited the lake during the course of his second exploring expedition to the west. Fremont noted that, "from a discussion of the barometrical observations made during our stay on the shores of the lake, we have adopted 4200 feet for its elevation above the gulf of Mexico."<sup>34</sup> Fremont's third expedition brought him to the lake again in 1845, and he spent the last week in October of that year exploring the lake, and Antelope Island. But he did not publish a full account of his third expedition, and the brief memoir he presented to the Senate in 1848 contains only a passing reference to the fluctuations of the lake, and to its being "four thousand two hundred [feet] above the level of the sea \* \* \*."<sup>35</sup>

In 1849, Captain Howard Stansbury was sent by the United States Army Topographical Engineer Corps to survey Great Salt Lake. In October and November of that year, preliminary to the survey, he made a circuit of the shores of the lake. Stansbury found a vast stretch of level land adjoining the lake on the north and west:

This extensive flat appears to have formed, at one time, the northern portion of the lake, for it is now but slightly above its present level. Upon the slope of a ridge connected with this plain, thirteen distinct successive benches, or water-marks, were counted, which had evidently, at one time, been washed by the lake, and must have been the result of its action continued for some time at each level \* \* \*.<sup>36</sup>

In some areas, far from the lake, driftwood was encountered:

\* \* \* We then passed, in a southerly direction, through deep sand, along what at one time had been the beach of the lake, as drift-wood was frequently seen

<sup>32</sup> Morgan, *op. cit.*, p. 19; Talmage, *op. cit.*, 43; Bowman, *op. cit.*, p. 214.

<sup>33</sup> E. W. Gilbert, *The Exploration of Western America*, Cambridge, England, 1933, p. 135.

<sup>34</sup> J. C. Fremont, *Report on the Exploring Expedition to the Rocky Mountains, etc.*, Washington, 1845, p. 156.

<sup>35</sup> J. C. Fremont, *Geographical Memoir upon Upper California*, Washington, 1848, p. 8. He wrote: "The Great Salt lake has a very irregular outline, greatly extended at time of melting snows. \* \* \* The shores of the lake in the dry season, when the waters recede, and especially on the south side, are whitened with encrustations of fine white salt \* \* \*."

<sup>36</sup> Howard Stansbury, *Exploration and Survey of the Valley of the Great Salt Lake of Utah*, Philadelphia, 1852, p. 105.

lying on the sands that stretch out to the eastward for many miles. In one instance a drifted cotton-wood log was seen, lying near what had evidently been the water-line of the lake, as thick as the body of a man. \* \* \*<sup>37</sup>

The actual survey of the lake began in April, 1850. One of Stansbury's first observations was that

\* \* \* Drift-wood is scattered along the shores at an elevation of four or five feet above the present level of the lake, which must have maintained that height for a considerable period, since in numerous spots along the drift line unmistakable evidences of a well-defined beach are still to be traced with perfect precision. \* \* \*<sup>38</sup>

Accordingly, Stansbury followed the driftwood line, or storm line, as he alternately referred to it, in the early stages of the survey, even though this line was in fact many miles distant from the actual shore of the lake.<sup>39</sup>

However, at one point in the survey, peering over a vast flat "unbroken by the least elevation for an apparently indefinite distance," Stansbury reconsidered the matter:

The question which now presented itself was in what way this sterile desert was to be surveyed. Apart from the consideration of time and expense, water was only to be procured by crossing the lake, bringing it to the shore, and then packing it on the backs of my crew for the chain party. This was obviously impossible, as they could not carry enough in that way to supply both the shore party and themselves while passing to and fro over the plain. In addition to this difficulty, how were the provisions to be carried and cooked? These considerations induced me to hesitate in risking the lives of my people by attempting to penetrate this desert, where the slightest derangement of the measures by which they were to be supplied with water might prove fatal. The appearance of the plain indicated that the lake had not been over it for very many years, for it was thickly grown up with grease-wood; and the great probability, if not positive certainty was, that, as the waters were evidently in a state of subsidence, they would never again overflow it. As, therefore, my object was to survey the shore of the lake in its present stage, I determined to abandon, in this instance, the storm-line, and to run the line of survey to a point west of the water, as it then was, and thence to strike across the flat to Strong's Knob, triangulating upon the prominent points of the different ranges, so as to obtain their general shape and distance, and sketching in the intervening ground. This course would secure all the ends of practical utility, without the hazard and delay to be incurred by penetrating the desert.<sup>40</sup>

Only a few days later, a storm upon the lake demonstrated how uncertain was any line purporting to describe the shore of the lake:

\* \* \* The water, under the influence of the northern blast, rose upon the beach crossed by the line a few days since so as to extend some six or seven miles to the south of it; but this morning it had returned to its old boundaries, upon the subsidence of the gale.<sup>41</sup>

<sup>37</sup> *Ibid.*, p. 107.

<sup>38</sup> *Ibid.*, p. 158.

<sup>39</sup> *Ibid.*, pp. 181, 185.

<sup>40</sup> *Ibid.*, p. 198.

<sup>41</sup> *Ibid.*, pp. 201, 202.

In the meantime, Captain Stansbury's assistant, Lieutenant Gunnison, had been surveying the eastern shore of the lake, and his report reflects similar difficulties in depicting the border of the lake:

\* \* \* Two lines have been located, the shore of the lake and base of the hills, in order to give the flat occupied by the farmers. \* \* \* The lake waters are driven by storms over the flat and wash off from the buttes, which will soon disappear. Drift-wood is found some miles from the present shore. \* \* \*<sup>42</sup>

The Stansbury survey was completed on June 27, 1850. In 1853, another exploration was sent to this region, "to ascertain the most practicable and economical route for a railroad from the Mississippi River to the Pacific Ocean." Captain Gunnison, who headed this party, was killed by Indians on October 26, 1853, near the present site of Hinkley, Utah. Seven of his party perished with him.<sup>43</sup> Lieutenant Beckwith completed the exploration, but he had little to report that was new with respect to Great Salt Lake:

The old shore-lines existing in the vicinity of the Great Salt Lake present an interesting study. Some of them are elevated but a few feet (from five to twenty) above the present level of the lake, and are as distinct and as well defined and preserved as its present beaches; and Stansbury speaks, in the Report of his Exploration, pages 158-160, of drift-wood still existing upon those having an elevation of five feet above the lake, which unmistakably indicates the remarkably recent recession of the waters which formed them, whilst their magnitude and smoothly-worn forms as unmistakably indicate the levels which the waters maintained at their respective formations, for very considerable periods.<sup>44</sup>

The significance of the drift-wood lines is discussed by Grove Karl Gilbert, who had been in the area of the lake during the summers of 1875-1878:

\* \* \* All about the lake shore there is a storm line marking the extreme advance of the water during gales in the summers of 1872, 1873, and 1874. It is indicated by driftwood and other shore debris and is especially distinguished by the fact that it marks a change in vegetation. In some places vegetation ceases at this line, but usually there is a straggling growth of herbaceous plants able to live on saline soil. Above the line, on all the steeper slopes not subjected to cultivation, the sage and other bushes flourish, but below the line they are represented only by their dead stumps. The height of this storm line above the contemporaneous still-water surface varies with the locality, being much greater on a shelving coast, over which the water is forced to a considerable distance by the winds, and especially small upon the islands. On the east side of Antelope Island it was found by measurement to be three feet above

<sup>42</sup> *Ibid.*, p. 213.

<sup>43</sup> Leland Hargrave Creer, *The Founding of an Empire*, Salt Lake City, 1947, p. 143.

<sup>44</sup> *Reports of Explorations and Surveys to Ascertain the Most Practicable and Economical Route for a Railroad from the Mississippi River to the Pacific Ocean*, Washington, 1855, Volume II, p. 97.

the summer stage of the lake in 1877, or about one foot above the winter stage in 1873.

A lower storm line was observed by Stansbury in 1850, and has been described to me by a number of citizens of Utah who were acquainted with it at that time and subsequently. The lake was then at its lowest observed stage; and the storm line was so little above it that it was submerged soon after the rise of the lake began. Like the line now visible, it was marked by drift-wood, and a growth of bushes, including the sage, extended down to it; but below it no stumps were seen.

The relations in time and space of these two storm lines contribute a page to the history of the lake. The fact that the belt of land between them supported sage bushes shows that previous to its present submergence it had been dry for many years. Lands washed by the brine of the lake become saturated with salt to such an extent that even salt-loving plants can not live upon them; and it is a familiar fact that the sage never grows in Utah upon soil so saline as to be unfavorable for grain. The rains of many years, and perhaps even of centuries, would be needed to cleanse land abandoned by the lake so that it could sustain the salt-hating bushes; and we cannot avoid the conclusion that the ancient storm line had been for a long period the limit of the fluctuations of the lake surface.<sup>45</sup>

In the meantime, from 1847 on, Great Salt Lake Valley had been settled. There thus exist, independently of the research of surveyors and explorers, the records and traditions of the inhabitants of the area as to the variations in the height and extent of the lake from 1850 to 1875. "In 1875, the first definite determination of the lake level was made, and since that time a nearly continuous record of its oscillations has been kept."<sup>46</sup>

Dale L. Morgan, writing in 1946, succinctly summarized the fluctuations of the lake to his time:

\* \* \* At the time of the Stansbury Survey in 1850 the lake was 4,201 feet above sea level. In the next 5 years it rose almost 4 feet higher, but at the end of the decade fell 5 feet. In 1862 it began a sudden, sharp climb, by 1868 rising nearly 12 feet, and in 1872 and 1873 rising 6 inches to its highest recorded mark. After 1875, however, it began to plummet, falling more than 10 feet in 9 years, and persuading Gilbert that it would soon dry up entirely. It rallied briefly in 1884-1885, rising to 4,207.5 feet, but it fell yearly thereafter until in 1905 it plumbed a depth almost a foot below zero on the Saltair gage. Gilbert's prophecies seemed on their way to rapid fulfillment when, under the stimulus of a succession of wet years, the lake started climbing again; in four years it climbed 8 feet, to a level 3 feet above Stansbury's mark of 1850. For 15 years the lake level remained fairly stable, but trending slightly upward until it reached the 4,205 mark. Then again, however, it dropped clear out of sight. In 1934 it struck zero on the Saltair gage, and kept going right on down, in 1935 reaching a low of 3.1 feet below zero.

However, the lake level promptly rose 2.5 feet, but drought in 1940 brought it down again to an all-time low, 3.2 feet below the zero level, or 4,193.55 feet above

<sup>45</sup> G. K. Gilbert, *op. cit.*, p. 242.

<sup>46</sup> G. K. Gilbert, *op. cit.*, p. 230.



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sea level. At this point stubbornly the lake began to struggle upward, and in April 1946 for the first time since 1934 it rose above the zero level, climbing as high as .3 feet into the plus zone (4,197.15 feet) before relaxing back below the zero line, in the usual late summer fluctuation.<sup>47</sup>

After 1946, the lake continued to rise, until in 1953 it stood at 4200 feet, the level at which it was when Fremont had visited it in 1843. Since 1953, the level of the lake has again been going down, and it is now less than 4,195 feet above sea level.

Great Salt Lake fluctuates not only from year to year, but also from month to month within the course of a year.<sup>48</sup> The annual oscillation of the lake level is about fifteen inches, but it has been as little as seven inches and as great as forty inches, varying with the ratio between evaporation losses and precipitation gains, and it is always less in years when a steady rise or fall is occurring. The annual crest stage usually occurs in May, June, and July, as a result of the melting of the mountain snows and the consequent flooding of all streams, together with the occurrence of the maximum precipitation for the year about or just before this time. The low stage comes in October, November, and December, when streams are lowest, precipitation least, and evaporation greatest.<sup>49</sup> A plot of the levels of the lake during a calendar year would show a classic bell-shaped curve, with the waters low during the first three months, gradually rising until they reach their peak in June, and then gradually declining until they reach their low for the year in November and December.<sup>50</sup>

From the foregoing description and history of the lake, these facts emerge: the lake since 1850 has risen and fallen many times, within a range of 17 feet; the factors responsible for this fluctuation are still at work, and will cause similar rises and falls in the future; the ancient levels of the lake which were of long duration are etched on the sides of ridges and hills, but the levels observed in recorded history have not left any permanent impress upon the soil, either because they were of short duration, or because the surrounding lands, being so flat, presented no resistant surface against the waters; and the soils of an area once covered by the lake are so saturated with salt that it might take many hundreds of years for them to be sufficiently leached to support vegetation.

<sup>47</sup> Morgan, *op. cit.*, p. 23. A graph showing the fluctuations of Great Salt Lake from 1851 to 1950 is included in Geological Survey Water-Supply Paper 1314: *Compilation of Records of Surface Waters of the United States through September, 1950*, Part 10, The Great Basin, 1960, p. 25.

<sup>48</sup> Geological Survey Water Supply Paper 1314, *op. cit.*, pp. 24-26.

<sup>49</sup> John M. Boutwell, editor, *The Salt Lake Region*, Washington, 1933, pp. 5-6.

<sup>50</sup> G. K. Gilbert, *op. cit.*, p. 239.

It therefore follows that customary methods of determining the high water mark, as suggested in the survey manual, are not capable of application to Great Salt Lake. The principle embodied in the manual's instructions is that the annual flux and reflux of a lake carves upon its shores guidelines to the location of the mean high water mark. This is based upon the assumption that each year's cycle is repeated within the same range: that the low and high water levels for one year will be about the same as the low and high water levels for any other year, and that marks on the ground will result from, and reflect, the lake's constantly receding from, and returning to, the same levels. But this assumption, as we have seen, is not valid for Great Salt Lake. Similarly, the use of vegetation as a guide to determining the mean high water mark is applicable only in situations where the chief deterrent to the growth of vegetation is the presence and action of water against a shore, whereas the absence of vegetation on hundreds of square miles of land adjacent to Great Salt Lake is due to other reasons, not connected with the location of the shoreline in historic times.

It therefore follows that if this Bureau's cadastral engineers were to use their customary guidelines in determining the high water mark of Great Salt Lake, they would, like Captain Stansbury, often be operating miles from the waters of the lake, and their results would have no relationship to the configuration of the lake as it existed in 1896, or as it exists today, or as it existed at any other time back to which the records of mankind extend.

This is well illustrated by the litigation in the *Provo City* cases *supra*, where it will be remembered, the State claimed ownership of all lands below the high water mark of Utah Lake on the date of Statehood, but was unable to show by a preponderance of the evidence where the high water mark on that date had been.

Utah Lake is similar to Great Salt Lake in that it occupies a flat shallow basin which was once part of Lake Bonneville. Unlike Great Salt Lake, Utah Lake has an outlet, and is therefore a fresh water lake, with a maximum level not much higher than the level of the outlet.

In the first of the *Provo City* cases *supra*, where the Court held that the State had failed to prove that the lands in issue were below the high water mark of the lake at the time Utah was admitted into the Union, high water mark was defined in the conventional manner: "a mark on the land impressed by the water upon the soil by covering it for sufficient length of time so that it is deprived of vegetation and its value for agricultural purposes destroyed." This is the same.

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definition urged in the instant case by the appellant. In a dissenting opinion, Chief Justice Larson showed a keen appreciation of the technical difficulties presented by that concept of the high water mark:

With this particular lake (Utah Lake), as shown by the record, for every foot rise about 1,000 acres of land are submerged, and on the contrary, for every foot fall this amount of land is restored to use. The elevation is so slight and the outer edges so shallow and effected [sic] by swamp and aquatic vegetable growth that the high water mark is extremely difficult if not impossible to ascertain.

It is evident that the application of this old established vegetation rule is of only relative value, in solving this case for, in territory as flat as this is in the vicinity of the lands involved in this action, we have no distinct and deciding mark \* \* \*.<sup>51</sup>

The subsequent litigations revealed the truth of these remarks. Upon the plaintiff's petition for a rehearing, the Utah Supreme Court remanded the case to the district court, and directed that court to take evidence and from that evidence determine the exact location of the high water mark of Utah Lake at the time Utah became a State.<sup>52</sup>

The second trial was held and when, in due course, its results were again before the Utah Supreme Court on appeal, the State's evidence at that trial was summarized thusly:

\* \* \* The plaintiff produced a geologist who went to the shores of Utah Lake where the ground was stable and hard and located four markings of ancient water levels, and from that and some experimentations which he conducted, he concluded that the high water mark at the time of statehood was at 4488.95 feet above sea level which would be exactly at compromise level as that term was used in our previous opinions. He conceded that this mark had probably been made by the water standing at that level for a period of thousands of years. He also recognized that it might not be the exact mark where vegetation would cease to grow at the time of statehood. We are of the opinion, after a study of this evidence, that it has little or no value in determining the elevation of the high water mark on this ground at the time Utah became a state.<sup>53</sup>

The Court found, accordingly, that the State had failed to establish where the high water mark was. The language of the decision implies that the Court has not abandoned the "exact mark where vegetation would cease to grow at the time of statehood" as the criterion for determining the high water mark. But this criterion, demonstrably unworkable in application to Utah Lake, is even more unworkable

<sup>51</sup> *Provo City v. Jacobsen (State, Intervener)*, 176 P. 2d 130, 133, 139 (1947).

<sup>52</sup> *Provo City v. Jacobsen (State, Intervener)*, 181 P. 2d 213 (1947).

<sup>53</sup> *Provo City v. Jacobsen*, 217 P. 2d 577, 579 (1950).

when applied to Great Salt Lake, where extensive salt flats prevent the growth of vegetation over vast areas which have not been covered with water for hundreds of years.

Since there are no reliable physical guides to the location of the line separating the federally owned public domain from the State-owned bed of the lake, it is hereby concluded that the proper and only feasible method of segregating Great Salt Lake from the adjacent public lands is to meander the lake along the water's edge as of the date of the survey. It is quite possible that in the future, as in the past, surveys conducted in different years will show abrupt breaks in the continuity of the meanders, but this is a matter of small practical importance, since it is the water's edge, and not the meander line, which marks the actual boundary of the public domain. The extension of the survey over relicted lands shall be done in such a manner as will not interfere with the rights of adjacent littoral owners to their proportionate interest in the relicted area.

The decision of the Area Administrator, as modified by this decision, is affirmed.

The Utah State Land Board is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. These regulations are reprinted on Form 4-1365, a copy of which is enclosed. Because the Utah State Land Board is an agency of a State government, no filing fee will be required.

KARL S. LANDSTROM,

*Director.*

December 17, 1962

February 7, 1963

The Honorable  
The Secretary of the Interior  
Washington 25, D.C.

MY DEAR MR. SECRETARY:

In accordance with your request of December 18, 1962, I have examined Opinion M-36645 of your Solicitor, relating to certain applications filed by the State of Utah for indemnity selections of public land within its boundaries which is under mineral lease to a private firm for the extraction of potash. It appears that the lessee is presently engaged in constructing a mine and anticipates its completion and the commencement of production in the summer or fall of this year. In the light of indications that the lessee will spend a total of more than \$30,000,000 to bring the mine into production, it is clear that the potash deposits are estimated to have a great value. The State of Utah submitted the first of the applications for indemnity selection on June 7, 1961, some months after the lessee, following favorable exploratory operations and analysis, had commenced the excavation of a mining shaft.

Section 2275 of the Revised Statutes (43 U.S.C. 851) permits States to select public lands as indemnity for school lands originally reserved to them but lost by the subsequent preemption of homesteaders, inclusion within Federal reservations or other disposition. However, section 2276(a) (3) of the Revised Statutes (43 U.S.C. 852(a) (3) Supp. 1961) limits selections by providing that—

“Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or *producible status* \* \* \*” [Italics added.] The question considered in Opinion M-36645 is whether the lands sought by the State of Utah are in a “producible status” within the meaning of this statute.

Opinion M-36626 issued in your Department on September 8, 1961, held that mere knowledge that land under lease or permit contains valuable mineral deposits does not render it in a “producible status.” Opinion M-36645 of your Solicitor expresses the view that this conclusion is incorrect and adopts a standard less favorable to the states. It advances the view that the phrase “lands in a producible status” includes “any mineral lands which are subject to lease or permit and which are known, at the time of selection, to contain a valuable and accessible deposit of mineral in such quantity and of such quality as to warrant the expenditure of funds for its extraction and production.” Using this standard, your Solicitor has concluded

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in his opinion that the applications filed by Utah must be denied because the lands which are sought have been in a "producible status" at all times since a date prior to the filing of the first application.

It is my view that the earlier of the two opinions reaches the correct result and that the land sought by Utah is not ineligible for indemnity selections under section 2276(a) (3) of the Revised Statutes.

It has long been congressional policy to grant States entering the Union in which there is public land certain sections in each township of such land for the support of their public schools.<sup>1</sup> However, title does not pass to the States until the granted lands have been surveyed, with the result that in the meantime they may be appropriated under the Federal land laws by private persons or the Government itself. In order to make up for the lands thus lost to the States, Congress enacted section 2275 of the Revised Statutes, giving a State the right to select other public lands of equal acreage within its boundaries as indemnity.

Originally, mineral lands were excluded both from grants in place to the States and from State indemnity selection.<sup>2</sup> However, the act of January 25, 1927,<sup>3</sup> expanded existing grants in place for the support of public schools to include some sections of mineral land. Not included were lands of this character which were under mineral lease or permit at the time of survey. Amendments to this statute later removed this limitation so that grants in place now extend to school sections, whether or not mineral in character, which have been made subject either to mineral leases or applications therefor.<sup>4</sup> It was not until 1958 that Congress enacted legislation making it possible for the States to receive mineral lands by indemnity selection. It is this legislation under which Utah has filed the applications which are now in question and which must be construed in considering whether those applications should be granted.

The legislation enacted in 1958 amended section 2276 of the Revised Statutes (43 U.S.C. 852) to allow a State to make indemnity selections from any unappropriated, surveyed public lands within the State, subject to the following restrictions:<sup>5</sup>

1. No lands mineral in character may be selected except to the extent that the selection is being made as indemnity for lost mineral lands.

<sup>1</sup> In the case of Utah, Congress set aside sections 2, 16, 32 and 36 in each township. Act of May 3, 1902, 32 Stat. 188, 43 U.S.C. 853.

<sup>2</sup> See *United States v. Sweet*, 245 U.S. 563 (1918).

<sup>3</sup> 44 Stat. 1026, 43 U.S.C. 870.

<sup>4</sup> Act of April 22, 1954, 68 Stat. 57; act of July 11, 1956, 70 Stat. 529; 43 U.S.C. 870.

<sup>5</sup> Act of August 27, 1958, 72 Stat. 928, 43 U.S.C. 852(a). R.S. 2276 was further amended by the act of September 14, 1960, 74 Stat. 1024, 43 U.S.C. 852(a), in particulars which need not be noted here.

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2. No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lost lands on such a structure; and

3. Land subject to a mineral lease or permit may be selected only if none of such land is in a "producing or producible status."<sup>6</sup>

As introduced, the bill which amended section 2276 did not contain these restrictions.<sup>7</sup> They made their way into the legislation upon the recommendation of the Department of the Interior (hereinafter referred to as "Interior"). Interior originally recommended that what is now the third restriction exclude only lands subject to a mineral lease or permit which are in a *producing* status.<sup>8</sup> Thereafter it took the position that—

"[This] language \* \* \* is not sufficiently restrictive since it would permit a State to select land subject to a mineral lease when none of the land subject to that lease was in a producing status. Presumably, this would permit the selection of leased land on which there is a well capable of production, but on which production has been suspended. It is, therefore, suggested that the words 'producing status' \* \* \* be replaced by the words 'producing or producible status.'"<sup>9</sup> It will be noted that this explanation by Interior referred only to an oil well and did not mention the meaning of the word "producible" in relation to solid minerals. The meager legislative history of the 1958 act<sup>10</sup> reveals no discussion of this point and nothing to indicate that it was in any one's mind during the period when the legislation

<sup>6</sup> Where land subject to a mineral lease or permit is selected, the State succeeds to the rights and obligations of the United States thereunder and the lessee or permittee is left in the same position as if the selection had not been made (act of Aug. 27, 1958, as amended, footnote 5, *supra*). Rents and royalties paid to the United States under leases for potash mining are distributed as follows: 37½ percent is paid to the State in which the land is located, for expenditure on roads or for the support of public educational institutions; 52½ percent is credited to the reclamation fund in the Treasury, a fund devoted to the development of water for the reclamation of arid land in the western states; and 10 percent remains in the Treasury (Sec. 5, act of Feb. 7, 1927, 44 Stat. 1058, 30 U.S.C. 285, and act of Feb. 25, 1920, 41 Stat. 450, as amended, 30 U.S.C. 191). A State generally administers leased indemnity lands which it has selected and receives all revenues accruing after selection to be used for the benefit of its public schools. However, in cases where a portion of land under a lease is not available for selection, the United States continues to administer all the land under the lease and retains 10 percent of the revenues allocable to the State, the remainder of 90 percent going to the State for its schools (E.S. 2276(a)(4), 43 U.S.C. 852(a)(4)). It appears that a number of Utah's applications here are for partial selections.

<sup>7</sup> S. 2517, 85th Cong.

<sup>8</sup> Letter from Interior to Senate Committee on Interior and Insular Affairs, dated Feb. 27, 1958, S. Rept. 1735, 85th Cong., 2d sess., pp. 4, 6.

<sup>9</sup> Letter from Interior to House Committee on Interior and Insular Affairs, dated June 16, 1958, H. Rept. 2347, 85th Cong., 2d sess., p. 5.

<sup>10</sup> Transcript of hearings of July 22, 1958, on S. 2517 and H.R. 12117 of the Public Lands Subcommittee of the House Committee on Interior and Insular Affairs (not printed); S. Rept. 1735 and H. Rept. 2347, 85th Cong., 2d sess.; 104 Cong. Rec. 11921-22, 18289-90.

was before Congress. Indeed, what little there is in the legislative history bearing on the third restriction is almost exclusively concerned with its application to public lands productive or potentially productive of oil or gas.

Ordinarily, grants by the United States must be construed strictly against the grantee. However, a different rule applies where, as here, the grants are made in "legislation of Congress designed to aid the common schools of the States \* \* \*." Such legislation, the Supreme Court has held, "is to be construed liberally rather than restrictively."<sup>11</sup> In view of the fact that under this canon of construction the burden lies upon Interior to demonstrate that the construction of the statute adopted in Opinion M-36645 is correct, the mere dictionary definition of "producibile," *i.e.*, "capable of being produced," goes far toward establishing the soundness of the contrary construction advanced in the earlier Opinion M-36626. The minerals in question here are, of course, not now capable of being produced except in the sense that it is now physically and financially feasible to take steps that will result in the production of such minerals at some future time.

This view of the statute is reinforced by the fact that the presence of minerals in paying quantities, equated in the opinion of the Solicitor with minerals that are in a "producibile" status, is described in terms of "valuable deposits" in other statutes dealing with the public lands.<sup>12</sup> The inference is strong that if Congress desired to invoke this concept, it would not have used the new term "producibile" but would have employed the standard language.

Moreover, beyond these general considerations, it appears from an analysis of the effect of the statute that the construction of it advanced by the Solicitor is at variance with the manifest intent of Congress to authorize the States to select some mineral lands which are subject to lease. It is, of course, a basic rule of statutory interpretation that a construction which has the effect of making a statute meaningless should be avoided if at all possible. An analysis of the statutes governing the granting of mineral leases on public lands, to which I now turn, shows that no lands subject to lease for the production of potash and other solid minerals would be available for selection under Interior's construction of R.S. 2276.

The statutes applicable to the granting of leases for exploitation of oil and gas vary from those relating to the exploitation of solid minerals. Exploration for oil and gas is allowed by means of non-

<sup>11</sup> *Wyoming v. United States*, 255 U.S. 489, 508 (1921).

<sup>12</sup> See, *e.g.*, 30 U.S.C. 223, 262, 272, 273, 282, and 283.



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competitive leases in cases where the lands are not within any known geologic structure of a producing oil or gas field. Where a known structure of this nature exists, leases are granted by competitive bidding.<sup>13</sup> The exploitation of potash and certain other minerals is handled in a somewhat different manner. Exploratory operations designed to establish the existence of mineral deposits of a quantity and quality sufficient to justify commercial exploitation are licensed by a prospecting *permit*. A *lease* for such exploitation may not be granted until it appears that deposits of this kind have been found. Thus, where a permit has been issued in the case of potash lands, the permittee may obtain a lease upon a showing that "valuable deposits \* \* \* has [sic] been discovered by the permittee \* \* \* and that such land is chiefly valuable therefor." "Lands known to contain valuable deposits" of potash which are not covered by permits or leases are subject to lease by advertisement, competitive bidding or other methods fixed by general regulation.<sup>14</sup> A comparison of these leasing methods shows that the noncompetitive oil and gas lease—*i.e.*, one granted where there is not a known geologic structure—corresponds to the prospecting permit granted for a search for potash. The competitive oil and gas lease corresponds to the mineral lease for potash.

The second restriction contained in R.S. 2276, as amended, provides that lands on a known oil and gas structure may not be selected by way of indemnity unless the base lands are on such a structure, thus severely limiting the possibility of selections where there is a competitive oil and gas lease. R.S. 2276 therefore leaves outside the scope of the third restriction, and open for indemnity selections so far as oil and gas are concerned, mainly lands subject to noncompetitive leases, sometimes called "wildcat" leases. This scheme as to oil and gas lands was enacted deliberately and, when considered with the example given by Interior in proposing the addition of the word "producible" to the third restriction,<sup>15</sup> makes evident a congressional policy to restrict the number of indemnity selections of known oil and gas lands.

Neither the 1958 amendment to R.S. 2276 nor anything in the legislative history manifests a parallel policy as to potash or other solid minerals. More particularly, there is no indication in the third restriction or in its history that Congress intended in the case of those minerals to authorize only the selection of lands subject to a permit—the

<sup>13</sup> Section 17 of the act of Feb. 25, 1920, 41 Stat. 443, as amended, 30 U.S.C. 226.

<sup>14</sup> Sections 1-3 of the act of Feb. 7, 1927, 44 Stat. 1057, as amended, 30 U.S.C. 231-233.

<sup>15</sup> P. 67, *supra*.

equivalent of a "wildcat" oil and gas lease—and to exclude leased lands. Yet it is just this result which is reached in Opinion M-36645, for the word "producibile" is there construed to forbid indemnity selections where "mineral lands are subject to lease or permit and \* \* \* are known, \* \* \* to contain a valuable and accessible deposit of mineral in such quantity and of such quality as to warrant the expenditure of funds for its extraction and production." Since only lands which are known to contain valuable deposits of potash may be leased for the extraction of that mineral and, as a practical matter, leases will be obtained only where the expenditure of funds is warranted, this construction of the statute would exclude from indemnity selection all lands leased for the mining of potash. To repeat, I find neither a specific statutory provision nor a legislative record on which to base such exclusion.

For the foregoing reasons I have concluded that the standard set forth in Opinion M-36645 is not valid and that the one set forth in Opinion M-36626 should be retained. In my view, lands leased for the extraction of potash are not in a "producibile status," and ineligible for an indemnity selection, until the mineral has been or can be extracted in commercial quantities. This view is consistent with Interior's regulation pertaining to the third restriction of R.S. 2276 (a).<sup>16</sup> After stating the gist of the restriction, the regulation continues as follows: "It [the law as set forth in R.S. 2275 and 2276] permits the selection of lands withdrawn, classified or reported as valuable for coal, phosphate, nitrate, *potash* \* \* \* if such lands are otherwise available for, and subject to, selection \* \* \*." [Italics added.] Accordingly, I am of the opinion that inasmuch as the State of Utah filed the applications for selection pending in Interior prior to a time when potash could be mined from the selected lands, R.S. 2276 (a) (3) does not bar your approval of those applications.

Although I believe that the legislation enacted in 1958 must be construed as indicated above, it is also my conviction, based on my study of this matter, that Congress did not foresee and evaluate the effect of this legislation upon lands containing solid minerals. As it now reads, the statute provides a means whereby some of the States could be permitted to select, by way of indemnity, all public lands within their borders which are found from time to time to contain valuable deposits of such minerals. I am advised that the potential impact of the statute upon revenues, primarily those used in the Federal reclamation fund, is very substantial, and the wisdom and fairness of such a diversion of funds seems open to question. Accordingly, you may

<sup>16</sup> 43 C.F.R. 270.1 (c).

December 17, 1962

wish to bring the facts to the attention of the appropriate committees of Congress together with your recommendation as to whether remedial action is required.

In the meantime, your attention is invited to the fact that under section 7 of the Taylor Grazing Act (43 U.S.C. 315f), you have discretion to determine whether particular lands should be made available for selection under section 2275 of the Revised Statutes. That discretion has, of course, already been exercised in the present case. However, you may wish to take appropriate action under the Taylor Grazing Act as to future cases in order to prevent further selections from being made by the States, at least pending further consideration of this matter by the Congress.

Sincerely,

ROBERT F. KENNEDY,  
*Attorney General.*

#### UTAH INDEMNITY SELECTIONS, CANE CREEK POTASH AREA

##### School Lands: Indemnity Selections—Mineral Lands: Generally

Section (a) (3) of the Act of August 27, 1958 (72 Stat. 928, 43 U.S.C. 852), does not authorize the selection of lands which have been probed by core drilling and extensive exploration work to the extent that the boundaries and quantity of a valuable deposit of mineral are well defined and the mineral within such deposit is known to be of such quality as to warrant expenditure of funds for extraction.

##### Words and Phrases

Land in a "producible status" as that term is used in section (a) (3) of the Act of August 27, 1958 (72 Stat. 928, 43 U.S.C. 852), includes mineral lands subject to lease or permit and which are known, at the time the application for selection is complete, to contain a valuable and accessible deposit of mineral in such quantity and of such quality as to warrant the expenditure of funds for extraction and production.

See Attorney General Opinion February 7, 1963, p. 65.

M-36645

December 17, 1962

TO: THE SECRETARY OF THE INTERIOR.

SUBJECT: UTAH INDEMNITY SELECTIONS, CANE CREEK POTASH AREA.

You have requested that I review Opinion M-36626 of September 8, 1961, relating to the selection by the States of mineral lands subject to lease or permit under Section 2276 of the Revised Statutes (43 U.S.C. 852). Opinion M-36626 held that "knowledge that land

under lease or permit contains valuable mineral deposits does not render it in a 'producibile status' within the meaning of section 2276-(a)(3) of the Revised Statutes (43 U.S.C. 852(a)(3))." I have determined that this conclusion is not correct.

The State of Utah is seeking to make indemnity selections of land under mineral lease, which land is known to contain a valuable deposit of potash sufficient in both quantity and quality to warrant the expenditure of funds for the purpose of extraction. Prior to the filing of the application for lieu selection by the State, the Delhi Taylor Oil Company had fully core drilled the property. The first hole was completed on February 17, 1957, disclosing the existence of a valuable deposit of potash. Further exploration and analysis of the property was made and more holes were drilled which revealed that the quantity and quality of the mineral was such as to warrant the expenditure of funds for its extraction. On January 19, 1959, Delhi Taylor Oil Company filed application for a preference right lease, and on May 1, 1959, the lease was issued to Delhi Taylor. Subsequently, all rights in the lease were assigned by Delhi Taylor to the Texas Gulf Sulphur Company. Following the award of the preference right lease, but still well in advance of the application for selection filed by the State of Utah, excavation was commenced of a mining shaft for the purpose of extracting the potash.<sup>1</sup> The State of Utah subsequently filed eighteen applications to open the property under lease as suitable for indemnity selection.<sup>2</sup>

The State applications were made under the 1958 amendment to section 2276 of the Revised Statutes (43 U.S.C. 852),<sup>3</sup> which permits a State to make lieu selections of lands subject to the following three conditions:

1. No lands mineral in character may be selected except to the extent that the selection is made as indemnity for lost mineral lands;
2. No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is made as indemnity for lost lands on such a structure; and
3. Land subject to a mineral lease or permit may be selected only if none of such land is in a producing or producible status.

<sup>1</sup> From information available in the files of Geological Survey, it appears that the company has expended in excess of \$10 million in the exploration and development of this potash area and anticipates expenditures totaling \$30 million or more by the time production actually commences in summer or fall of 1963.

<sup>2</sup> The number and filing dates of the pending applications are set forth in the Appendix. Some of the pending applications for selection will attach until the lands are opened and classified as suitable for selection.

<sup>3</sup> Act of August 27, 1958 (72 Stat. 928).

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It is assumed for purposes of this opinion that the State is offering mineral base lands.<sup>4</sup> Thus, the issue here is whether the third condition is met, *i.e.*, whether the selected lands, which are now under lease, are in either a "producing" or "producible status" within the contemplation of the act. I have examined the language and the entire history of the pertinent statutes to determine the intent of Congress. I have also carefully scrutinized the facts and technical data relevant to the proposed selections by the State of Utah to determine whether such selections fall within the purview of the statute. These studies have led me to conclude that the interpretation of the statute set forth in Opinion M-36626 is incorrect and that, for reasons hereinafter stated, the land in question is not eligible for selection by the State of Utah.

*"Lands in a Producible Status"*

Words in a statute are usually to be given their commonly accepted meaning. The Oxford English Dictionary<sup>5</sup> defines producible as "capable of being produced." "Status" is synonymous with "state" or "condition."<sup>6</sup> On a literal interpretation, "lands in a producible status" would mean land in a "condition" in which it is "capable of being produced." Of course, this meaning could not apply here since the mineral within the land, not the land itself, is meant to be the object of production. Where, in the interpretation of statutes, the acceptance of the literal or usual meaning would lead to absurd results or would thwart the obvious purpose of the statute, such meaning must be rejected. See *Helvering v. Hammel*, 311 U.S. 504 (1941); *United States v. Lederer Terminal Warehouse*, 139 F.2d 679 (6th Cir. 1943). "Producible" must consequently be used in a sense which would give the following meaning to the phrase in question: "Land which contains minerals capable of being produced." Since the lands in question are known to contain valuable mineral and it has been definitely established that the mineral can be produced therefrom, it would appear that they are in a "producible status."

Opinion M-36626 held that the phrase "lands in a producible status" means lands in such actual physical condition that minerals can immediately be produced therefrom. The effect of this is to make leased mineral land available for lieu selection although known to contain

<sup>4</sup> The Bureau of Land Management is currently investigating the nature and characteristics of the base lands underlying the applications filed by the State of Utah to determine whether such lands have been properly classified as "mineral lands," the present classification being in doubt.

<sup>5</sup> Vol. VII, p. 1422 (1953).

<sup>6</sup> The American College Dictionary, p. 1181.

valuable minerals in quality and quantity sufficient to justify a mining operation. In fact, it makes such lands available for selection by the States even though the exploration work has been completed and the development of a mining shaft and other facilities is so advanced that production is imminent. The historical background and the legislative history of the 1958 amendment establishes that there is no basis for such a construction of the language of this act.

#### *Historical Background*

The 1958 amendment is the most recent in a series of Congressional enactments relating to school grants involving mineral lands. To be interpreted properly this amendment must be placed in its proper historical context. Since 1785 it has been the policy of the Federal Government to grant to new States numbered sections of land to be used in support of their public school systems. In some Western States as many as four sections in each township were granted in recognition of the arid nature of the lands and the large reserved areas unaffected by the grants. These sections were spaced widely apart in each township in order to give each State a proportionate part and fair cross-section of all classes of land within its boundaries.<sup>7</sup> Prior to 1927, it was settled Congressional policy to except or withhold known mineral lands or the mineral estate in such lands in making grants of public lands in the West for schools. This policy was so well settled that in *United States v. Sweet*, 245 U.S. 563 (1918), the Supreme Court held that as a matter of Governmental policy, a school grant was deemed to pass no title to lands known to be valuable for minerals, even though the statute establishing the grant contained no express reservation of mineral lands.

The rule for determining whether or not the lands were mineral within the meaning of land grant statutes was spelled out by the Supreme Court in *United States v. Southern Pacific Railroad Co.*, 251 U.S. 1, 13 (1919), as follows:

\* \* \* the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end.

This test had earlier been applied with respect to lands containing solid minerals in *Diamond Coal & Coke Co. v. United States*, 233 U.S. 236 (1914). Under the early school grant statutes, States which lost school sections because of their mineral character, as determined by the applicable test, could select unappropriated, surveyed public lands, *not mineral in character*, on an equal acreage basis as indemnity for the lost lands. (26 Stat. 796, 43 U.S.C. 852).

<sup>7</sup> See 104 Cong. Rec. 11921-22 (1958) (Remarks of Senator Watkins).

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In 1914, Congress amended the mining laws in a manner which allowed the State to make lieu selections of lands valuable for phosphate, nitrate, potash, oil, gas or asphaltic minerals (the minerals later covered by the Mineral Leasing Act of 1920), but only if these minerals were reserved to the United States.<sup>8</sup>

In 1927, Congress, over the strong objections of the Secretary of the Interior, abandoned its policy of excepting mineral lands from the grants of numbered school sections in place. The Act of January 25, 1927 (44 Stat. 1026, 43 U.S.C. 870) extended previous school grants to embrace numbered school sections which were mineral in character, subject to existing rights. It provided that the minerals in such lands could be disposed of by the States only under leases with the resulting rents and royalties used for the support of the common or public schools. But, notwithstanding this change of policy which included mineral lands in the grants of school sections, lieu selection of mineral lands was not allowed.

The 1927 Act excluded from its operation lands which were subject to or included in existing reservations, Federal court proceedings, or in any valid application, claim, or right initiated under Federal law. Thus, lands under mineral lease or permit were excluded from the grants. Amendments to the 1927 Act were adopted in 1954<sup>9</sup> and 1956<sup>10</sup> to provide that the existence of a mineral lease or leases or applications therefor on any numbered school section at the time of survey did not prevent the attachment of the grant to a State of such section. Neither amendment, however, went so far as to extend to the States the privilege of making lieu selections of mineral lands. This step was taken in 1958 by the enactment of P.L. 85-771.

#### *Legislative History of the 1958 Act*

I have examined carefully all of the legislative history of the 1958 Amendment, including the Departmental recommendations, which bears on the interpretation of the phrase "lands in a producing or producible status." At no point in this material did the framers of the amendment undertake to provide a detailed definition of these terms. However, the several changes in the bill as originally presented, together with the explanation of these changes, indicate that Congress intended that lands under mineral lease which have been developed to the point that production is a certainty should remain unavailable for selection by the States.

<sup>8</sup> 88 Stat. 509, 30 U.S.C. 121, 123.

<sup>9</sup> 68 Stat. 57, 43 U.S.C. 870.

<sup>10</sup> 70 Stat. 529, 43 U.S.C. 870.

The bill which was subsequently amended and later enacted into law as P.L. 85-771 did not contain the limitations set forth in subsections (a), (b) and (c) of the present law.<sup>11</sup> The language of the original bill would have allowed the selection of lieu lands of known mineral character regardless of the character of the lost lands. The pertinent portion of the original bill provided as follows:

\* \* \* and other lands of equal acreage, whether or not known to be valuable for minerals, are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes \* \* \*

The Secretary of the Interior reported on the bill to the Senate Committee on Interior and Insular Affairs on February 27, 1958, recommending substantial changes in its language. The report stated in relevant part as follows:

Since existing law permits a State to obtain title to school sections in place which are mineral in character, it does not appear to be just to prohibit the State in all cases from selecting mineral lands as indemnity lands. However, we do not see any justification for permitting a State to select mineral lands except when it is selecting lands as indemnity for lost mineral lands, and, therefore, we believe that the proposed amendment of section 2275 must be revised considerably.

\* \* \* \* \*

In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than of equal value carries this policy forward. Under S. 2517, as introduced, a State would even have the right to select school lands in lieu of school lands that do not exist. We believe, accordingly that S. 2517 should be amended so that it would permit a State to select mineral lands in lieu of school sections in place, mineral in character, which were lost, providing that the lands to be selected by the State are not subject to a producing mineral lease or permit, nor on a known geologic structure of an oil or gas field. This would prevent a State from being able to wait until after mineral production had actually been started on a parcel of land before it determined to select it.

Following the text of the Secretary's report, a proposed amendment was set forth, providing, in relevant part, as follows:

That lands mineral in character, which are not in a known geologic structure of a producing oil and gas field, may be selected by the State or Territory to the extent that the selection is being made as indemnity for mineral lands lost to the State or Territory because of appropriation prior to survey: *Provided further*, That lands subject to a mineral lease or permit may be selected, but only if all of the lands subject to that lease or permit are selected and if none of the lands subject to the lease or permit *are in a producing status*: \* \* \* [italics supplied.]

No reference was made in this proposed amendment to lands in a "producibile status."

<sup>11</sup> S. 2517, 85th Cong.



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The changes proposed by the Department were incorporated into the House version of the bill (H.R. 12117) and, following the introduction of this bill, the Department submitted its second report suggesting additional changes which would further restrict the States in making lieu selections of mineral lands. Among other suggestions, the Assistant Secretary advised the House Committee that:

The language of subsection (a) (3) of section 2276, as it would be amended by H.R. 12117, is not sufficiently restrictive since it would permit a State to select land subject to a mineral lease when none of the land subject to that lease was in a producing status. Presumably, this would permit the selection of leased land on which there is a well capable of production, but on which production has been suspended. It is, therefore, suggested that the words "producing status" at page 4, line 12, be replaced by the words "producing or producible status."

The suggested revision was incorporated into the bill as subsection (a) (3).<sup>12</sup>

The language used by the Department in recommending the changes in the bill indicated that no justification was seen for allowing the State to select lands which were likely to be far more valuable than the school sections which had been lost. The changes recommended by the Department were based upon a principle of fair indemnification. The particular restriction involved here was designed to prevent the State from waiting until after mineral production had actually been started on a parcel of land before it determined to select it. There is no qualitative difference between lands on which production has been actually started and lands on which production is certain to occur but has not actually begun. It is the certainty that valuable minerals can be and will be produced from the land which is crucial. To allow the selection of the lands sought here by the State of Utah would grossly violate the principle of fair indemnification which was announced and discussed in the Department's reports on the bill.

When the revised version of the bill reached the floor of the Senate, Senator Arthur V. Watkins, who reported on S. 2517 and managed the bill on the floor of the Senate, made a statement outlining the purpose of the legislation and acknowledging the restrictions imposed on the selection of mineral lands.<sup>13</sup> Senator Watkins set forth the purpose of the amendment in the following language:

<sup>12</sup> As finally drafted subsection (a) (3) read as follows:

"Lands subject to a mineral lease or permit may be selected, but only if all the lands subject to that lease or permit are selected and if none of the lands subject to that lease or permit are in a producing or producible status." \* \* \*

<sup>13</sup> The relevant portion of Senator Watkins' statement regarding the restrictions in the bill simply quoted or paraphrased the language of the bill. See 104 Cong. Rec. 11921-22 (1958).

The objective of this legislation is merely to make whole the States which have pending in lieu selections of lands for preempted school sections. It gives the States and Territories affected the right to select mineralized land for forfeited school sections which were mineral in character. This, the committee feels, is doing nothing more than the Congress intended in the original grants under the respective enabling acts, wherein the sections were granted by specific number in order to insure that the schools received a fair cross-section of land values. 104 Cong. Rec. 11921 (1958).

It is obvious that this avowed purpose would be subverted if the States were permitted to receive more than a fair cross-section of land values by selecting proven lands on which mineral production has actually begun or is certain to commence due to the known value and extent of the mineral deposit. Senator Watkins also acknowledged in his statement on the floor of the Senate that this "legislation does not represent any change in policy or Congressional intent in this field." Presumably, the policy and Congressional intent referred to is that of providing the States with a fair cross-section of land values, and of allowing lieu selections to indemnify the States with lands which are comparable to the lands lost to the State. Prior to 1958 it had long been the policy and intent of Congress to exclude valuable mineral lands from selection under the school indemnity acts. *United States v. Sweet, supra; Charleston, S.C. Min. & Manufacturing Co. v. United States*, 273 U.S. 200 (1927).

We find in the 1958 act a manifestation of Congressional intent to change this latter policy, but only to the extent necessary to accomplish the over-all objective of this legislation and prevent inequities in its application. It cannot fairly be said that Congress abandoned the policy of providing a fair cross-section of lands to the States in favor of a policy which would allow the States to select only those lands which are known to contain rich deposits of valuable minerals.

A hearing was held on S. 2517 on July 22, 1958, before the Public Land Subcommittee of the House Interior and Insular Affairs Committee. The testimony given at the hearing was recorded but never printed. At several points in the hearing, reference was made to the limitations imposed by the amended bill on the selection of mineral lands. Congressman William Dawson of Utah, who sponsored the House bill stated:

\* \* \* I call the gentleman's attention to provisions in this bill which prohibit the State from going into an area where there is an existing oil or gas lease development. That is one of the amendments requested by the Department.

If there is a producing well or a going mine, that is excluded. Tr. p. 5.

Later, in discussing the time limit imposed by the Act for completing the selections, Congressman Dawson said:

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It is not the State's intention to wait until they find a development and then move in, because they are prohibited in this bill from doing that \* \* \* Tr. p. 10.

The sponsor of the bill spoke not of production, but of development. Relating this language to the situation at hand, we find that the potash lands sought here by the State of Utah have been fully core drilled and are under extensive development. As outlined earlier, a mining shaft was under construction by the lessee at the time the State's applications were filed. The State could have filed these applications as early as September of 1958. At that time the full quality and extent of the deposit had not been established, and mining operations were not yet a certainty. This is precisely the situation alluded to by Congressman Dawson and which he considered the amended bill to prevent. The context in which Congressman Dawson made this statement points up clearly his meaning. His statement concerning time limits quoted above was in response to the following observation by Chairman Aspinall:

Mr. Aspinall: \* \* \* The only thing that I do not want to do is to extend long enough so that it gives a *further advantage* to the States which they otherwise would not have.

I am satisfied that ten years is a minimum in which this job can be done. [Italics supplied.] Tr. pp. 9-10.

One "further advantage" is that which would inevitably result if a State were permitted to wait indefinitely to make its lieu selections and thus pass up lands only potentially valuable for minerals and wait until production of minerals was a certainty. Congressman Dawson answered that this was prohibited by the amended bill.

I have concluded from a study of this legislative history that the phrase "producing or producible status" was incorporated into the bill to prevent two situations from arising:

1. The selection by the State of lands on which mineral production had actually been started, and
2. The selection by the State of lands subject to lease or permit and which are positively known to contain valuable mineral deposits.

#### *Opinion of September 8, 1961*

Opinion M-36626 found the meaning of the term "producible" much more limited than I have determined it to be. That opinion held that the lands must be in actual condition to produce at the particular time involved in order to be "producible." This construction was based upon two assumptions:

1. That the example of the well capable of production and on which production has been suspended, as used in the Department's report

on the bill, limits the meaning of "producibile" to this type of situation; and

2. That a broader definition of "producibile" would frustrate the purpose of the 1958 Amendment to make mineral land available for lieu selection.

These assumptions are unwarranted. There is an important difference between oil or gas and solid minerals which was not recognized in the opinion. While it is possible to determine whether an area is prospectively valuable for oil and gas without drilling, it cannot be determined that commercial quantities of oil and gas exist without actually drilling wells. Thus, a well is usually a means of discovery as well as a means of producing oil or gas. Solid minerals, on the other hand, can be discovered and their existence in commercial quantities determined before the facilities for commercial production need be established. The use of a capped oil well, obviously as an example, did not mean that the term "land in producibile status" is restricted to land which has produced in the past. The term describes all lands certain to produce in the future. Lands in a producibile status are all lands known to be capable of producing whether or not they have produced in the past. This is consistent with the legislative history.

It does not appear that the construction given here to the phrase "lands in a producibile status" will violate the purposes of the 1958 Amendment. The earlier opinion indicated that the intention of the act was to permit lieu selection of lands of known mineral value. This is not entirely accurate—the amendment was to allow State selection of lands deemed mineral in character. There is a real difference between lands mineral in character and lands in which a valuable deposit of mineral has actually been discovered. Under Departmental decisions, lands "prospectively valuable" for leasable minerals have been considered to be mineral land although no actual discoveries have been made. *Foster v. Hess*, 50 L.D. 276 (1924); *State of New Mexico*, 52 L.D. 741 (1929). The school sections lost to the State for which lieu selections are provided in the 1958 amendment were lands "mineral in character." No actual discoveries of valuable mineral deposits in these lands were required to qualify them as mineral in character. *Standard Oil Company of California v. United States*, 107 F. 2d 402 (9th Cir. 1939), cert. denied, 309 U.S. 654, 673, 697 (1940). Thus the lands lost to the States for which the 1958 amendment seeks to give indemnity are not necessarily lands on which a valuable deposit of mineral had actually been discovered. And in allowing the State to select lands deemed mineral in character, the 1958 amendment un-

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doubtedly meant lands prospectively valuable for mineral, rather than lands in which deposits had actually been discovered. Under the Mineral Leasing Act as amended, oil lands are subject to lease before actual discoveries have been made, and lands prospectively valuable for other minerals are subject to permit. Thus an interpretation of the act which defines "producible" lands as lands on which a valuable discovery has been made and on which production is a certainty and on which costly development is in progress will still leave some land subject to lease or permit open to selection and will not render the provision meaningless as suggested by the previous opinion.

In summary, I have concluded that the phrase "lands in a producible status" includes any mineral lands which are subject to lease or permit and which are known, at the time the State's application for selection is complete, to contain a valuable and accessible deposit of mineral in such quantity and of such quality as to warrant the expenditure of funds for its extraction and production.

Applying this test to the lands at issue here, the conclusion is inevitable that the land sought was in a "producible status" at the time the State's applications were filed. As of the date of the first of these applications, the lands had been probed extensively by core drilling. The boundaries of the potash area were blocked out and well defined. The potash deposit was known to be of a very high grade. The depth and configuration of the deposit were known and the engineers had determined that there were no extraordinary circumstances which would thwart the extraction of the potash. With these known facts, it was determined by the owners of the lease that the quantity and quality of the deposit warranted the expenditure of funds for extraction. Pursuant to this determination, large expenditures were made in the development of the area, a shaft was begun and the construction thereof was well under way when the State finally elected to file its applications. Under these circumstances, it is impossible to conclude, without violating the spirit and the letter of the act, that the lands with respect to which the State's application for selection is complete, were not in a "producible status" on the date of application. They are, consequently, not eligible for selection, and the State's applications must be denied.

FRANK J. BARRY,  
*Solicitor.*

<i>Number of Pending Application</i>	<i>Date of Filing</i>
Utah 069174 <sup>a</sup> -----	6/ 7/61
Utah 084949 <sup>b</sup> -----	2/13/62
Utah 084947 <sup>c</sup> -----	2/13/62
Utah 084948 <sup>c</sup> -----	2/13/62
Utah 086643 <sup>c</sup> -----	3/ 1/62
Utah 096418 -----	8/30/62
Utah 079352 -----	11/ 7/61
Utah 079353 -----	11/ 7/61
Utah 077102 -----	3/21/62
Utah 077103 -----	9/21/61
Utah 077104 -----	9/21/61
Utah 077105 -----	9/21/61
Utah 077106 -----	9/21/61
Utah 077107 -----	9/21/61
Utah 077108 -----	9/21/61
Utah 077109 -----	9/21/61
Utah 084946 -----	2/13/62
Utah 084950 -----	2/13/62
Utah 084951 -----	2/13/62
Utah 096561 -----	10/17/62

<sup>a</sup>Original case.

<sup>b</sup> Case closed—Utah 096418 submitted in place of this application.

<sup>c</sup> Indicates that the State's application for selection has been completed with the classification and opening of the lands as suitable for selection subject to determination of the issues raised herein.

## THE MEANING OF THE WORD "PRODUCIBLE" AS USED IN SECTION 2276 OF THE REVISED STATUTES (43 U.S.C. 852)

### State Selections

Mere knowledge that land under lease or permit contains valuable mineral deposits does not render it in a "producible status" within the meaning of section 2276(a) (3) of the Revised Statutes (43 U.S.C. 852(a) (3)).

See Attorney General Opinion February 7, 1963, p. 65.

M-36626

September 8, 1961

To: CHIEF, CONSERVATION DIVISION, GEOLOGICAL SURVEY.

SUBJECT: THE MEANING OF THE WORD "PRODUCIBLE" AS USED IN SECTION 2276 OF THE REVISED STATUTES (43 U.S.C. 852).

We have reviewed your proposed teletype to the State Director, Bureau of Land Management, at Salt Lake City, Utah, concerning

*September 8, 1961*

Utah 069174, a State indemnity selection. Whether the State of Utah may select the lands in question depends on the meaning ascribed to the word "producible" as it is used in section 2276 of the Revised Statutes. The existence of the potash deposit has been clearly established. A shaft has been started, but there is now a distance of more than 2,000 feet still to go. There is no known condition which may impede development. Nevertheless, it is expected that many months must elapse before production will be commenced.

Section 2276 permits a State, in making indemnity selections for school lands, to select mineral lands subject to three conditions. (1) The State may select lands mineral in character only to the extent that it has lost lands mineral in character. The selected lands and the base lands need not be valuable for the same mineral, and there is no requirement that the respective values of the lands be equal. All that is required for the State to select mineral lands is that the base lands be mineral also. (2) However, this right to select mineral lands is further qualified where the selected lands are on a known geologic structure of a producing oil or gas field. For such lands to be acquired by a State it is necessary that the base lands also be on a known geologic structure. (3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a "producing or producible status." The term "producible status" is not defined elsewhere. Consequently, its meaning must be deduced from its context in the statute and from any reference in the legislative history.

The act of August 27, 1958 (72 Stat. 928), amended section 2276 to permit a State to select mineral lands. One of the bills upon which the 1958 act was based, H.R. 12117 of the 85th Congress, as originally introduced merely prohibited the selection of leased lands in a "producing status." In a letter of June 16, 1958, to Mr. Engle, Chairman of the House Committee on Interior and Insular Affairs, the Department recommended that these words be changed to "producing or producible status." In recommending this change, the Department said that the term "producing status" was "not sufficiently restrictive since it would permit a State to select land subject to a mineral lease when none of the land subject to that lease was in a producing status. Presumably, this would permit the selection of leased land on which there is a well capable of production, but on which production has been suspended." H.R. Rept. No. 2347, 85th Cong., 2d sess., 2, 5 (1958). This recommendation by the Department

was accepted without comment by the Congress, and it is, as a result, the only reference in the legislative history which casts any light upon the meaning of the term "producible." While the explanation of the term given in our letter does not profess to be complete, it does indicate that, when we made the recommendation, we were not thinking of "producible status" as indicating the status of land known to be valuable but not yet ready to be exploited, but as indicating rather land containing valuable mineral deposits which had at one time been in production or which were at least completely ready for production, without further exploratory or developmental effort. If this meaning should be adopted, the land in question is clearly not in a producible status, for, while the potash deposits are known to exist, it will be many months, at best, before they will be ready for production and it is possible that the shaft being sunk at this time will not prove satisfactory.

This answer reached by a reading of the legislative history is reinforced by a careful study of the context in which the term appears in the statute. As we pointed out above, three conditions are set up governing the selection of mineral lands by the State. The first condition, appearing in section 2276(a)(1), permits the selection of lands of known mineral value, provided that the base lands are mineral in character. The potash lands which we are considering are of known mineral value, and perhaps more extensive steps to ascertain the extent of the mineral deposit have been taken than is true of many lands deemed mineral in character. Nevertheless, there has been no production, and it is difficult to say anything more of this land than that it is positively known to possess mineral value. If the possession of such knowledge is deemed to place the land in a producible status, then any land which is known to possess mineral value will have to be regarded as in a producible status and, if under lease or permit, will not be subject to State selection. Such a determination would in large measure frustrate the principal purpose of the act of August 27, 1958, which was to permit States to select mineral lands in indemnity for mineral school lands originally granted to them but later found to be unavailable.

It should also be considered that subsections (a)(2) and (a)(3) draw an apparent distinction between three classes of oil and gas lands: producing, producible, and on a known structure. Oil and gas lands falling within the first two categories may not, if under lease or permit, be selected by a State. Oil and gas lands in the third category may be selected as indemnity for similar lands. Con-



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sequently, it is evident that, as applied to oil and gas, "producibile status" means more than that the land is merely known to contain the mineral. Since subsection (a)(3) makes no distinction between oil and gas and other minerals as to the term "producibile status," we are led to the conclusion that for lands to be deemed in a producibile status we must have more than the mere knowledge that they contain valuable mineral.

While we have not found any previous decisions on the specific point of the meaning of "producibile status" in section 2276, the Department has in the past construed the meaning of the term "well capable of producing oil or gas in paying quantities" as found in section 31 of the Mineral Leasing Act, as amended (30 U.S.C. 188). That section provides for the automatic termination for failure to pay rental of any lease on which there is no well of that nature. In *United Manufacturing Company et al.*, 65 I.D. 106 (1958), it was held that a "well capable of producing" was a well which is actually in a condition to produce at the particular time in question. It is not one that is mechanically unable to produce because the casing has not been perforated and that has only prospects of being a commercial well. The terms "capable of producing" and "producibile" are virtually synonymous. Under the 1958 holding, it is obvious that the potash lands described in your teletype would not be regarded as in a producing status.

We have accordingly approved your proposed teletype to the State Director.

THOMAS J. CAVANAUGH,  
*Associate Solicitor.*

### APPEAL OF CECIL SCHWEIGHARDT

IBCA-293

*Decided March 4, 1963*

**Contracts: Changes and Extras—Contracts: Additional Compensation—  
Rules of Practice: Evidence**

An appeal involving a claim for additional compensation based on the contract price for deleted work not performed will be denied where the contractor fails to submit evidence of the costs of materials and labor claimed to have been incurred in anticipation of the performance of the deleted work.

#### BOARD OF CONTRACT APPEALS

A timely appeal was filed from the Findings of Fact and Decision of the Contracting Officer of June 21, 1961. The dispute concerns:

an alleged deletion of work under the above-captioned contract and a claim of \$935.17 as additional compensation therefor dated August 8, 1960. The principal work under the contract was structural excavation and construction of reinforced concrete footings as part of the construction of a line terminal and capacitor additions at Okanogan Substation in Okanogan County, Washington. The contract included Standard Form 23A (March 1953), together with other provisions and specifications.

The approximate amount of structural excavation (Item 1), as shown in the contract schedule of unit prices, was 140 cubic yards at a unit price of \$6.60 or an estimated total of \$924. The approximate quantity of reinforced concrete footings (Item 2) was 55 cubic yards at \$143, estimated total of \$7,865. The total estimated contract price, including the prices of nine other items not relevant to this appeal, was \$17,272.95.

A total of 46 concrete footings was listed in paragraph 1-103 of the specifications, including two large footings designated as Mark B2, the latter being intended to serve as foundations for 115 kv oil circuit breakers. However, Drawing No. 222-11-342-D1, Revision 3, made a part of the contract, provided the following instructions as to the Mark B2 footings only:

Defer construction pending verification of equipment details by Branch of Design.

At a meeting on August 8, 1960, the date of the award of the contract, the contractor-appellant (Mr. Schweighardt) discussed the proposed award with Bonneville Power Administration personnel, including Mr. Kenneth M. Klein (the contracting officer) and Mr. V. E. Taylor, Chief of Construction. It was noted by Mr. Taylor that Mr. Schweighardt had recently been awarded a separate contract by Bonneville Power Administration, to be performed at a different location. Mr. Taylor stated that the two contracts would be required to be performed simultaneously. At this meeting it developed that there was an urgency under this contract for completion of certain footings by September 9, 1960. These footings were to receive equipment necessitating temporary de-energizing of the existing power lines. It was agreed that the Notice to Proceed would be issued effective August 22, 1960, and that Mr. Schweighardt would acknowledge its receipt as of that date and start work the same day.<sup>1</sup> The contract required that

<sup>1</sup> Minutes of meeting, dated August 8, 1960, in appeal file.

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the contractor commence work within ten (10) calendar days from receipt of the Notice to Proceed, and that the work be completed within sixty (60) calendar days after receipt of the Notice to Proceed. Liquidated damages of Fifty Dollars (\$50) per day were to be assessed for delay in completion of the contract.

Revision 4 of Drawing No. 222-11-342-D1 was issued to the contractor under date of September 23, 1960. This revision released one of the Mark B2 footings for construction in Bay 3 of the project. However, this revision continued to exclude the remaining footing, by the following language:

Defer Construction of Ftg. B2 in Bay 4.

The continued deferment of the Mark B2 footing in Bay 4 was caused by delay in arrangements between the Bonneville Power Administration and the Atomic Energy Commission for transfer to BPA of a 115 kv oil circuit breaker. This proposed equipment transfer was never completed and the instant contract was performed within the allotted time as amended, without the Mark B2 footing in Bay 4.

In the meantime the contractor had proceeded to prepare for the expected instructions to construct the Mark B2 footing in Bay 4. Excavation work was performed, and forms, steel, etc., were ordered and received at the job site, which was in a location somewhat remote from supply sources. The contractor also maintained his qualified workmen at the site so they would be available for the deferred work.

The Government did not at any time issue a change order deleting the Mark B2 footing for Bay 4. The contracting officer's authorized representative at the site assumed that the situation came within the purview of Section 2-107 of the Supplementary General Provisions of the contract,<sup>2</sup> providing in substance that variation between estimated quantities and actual quantities should not affect the unit price

<sup>2</sup> "2-107. *Quantities and Unit Prices.* A. The total estimated quantities necessary to complete the work as specified are listed in the 'Schedule of Designations and Bid Prices', attached to and made a part of these specifications.

"B. These quantities are estimates only and will be used as a basis for canvassing and evaluating bids and for estimating the consideration of the contract. The contractor will be required to furnish and place the entire quantities necessary to complete the work specified, be they more or less than the estimated quantities.

"C. If the actual quantity of any bid item varies from the estimated quantity by more than 25 percent, the contracting officer and the contractor, at the request of either, will negotiate for a revised unit price to be applied to the units of work actually performed in excess of 125 percent or less than 75 percent of the estimated quantity; provided, that no such negotiation shall be undertaken unless the variation from the original contract amount for any bid item exceed \$1,000, based on the contract unit price."

unless the variation exceeded 25 percent of the estimated quantity, and then only if the variation resulted in a price differential exceeding \$1,000. The actual variations from the approximate or estimated quantities amounted to 12 percent for Item 1 and 15 percent for Item 2.

In his letter of November 21, 1960, the contractor protested the deletion of the Bay 4 footing and stated:

During the last days of the contract I was told by Mr. P. F. Caudill, Project Engineer and by Mr. Carlisle Brown of your office, that the other [Mark B2 footing for Bay 4] was cancelled and that I should expect payment only for the number of cubic yards of concrete placed.

The contractor also pointed out that the two Mark B2 footings were larger than the 44 other footings (7.37 cubic yards of concrete each, compared with about 0.9 cubic yard average for the others) and that the Mark B2 footings required considerably less forming material and labor. He stated that the bid schedule compelled him to bid an average price for reinforced concrete footings and that the Government, by deleting part of the work which was the least costly to perform, had, in effect, increased the average cost per cubic yard for the remaining quantities.

Counsel for appellant, by letter of February 2, 1961, filed a claim on behalf of appellant in the amount of \$935.17, based on the following computations:

Work performed in excavating for Bay 4 footing, 2 $\frac{3}{8}$ cubic yards @ \$6.60-----	\$17.60
Work deleted, 7.37 cubic yards of concrete @ \$143.00, less credit of \$18.50 per cubic yard of ready-mix concrete not purchased-----	917.57
Total claim-----	\$935.17

Mr. V. E. Taylor's reply of February 16, 1961, to appellant's counsel, called attention to the fact that the only work actually performed was the excavation for the footing, at a contract value of \$17.60. No itemization of other actual costs were furnished by appellant, although Mr. Schweighardt had based his claim in part, at least, on the fact that he had purchased form lumber and steel for the footing. However, the form lumber was actually used in construction of the Mark B2 footing in Bay 3, hence it was not a total loss. Mr. Taylor's letter suggested an adjustment of \$200, based on 20 percent of the approximate contract value (\$1,000) of the deleted work. This was rejected by appellant's counsel in his letter of February 20, 1961.

March 4, 1968

In his decision of June 21, 1961, the contracting officer found that appellant was entitled to an adjustment pursuant to the Changes clause of the contract in the amount of \$352.60, stating:

\* \* \* The action of the contractor in planning for the maximum work that the Government might order was not unreasonable. \* \* \*

Because of the lack of data as to itemized costs (requested by the Government but not supplied by the Contractor) to support the claim, the contracting officer based his figures on the contract drawings and available price lists, as follows:

Structural excavation, 2 $\frac{2}{3}$ cubic yards @ \$6.60-----		\$17.60
Reinforced concrete footing, materials and direct labor costs to contractor-----	\$135.00	
Plus equitable adjustment other factors-----	200.00	335.00
		<hr/>
Total adjustment-----		352.60

On July 17, 1961, Mr. Schweighardt appealed from this decision. The appeal relies on the unsupported statement by Mr. Schweighardt that he had incurred all of the costs of performing the work of constructing the Mark B2 footing in Bay 4. But, as the contracting officer's decision points out:

\* \* \* However, there is no evidence that the laborers were paid by the contractor for work not performed. \* \* \*

Mr. Schweighardt, in his letter of November 21, 1960, made a statement pertinent to this factor of his claim:

\* \* \* One [cement] finisher was released after the one footing was completed, the other remained until the end of the contract, and although there were days he did not work at all he was available and was being paid subsistence. \* \* \*

We conclude that a fair inference to be drawn from the foregoing is that the cement finisher was not paid wages when he did not work, and that on such occasions he received subsistence only. The payrolls submitted with the appeal file show that wages were paid for cement finishing work on other structures, such as the control house and man-holes, from October 12 to October 24, 1960. All work was completed as of November 1, 1960. However, after October 17, 1960, there were no employees on the contractor's payroll who were classified as cement finishers.

There is no doubt that the deletion of the Mark B2 footing for Bay 4 amounted to a constructive change order, for which appellant was

entitled to an equitable adjustment pursuant to the Changes clause. Appellant has cited *Peter Kiewit Sons' Co. v. United States*,<sup>3</sup> as authority for the proposition that the Government, by failing to issue a change order for the deletion of work, may not force the contractor to take a loss. We are in full agreement with that principle. But no evidence has been submitted by appellant that the contractor took a loss on this contract as a whole. In order to enable the application of the principle, the contractor must establish his costs of complying with the change.<sup>4</sup> It is not sufficient for the contractor to say merely that he is entitled to the full contract price for the work that was deleted (less concrete not purchased). The *Kiewit* case does not stand for the proposition that a contractor, by alleging that he incurred all of the costs incident to performance of deleted work not performed, without any proof as to the items of costs involved, may recover the contract price for work not performed.

We have held consistently that mere allegations are not proof of essential facts which are disputed.<sup>5</sup>

The Board considers that the decision of the contracting officer was eminently fair, in the light of his inability to obtain evidence of itemized costs from appellant. In the absence of such evidence, the decision of the contracting officer must be affirmed. The Board wishes to make it clear, however, that our denial of the appeal does not prevent completion of the equitable adjustment described in the decision of the contracting officer.

#### *Conclusion*

The appeal is denied.

THOMAS M. DURSTON, *Member*.

I CONCUR:

PAUL H. GANTT, *Chairman*.

<sup>3</sup> 109 Ct. Cl. 517 (1947).

<sup>4</sup> *Of. Henly Construction Company*, IBCA-249 (December 7, 1961), 61-2 BCA par. 3240, 4 Gov. Contr. 49 (b).

<sup>5</sup> *Duncan Construction Company*, IBCA-197 (February 1, 1961), 61-1 BCA par. 2932, 3 Gov. Contr. 180(r); *AAA Construction Company*, IBCA-55 (November 26, 1957), 64 I.D. 440, 442, 57-2 BCA par. 1510.

March 11, 1963

**TRANSFER OF REAL AND PERSONAL PROPERTIES TO THE STATE  
OF ALASKA PURSUANT TO SECTION 6(e) OF THE ALASKA STATE-  
HOOD ACT**

**Alaska: Statehood Act**

The legislative history of section 6(e) of the Act of July 7, 1958, clearly indicates that Congress intended to limit the application of section 6(e) to transfers of property, real and personal, which has been used solely for the purposes of conserving and protecting Alaskan fisheries and wildlife under the provisions of the State laws cited in the Act.

**Alaska: Generally**

Legislative grants must be construed strictly against the grantee lest they be enlarged to include more than what was intended.

**Alaska: Generally**

Section 45(a) of the Alaska Omnibus Act permits the transfer of real and personal property to the State, if it is determined that a Federal function has been terminated or curtailed and has been or will be assumed by the State.

**Alaska: Generally**

The authority of any Commission appointed pursuant to section 46(a) of the Alaska Omnibus Act is limited to the consideration of factual disputes only and such a Commission has no authority to pass upon questions of law or to resolve disputes respecting the proper interpretation of the statute.

M-36648

March 11, 1963

**TO: SECRETARY OF THE INTERIOR.**

**SUBJECT: TRANSFER OF CERTAIN PROPERTY IN ALASKA TO THE STATE.**

The question has been raised whether the State of Alaska is entitled to the transfer, pursuant to section 6(e) of the Act of July 7, 1958 (72 Stat. 339), of certain properties, real and personal, located within Alaska and presently utilized by the Fish and Wildlife Service of this Department.

By letter dated June 7, 1961, this Department advised the Governor of Alaska that the properties in question (a list of these properties is found in a letter, dated October 11, 1961) were not used solely for the purposes set forth in section 6(e) of the Act of July 7, 1958, and therefore would not be transferred. The Governor was also advised that we would periodically review the matter to determine if any of these properties could be transferred to the State pursuant to section 45(a) of the Alaska Omnibus Act (73 Stat. 141). Sub-

sequently, we agreed, after discussions with the State's Attorney General, that we would reconsider the entire question and advise the State further. A meeting was held in Washington, D.C., on December 19, 1962, with Mr. George N. Hayes, the Attorney General of the State of Alaska, to discuss our interpretation of section 6(e) and it was agreed that upon reconsideration we would advise him in writing of our decision.

The pertinent provisions of section 6(e) are as follows:

*All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: Provided, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife \* \* \* [Italics supplied.]*

It is the contention of the State of Alaska that the statute in question should be liberally construed in favor of the State. Under such interpretation the State contends that the phrase "\* \* \* property \* \* \* which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, \* \* \*," as used in the statute, includes property which is also used in the performance of various authorized Federal functions which are continuing in nature. However, reference to the limitations set forth in the Act itself, the legislative history of the Act, and the application of the canons of construction, lead inevitably to the conclusion that section 6(e) of the Act must be construed much more narrowly.

First, the interpretation urged by the State of Alaska ignores the limitations imposed by the language immediately following the above-quoted phrase. The second phrase limits the property available to the State to that which is used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, "\* \* \* under the provisions of the Alaska game law of July 1, 1943 [Citations]



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and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 [Citations] \* \* \*." Reference to the Senate and House reports indicates clearly that Congress intended by the insertion of the last-quoted portion of the statute, to limit the application of section 6(e) to transfers of certain specific property which is or has been used solely for the purposes enumerated in that section. In the Senate reports (S. Rept. No. 1163, 85th Cong.) on S. 49, the Senate Committee on Interior and Insular Affairs analyzed section 6(e) as follows:

Subsection 6(e) directs the transfer to the State of Alaska of all real and personal property which is owned by the United States, situated in Alaska, and *used for the sole purpose* of conserving and protecting Alaskan fisheries and wildlife *under* the provisions of the statutes cited in the subsection. However, such transfer shall not include the following: (1) lands set apart as wildlife refuges or reservations, (2) facilities utilized in connection with wildlife reservations or refuges, or (3) *lands or personal property utilized in connection with general research activities* relating to fisheries or wildlife. [Italics supplied.]

Similarly, the House Committee on Interior and Insular Affairs in a report (H. Rept. No. 624, 85th Cong.) on H.R. 7999 stated:

Subsection [6] (e) provides for the transfer and conveyance of all United States property used for conservation and protection of fisheries and wildlife to the State of Alaska. It also provides that said transfer *shall not* include withdrawn lands used in general wildlife and fisheries research activities. \* \* \* [Italics supplied.]

Clearly, Congress intended to transfer to the State, by operation of section 6(e), only such real and personal property as may be *used solely* for the purposes of management, conservation and protection, of Alaskan fisheries and wildlife under the provisions of the Alaska game laws and the Alaska fisheries laws.

It has long been held " \* \* \* that all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included." *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960), rehearing denied 364 U.S. 855. See also *United States v. Michigan*, 190 U.S. 379, 401 (1903), and *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957). Since section 6(e) was intended as a grant of certain specific Federal properties to the State, it must include only those properties expressly referred to, and not those needed for the continued performance of authorized Federal functions even though the same property may have been used to manage Alaska fish and wildlife resources.

Thus, upon a determination that the properties in question were *used solely* for the purposes set forth above, those properties should be transferred to the State. However, we find that very little, if any, of the properties utilized in Alaska prior to Statehood were used solely for the purposes set forth in section 6(e), since the Department carried out its dual functions, territorial and Federal, using all of the properties under its control. The legislative history of the Statehood Act clearly indicates that Congress was not aware, when considering H.R. 7999, of this historic dual use of properties by this Department in Alaska. Congressman Aspinall, Chairman of the House Committee on Interior and Insular Affairs, makes this clear on the floor of the House (105 Cong. Rec. 9472, 86th Cong. 1st Sess.) when he explains the purpose of section 45(a) of the Alaska Omnibus Act (73 Stat. 141), as follows:

This legislation [H.R. 7120] was introduced at the request of the President of the United States.

\* \* \* \* \*

H.R. 7120 was prepared in the Bureau of the Budget after consultation with all agencies of the executive branch administering Federal statutes which were affected by the admission of Alaska into the Union. The bill deals with Federal-State relations and matters affecting the scope of Federal operations in Alaska.

\* \* \* \* \*

Section 45 authorizes the President, until July 1, 1964, to transfer, without compensation, all real and personal property pertaining to any Federal function in Alaska which is terminated or curtailed and which is assumed by the State. At present it is contemplated that general authority would be used to transfer \* \* \*, *some fish and game management equipment, including boats and aircraft.*

The justification for such transfers \* \* \* rest on the following points:

First. In each case, the State of Alaska is assuming a function [including the management of their fish and wildlife resources] heretofore the responsibility of the Federal Government.

\* \* \* \* \*

Second. To enable the State to assume those responsibilities now, and to prevent the Federal responsibility from continuing indefinitely, it is necessary and practical to turn over to the State certain property used by the United States in the performance of those functions.

\* \* \* \* \*

Third. No property is to be transferred *unless it is excess to United States needs in Alaska and unless it relates to a function taken over by the State* \* \* \*. The Federal Government will retain all property needed for continuing Federal functions \* \* \* [Italics supplied.]

Thus, the properties sought by the State of Alaska may be transferred to the State pursuant to section 45(a) of the Alaska Omnibus

March 11, 1963

Act, if it is determined that a Federal function has been terminated or curtailed and the performance of the function or substantially the same function has been or will be assumed by Alaska pursuant to the Act of July 7, 1958, *supra*, or the Alaska Omnibus Act, *supra*. Even if such a determination is made, the question of whether the property should or should not be transferred is discretionary in the Secretary (see E.O. No. 10857, 25 F.R. 33). The Fish and Wildlife Service has advised us by memoranda, dated December 18 and 19, 1962, that the properties are presently needed to carry out continuing Federal activities in Alaska.

We now understand that Governor Egan has requested that procedures should be set in motion pursuant to section 46 of the Alaska Omnibus Act, *supra*, to establish a temporary commission to settle the dispute. Section 46 (a) of the Act provides :

(a) In the event *any disputes* arise between the United States and the State of Alaska prior to January 1, 1965, concerning the transfer, conveyance, or other disposal of property to the State of Alaska *pursuant to section 6(e) of the act of July 7, 1958 \* \* \**, or *pursuant to this Act*, the President is *authorized* (1) to appoint by and with the advice and consent of the Senate a temporary commission of three persons, to consider, ascertain, adjust, determine, and settle such disputes, and (2) to make such rules and regulations as may be necessary to establish such temporary commission or as may be necessary to terminate such temporary commission at the conclusion of its duties. In carrying out its duties under this section, such commission may hold such hearings, take such testimony, sit and act at such times and places, and incur such expenditures as the commission deems necessary. No commission shall be appointed under authority of this subsection after June 30, 1965. [Italics supplied.]

I have concluded that a Commission appointed pursuant to section 46(a) of the Omnibus Act has authority to settle only factual disputes as to what property is subject to transfer to the State in accordance with section 6(e) or 45(a). However, such a Commission has no authority to pass upon questions of law or to resolve disputes respecting the proper legal interpretation of the statute. The Report of the House Committee on Interior and Insular Affairs (H. Rept. No. 369, 86th Cong.) on H.R. 7120, later enacted as the Alaska Omnibus Act, states in pertinent part as follows :

Section 46 provides for the establishment, should the need arise, of a temporary three member Commission to hear and settle any dispute between the Federal Government and Alaska concerning the transfer of Federal property to the State. In both the Statehood Act (notably sec. 6(e)), and this bill \* \* \*, provision is made for the transfer or conveyance of certain Federal property

to Alaska. If the respective governments should not agree as to *what property is comprehended by such sections*, the President would be authorized to appoint a temporary Commission to settle the dispute. The Commission would make no money settlements, but would *merely decide which jurisdiction is entitled to the disputed property*. Members would receive \$50 per day, would be reimbursed for travel, and would receive a per diem allowance when away from their usual places of residence. Committee amendments to this section have been pointed out above. [Italics supplied.]

Furthermore, the decisions of the Commission, even as to factual disputes are not intended to be final. In this regard, the House Report (H. Rept. No. 369, 86 Cong.) contains the following relevant language:

The committee marked up in several respects the original proposal relating to the potential establishment of a Commission to settle disputes arising out of the property transfer provisions of this act and of section 6(e) of the Alaska Statehood Act: (a) It has provided that the Commissioners shall be appointed with the advice and consent of the Senate; (b) *it eliminated a provision making the Commissioners' decision "final and conclusive for all purposes"*; (c) it has inserted a final date for any appointment of a Commission. The committee understands that it will be given an opportunity to review such rules and regulations as a Commission, if appointed, may set up. [Italics supplied.]

Since the dispute in the present case is purely legal and a Commission appointed under section 46 of the Alaska Omnibus Act would have no authority to resolve purely legal questions, and since there is no disagreement as to the facts regarding the use of the property in question, a Commission would have no jurisdiction in this case.

In summary, it is concluded that section 6(e) must be strictly construed; that the properties in question should not be transferred to the State unless they were used by the Federal Government solely for the purposes of conserving and protecting the fish and wildlife of Alaska under the provisions of the Alaska game laws and the Alaska fisheries law; that none of the properties in question were used solely for these purposes by the Federal Government. Therefore, the request of the State for the transfer of properties pursuant to section 6(e) is denied.

It is further concluded that a Commission appointed pursuant to section 46 of the Alaska Omnibus Act would have no jurisdiction to settle the present dispute since that Act authorizes the establishment of a Commission for the purpose of resolving factual disputes and not for the purpose of deciding legal issues respecting the interpretation of the statute.

FRANK J. BARRY,  
*Solicitor.*

*March 14, 1963*

## CLAIM OF HAROLD D. JENSEN

TA-227 (IR.)

*Decided March 14, 1963***Irrigation Claims: Generally**

Under Public Works Appropriation Acts, an award may be made only upon a showing that the damage was the direct result of nontortious activities of employees of the Bureau of Reclamation.

**Irrigation Claims: Generally**

A direct cause has been defined as a cause without which the injury would not have occurred, and which by itself is a self-sufficient cause of the injury.

**Irrigation Claims: Generally**

Each claim must be considered on its own peculiar facts and merits. The payment of any claim does not necessarily assure the payment of another claim on the mere allegation that it is similar or identical.

**Irrigation Claims: Water and Water Rights: Seepage**

In dealing with subterranean water, it is rare that conclusions can be drawn with mathematical precision. Such precision is not necessary. Reasonable and logical conclusions can and must be drawn from the evidence presented, and a decision will then be rendered consistent with the preponderance of the evidence.

**Irrigation Claims: Water and Water Rights: Seepage**

When a claim is made that seepage water from a Bureau of Reclamation irrigation structure has damaged private property, it is not necessary to a proper denial of the claim under the Public Works Appropriation Acts to have a finding as to the source of the water causing the damage. It is necessary only that there be a finding based on the evidence that the damage was not the direct result of nontortious activities of employees of the Bureau of Reclamation.

**APPEAL FROM ADMINISTRATIVE DETERMINATION**

Mr. Harold D. Jensen, Star Route, Connell, Washington, by and through his attorney, Mr. Fred Shelton, of Othello, Washington, has timely appealed from the administrative determination (T-P-183 (Ir.)) of July 17, 1961, of the Acting Regional Solicitor, Portland Region, Portland, Oregon, denying his claim in the amount of \$1,008.-58. Mr. Jensen alleges that during the 1957 season 6.3 acres of beans were destroyed by seepage from the Potholes East Canal, an irrigation structure of the Columbia Basin Project of the Bureau of Reclamation.

In the original determination, the Acting Regional Solicitor denied the claim under the Federal Tort Claims Act<sup>1</sup> because "The claimant has not alleged nor do any of the circumstances establish negligence on the part of the United States or its employees that would justify a

<sup>1</sup> 28 U.S.C., 1958 ed., sec. 2671 *et seq.*

recovery herein \* \* \*.” He also denied the claim under the Public Works Appropriation Act<sup>2</sup> because in this instance the “\* \* \* canal leakage by legal definition is not a direct cause \* \* \*” of the damage.

It is clear from the notice of appeal that the appellant does not seek to have the original determination reversed on any theory of negligence on the part of the Government or its employees. The appellant does not allege negligence, nor does the investigation reveal any negligence. Therefore, the denial of the claim under the Federal Tort Claims Act in the original determination is affirmed.

The notice of appeal states, “\* \* \* the claimant suffered loss directly through the nonnegligent activities of the Bureau of Reclamation \* \* \* and is therefore compensable under Public Law 87-65.”<sup>3</sup> This places the appeal directly within the ambit of the Public Works Appropriation Act. Under the current Act, and its predecessors, awards may be made only upon a showing that the damage was the direct result of nontortious activities of employees of the Bureau of Reclamation.<sup>4</sup>

The appellant's land, Farm Unit 14, Irrigation block 11, Columbia Basin Project, Franklin County, Washington, and its topography are described in the original determination. These descriptions will not be repeated in this determination, except in so far as necessary to decide this appeal.

The notice of appeal excepts to the original determination in general in that it is contrary to fact or contrary to law or both.

Specific objections may be summarized as follows:

1. The interceptor drain constructed between the Canal and appellant's land before the 1957 crop season did not prevent the water leaking from the Canal from reaching the appellant's land. “The new interceptor drain merely collected the water to further cast it upon claimant's land.”

2. The investigating officer's report, quoted in the original determination, “\* \* \* concludes that this seepage from the canal could not have caused the water in the claimant's basement \* \* \*.” No claim is made for water in the basement. “The investigating officer makes no finding as to the source of water which damaged the beans, which is the gravamen of the issue \* \* \*.”

<sup>2</sup> Both the original determination and the notice of appeal refer to Public Law 87-65 (75 Stat. 144). This is a Joint Resolution of Congress which, among other things, continued the appropriations made to the Bureau of Reclamation under the Public Works Appropriation Act, 1961, 74 Stat. 743, until the Public Works Appropriation Act, 1962, 75 Stat. 722, became effective. This appeal will be considered under the currently applicable Public Works Appropriation Act, 1963, 76 Stat. 1216.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Northern Pacific Railway Co.*, T-560 (Ir.) (May 10, 1954), and administrative determinations cited therein; 39 Op. Atty. Gen. 425 (1940).

March 14, 1693

3. The conclusion that the damage was caused by the claimant's own irrigation water " \* \* \* is a speculative assumption \* \* \*."

4. It is not true that the wet land is located in a shallow swale. "The swale on this land is located Northwest of the damaged bean crop."

5. "Damages under similar facts were awarded for the 1957 year, to neighboring farms, and the claimant's position is not essentially different."

The specific exceptions will be considered in the order in which they are listed.

#### 1. *Interceptor Drain*

Concerning the first exception the memorandum from the Chief, Drainage Branch, Ephrata, Washington, to the Field Solicitor, Ephrata, Washington,<sup>5</sup> states, in part:

Observation well readings on October 6, 1957, indicated ground water level elevations on the eastern part of Farm Unit 14 as follows—918.6 adjacent to the Potholes Canal, 917.6 adjacent to the north side of the tile drain, 916.3 adjacent to the south side of the tile drain, 914.4 midway between the tile drain and the bean field, 913.3 at the north edge of the bean field. On November 6, 1957, the ground water elevation was 913.6, 450 feet south of the bean field and was 911.8 near the farmstead at the southeast corner of the unit. The Potholes Canal was unwatered about October 25, 1957. The ground surface of the bean field lies approximately between elevations 917 and 920, indicating that at the close of the irrigation season the ground water level in the vicinity was no higher than 4 feet below the ground surface, and that the pressure gradient acting on the movement of ground water from the north was only 3 feet in the 550-foot distance from the drain to the bean field.

A similar north-south observation line on the west part of Farm Unit 15 shows the following ground water surface elevations on October 6, 1957: 922.5 adjacent to the canal; 917.7 immediately north of the drain; a dry bottom at elevation 916.3 immediately south of the drain; 916.7, 112 feet south of the drain; and 913.7 300 feet east of the northeast corner of the bean field under discussion. These data indicate that no ground water at elevations capable of causing seepage damage to the beans was moving past the drain line from the Potholes Canal, at the close of the 1957 irrigation season at a time when the influence of canal seepage on the ground water levels would have been at a maximum.

The same memorandum indicates that measurements of flow in the drain taken in 1957 showed " \* \* \* that the drain was intercepting ground water at a rather uniform rate across Farm Units 14 and 15 and was conveying it westward, out of the area \* \* \*."

We agree with these factual findings and conclusions, and find that the first exception is without merit.

<sup>5</sup> Office Memorandum, dated September 6, 1961.

## 2. *Damage to Beans*

In the second exception the appellant seizes upon the circumstances that the original determination quoted that part of the investigating officer's report which concluded that the seepage from the canal could not have caused the water in the appellant's basement, but made no specific finding as to the source of the water which damaged the beans. The notice of appeal correctly notes that no claim was made for water in the basement. However, Mr. Jensen did mention the water in his basement, apparently in an attempt to bolster other aspects of his claim. The water in the basement "\* \* \* shows that a high water table existed at this location, remote from the Potholes Canal, and on the opposite side of the bean field at an elevation similar to that immediately south of the drain."<sup>6</sup> Further, the investigating officer did state his opinion as to the source of the water which damaged the beans. The original determination at page three states:

Based on this evidence and the reports of drainage engineers, it is the opinion of the Investigating Officer that canal seepage in 1957 was effectively neutralized by construction of the drain and the saturation on this unit was caused by claimant's own applied irrigation water.

Of course, it was not necessary for either the investigating officer or the Acting Regional Solicitor in the original determination to decide the source of the water which damaged the beans. It was necessary only that the original determination should find that the damage was not the direct result of nontortious activities of employees of the Bureau of Reclamation.<sup>7</sup> This in itself is the proper ground for the denial of the claim. Hence, the second exception is without merit.

## 3. *Damage by Irrigation Water*

The third exception attacks the conclusion that the damage was caused by the appellant's own irrigation water as being a speculative assumption. As stated above, it was not necessary to decide the source of the water which damaged the beans. However, the conclusion referred to is not a speculative assumption. In dealing with subterranean water, it is rare that conclusions can be drawn with mathematical precision. Such precision is not necessary. Reasonable and logical conclusions can and must be drawn from the evidence presented, and a decision is then rendered consistent with the preponderance of the evidence. The Acting Regional Solicitor did this in the original determination.

The third exception is without merit.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Northern Pacific Railway Co., supra, note 4.*



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#### 4. Location of Wet Land

The fourth exception denies that the land in question is located in a swale as stated in the original determination. The investigating officer states:<sup>8</sup>

\* \* \* the entire north half of this farm is a very shallow swale and is shown as such on topography maps of the area. This feature was a factor in the drainage studies of the unit. Water surface contours made of the water table are quite pronounced in showing the condition.

In absence of the presentation of any proof to the contrary, we must accept this finding as correct. Hence, the fourth exception is without merit.

#### 5. Alleged Precedents

The fifth exception alleges that damages were paid to appellant's neighbors for claims essentially the same as this one. Claimant identified neither the claims nor the neighbors. The records of this Department have been searched and reveal no pertinent payments or payment. Each claim must be considered on its own peculiar facts and merits. The payment of any claim does not necessarily assure the payment of another claim on the mere allegation that it is similar or identical.

The fifth exception is without merit.

The notice of appeal fails to state sufficient grounds to reverse the original determination.

The consideration of the specific exceptions to the original determination has moved us to a complete review and reconsideration of the claim. It is clear that if the seepage contributed at all to the appellant's damages, that it was not a direct cause.<sup>9</sup>

Therefore, by legal definition, canal seepage was not a direct cause of the alleged damage. The original determination is consistent with both the law and the facts.

Accordingly, I affirm the administrative determination (T-P-183 (Ir.)) of July 17, 1961, of the Acting Regional Solicitor, Portland Region, Portland, Orgeon, denying this claim.

FRANK J. BARRY,  
*Solicitor.*

<sup>8</sup> Office Memorandum, dated August 24, 1961, from the Investigating Officer to the Field Solicitor.

<sup>9</sup> A direct cause has been defined as a cause without which the injury would not have occurred, and which by itself is a self-sufficient cause of the injury. *Sanguinetti v. United States*, 264 U.S. 146 (1924); *Christman v. United States*, 74 F. 2d. 112 (7th Cir. 1934).

## ESTATE OF CHARLES WHITE NEZ PERCE ALLOTTEE NO. 66

IA-754

*Decided March 27, 1963***Indian Lands: Descent and Distribution: Wills**

An Examiner of Inheritance who succeeds one who died subsequent to conducting hearings in a will contest but before entering an order approving the will or determining heirs must conduct new hearings before he can validly approve the will or determine heirs unless the parties stipulate the case may be decided on the basis of the evidence taken by the deceased Examiner.

**APPEAL FROM AN EXAMINER OF INHERITANCE, BUREAU OF INDIAN AFFAIRS**

Counsel for Mr. James Andrews White have appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance dated January 5, 1956, denying the Appellant's petition for a rehearing in the matter of the Estate of Charles White, deceased Nez Perce Allottee No. 66, whose last will and testament, dated December 5, 1950, was approved by the Examiner on July 22, 1955.

The testator died on February 3, 1952, at the age of 81 years leaving an estate consisting of inherited interests in trust land appraised for probate purposes at \$26,747.22. He left surviving as his heirs-at-law Susie White, his wife, and the Appellant, an adopted son. By the terms of his will the testator devised all of his trust property to his half-brother William J. White except for a life estate in a portion of an inherited allotment which he devised to his wife Susie White. In his will the testator named the Appellant as a child of a deceased half-sister, his blood relationship to him, and listed other nephews and nieces by name "to show that I have not forgotten them or any of them, and that I purposely excluded them and each of them from any interest, share or distribution in my estate."

Hearings to determine the heirs or probate the will of Charles White were conducted by an Examiner of Inheritance in Lapwai, Idaho, on April 14 and 15, 1952, and November 3 and 4, 1952. William J. White, proponent of the will and Appellee here, was represented by counsel as were the contestants, the Appellant and Susie White. The Examiner who conducted the hearings died July 2, 1954, without having signed an order determining the heirs or approving the will. In the Examiner's files, however, there were found 56 typewritten pages entitled "Analysis of Testimony Taken April 14-15, 1952, and Nov. 3-4, 1952, at Lapwai, Idaho"; 33 typewritten pages entitled "Charles White Estate Notes on Briefs"; and 10½ typewritten pages entitled "Examiner's Conclusions from Study of Evidence and Briefs." None of these papers were dated or signed. The Examiner did sign, on March 17, 1954, an "Affidavit of Examiner

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of Inheritance." This affidavit recites that the Examiner became well acquainted with the testator during the probate of an estate from which the testator in 1946 had acquired most of his trust property. It continues to the effect that the Examiner from that time through 1951 was visited by the testator whenever the Examiner's duties took him to the Northern Idaho Indian Agency. The Examiner further stated in the affidavit that the testator at those visits appeared to be in good health and never appeared to be under the influence of intoxicants or to have been drinking liquor. He concluded the affidavit with the observation that in his last visit or visits in 1951 with the testator he observed no noticeable change in him either physically or mentally.

Subsequent to the death of the original Examiner, the contestants filed a motion to Strike the Record and for a new Hearing which was answered by the proponent. On July 22, 1955, a new Examiner of Inheritance entered an Order Denying Motion to Strike and for a New Hearing. On the same date, without having conducted any hearing himself, the new Examiner entered an Order Approving Will and Determining Heirs. Thereafter, on October 25, 1955, he entered an order amending the order of July 22, 1955, Denying Motion to Strike and for a New Hearing so that it became instead an Order Denying Petition for Supplemental Hearing. Sixty days from the date of the amended order were granted in which to petition for a rehearing. A timely petition for rehearing was filed by the contestants, Susie White and the Appellant, and an Order Denying Petition for Rehearing was entered by the Examiner on January 5, 1956, granting petitioners sixty days from that date in which to appeal.

Six grounds are set out in the notice of appeal filed by the Appellant. They are:

1. The testator made the will as the result of undue influence;
2. The testator was incompetent to make a valid will;
3. The substituted Examiner failed to make adequate findings of fact;
4. The Examiner before whom the hearings were conducted died before rendering a decision and before making a full and adequate evaluation of the evidence;
5. The Examiner conducting the hearings exhibited bias, prejudice and hostility in his notes, which were the basis of the order of the successor Examiner approving the will; and
6. The first Examiner interjected his personal knowledge into the decision of the case.

Appellant contends on the basis of 1 and 2 that an order should have been entered to set aside the will and distribute the estate to

the natural heirs or in the alternative, on the basis of 3-6, a rehearing should have been granted.

The Appellee and proponent of the will, besides taking the position that the testator was competent to make the will and did not do so as the result of undue influence, contends that the Examiner conducting the hearings did in fact decide the case on the basis of adequate findings. The undated and unsigned papers found in the Examiner's files constitute such decision in the view of the Appellee. Further, the Appellee challenges the appeal on the grounds that it was not timely taken and was not perfected in conformity with the governing regulations.<sup>1</sup>

The attack on the notice of appeal on these procedural grounds must be considered first. On May 9, 1956, the Deputy Solicitor wrote the attorneys for the Appellant concerning their request for an extension of time in which to file their brief in support of the notice of appeal. In considering the extension, the Deputy Solicitor observed that the attorneys' attention had theretofore been directed to the apparent failure to comply with the pertinent probate regulations. Such failures were stated to be an apparent late filing of the notice of appeal with the Superintendent of the Northern Idaho Indian Agency and omission from the notice of a certificate that copies of the appeal were furnished the adverse parties, no indication being present that copies of the notice were actually so furnished. The requested extension of time to file the brief was granted "but with the distinct understanding that the permission so granted shall not and could not be regarded as a waiver or suggestion of waiver of any defects which now appear to exist concerning the lack of compliance with the regulations or otherwise."

These observations were made by the Deputy Solicitor on the basis of the notice of appeal received from the Northern Idaho Indian Agency through the Examiner which bore an Agency date stamp of March 6, 1956. As the petition for rehearing was denied by the Examiner's order of January 5, 1956, the last day of the 60-day period for filing a timely notice of appeal was Monday, March 5, 1956. However, by a letter dated March 5, 1956, to the Examiner, the original of which is in the probate record, the Acting Superintendent of the

<sup>1</sup> The pertinent appeal provisions of the regulations are now contained in 25 CFR 15.19(a), then 25 CFR 81.19(a). The subsection, then as now, reads: "Any person aggrieved by the action taken by the examiner of inheritance on a petition for rehearing or on a petition for reopening may, within 60 days after the date on which notice of the examiner's action is mailed to the interested parties (or within such additional period as the Secretary, for good cause, may allow in any case), file with the superintendent a written notice of appeal to the Secretary. Such notice of appeal shall state specifically and concisely the reasons for the appeal. Copies of the notice of appeal shall be furnished by the appellant to the examiner of inheritance and to all parties who share in the estate under the decision of the examiner, and the notice of appeal shall contain a certificate stating that this has been done."

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Northern Idaho Indian Agency referred to a separate letter of the same date to the Examiner in which a notice of appeal prepared by the Appellant's attorneys had been transmitted to the Examiner. The first mentioned letter continued by saying that the Appellant, subsequent to the dispatch of the referenced letter, had come to the Agency with a notice of appeal which he had signed that date, March 5, 1956, and this second notice was transmitted with the Acting Superintendent's letter. On this record we are satisfied that a timely notice of appeal was filed with the Superintendent on March 5, 1956.

On the question of furnishing a copy of the notice of the appeal to the Appellee, it is conceded by Appellant that a copy was not sent to him at the time of filing the notice but at a later date. Appellant argues that the delay in service has not inconvenienced Appellee or prejudiced his substantive rights. The Appellee states in his brief on this point that the appeal was not perfected in conformity with the regulations and is therefore subject to dismissal. Since there is no showing of an adverse effect upon the rights of the Appellee, we are not persuaded dismissal of the appeal on this ground would be justified.

We next turn to the question whether in the circumstances of this case the death of the Examiner who conducted the hearings required his successor to hold new hearings on which to base the order approving the will which such successor entered.

The Examiner who entered the approval order of July 22, 1955, ruled at the time he denied Appellant's petition for rehearing that the Administrative Procedure Act<sup>2</sup> does not pertain to or govern the activities of his office. We cannot support this conclusion. Where restricted Indian property is concerned, the determination of heirs and approval of wills are governed by the Departmental regulations<sup>3</sup> promulgated under the authority granted by the Act of June 25, 1910.<sup>4</sup> Express provision is made in 25 CFR 15.2 and the 1910 Act for notice and hearing in these matters. Thus such proceedings fall within the adjudication provisions of the Administrative Procedure Act which cover "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"<sup>5</sup> and are not within the exceptions thereto.

Section 5(c) of the Administrative Procedure Act<sup>6</sup> provides:

\* \* \* The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. \* \* \*

<sup>2</sup> Act of June 11, 1946, 60 Stat. 237, as amended; 5 U.S.C. sec. 1001 *et seq.*

<sup>3</sup> 25 CFR, Part 15.

<sup>4</sup> 36 Stat. 855, as amended; 25 U.S.C. sec. 372 *et seq.*

<sup>5</sup> Sec. 5 of the Act of June 11, 1946, 60 Stat. 237, 239, 240; 5 U.S.C. sec. 1004.

<sup>6</sup> *Ibid.*

The question posed by this part of the Administrative Procedure Act in this case is whether, since death made the Examiner unavailable who presided at the reception of evidence, the substitute Examiner may enter an order without hearing the case. The parties apparently agree that *Gamble-Skogmo, Inc. v. Federal Trade Commission*<sup>7</sup> establishes the necessity for a hearing by the new Examiner if the credibility of witnesses who testified before the Examiner who became unavailable is an issue.<sup>8</sup> They differ as to whether an issue of witness credibility confronted the Examiner who entered the order of July 22, 1955.

Appellant contends that as no specific findings or decision were made by the deceased Examiner the substitute Examiner had to evaluate the testimony of the witnesses who appeared before his predecessor—those for the Appellant testifying to the effect the testator had become mentally incompetent because of excessive drinking and those for the Appellee *contra*. Appellee, on the other hand, takes the position that the previously described unsigned and undated papers which were found in the Examiner's files constitute a decision of the case so that the entry by the substitute Examiner of the order of July 22, 1955, was a purely ministerial function.

An examination of the 56 pages of the Analysis of Testimony, 33 pages of the Notes on Briefs, and 10½ pages of the Examiner's Conclusions from Study of Evidence and Briefs convinces us that although they may disclose the general direction in which the deceased Examiner was headed they do not constitute the unsigned determination of the case argued by the Appellee. They appear to us to represent only a digest and analysis of the fairly considerable record and briefing in the case preparatory to the drafting of an order approving the will or determining heirs.

But even if we were to agree, which we do not, that no credibility issues were passed upon by the substitute Examiner because of their determination by the deceased Examiner, we would still be unable to affirm the order of July 22, 1955, based on the original Examiner's conclusions. The execution by the deceased Examiner of his affidavit of March 17, 1954, relative to his personal knowledge of the testator casts such doubts on his objectivity in handling the

<sup>7</sup> 211 F. 2d 106 (8th Cir. 1954).

<sup>8</sup> Where there is no credibility issue involved concerning evidence received by a hearing examiner who becomes unavailable before a decision is made, as in *Art National Manufacturers Distributing Co. v. Federal Trade Commission*, 298 F. 2d 476 (2d Cir. 1962); *cert. denied* 370 U.S. 939 (1962); *rehearing denied* 371 U.S. 854 (1962), or where the parties so stipulate, a decision may be properly made on the basis of the evidence taken by the unavailable examiner.

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case that we would find it necessary for this reason alone to require a new hearing of the case before another Examiner.

In light of these conclusions, which require that a new hearing be held, it is unnecessary to consider the other grounds of appeal and nothing herein is intended to indicate an opinion with respect to them.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Solicitor, 210 Departmental Manual 2.2A (3) (a), the Order Denying Petition for Rehearing is reversed and the present Examiner of Inheritance is directed to set the case for rehearing at the earliest practicable date.

FRANK J. BARRY,  
*Solicitor.*

## REGULATION OF SEA OTTERS WITHIN THE THREE-MILE LIMIT

### Fish and Wildlife Service

Although the Fur Seal Act of 1944 prohibits the taking of sea otters, there is no international agreement or treaty, which can be found, as a basis for the protection of sea otter either at sea or within the territorial waters of the United States.

The intended purpose of the Fur Seal Act of 1944 was to regulate persons under the jurisdiction of the United States.

The Congressional intention of the Fur Seal and Alaska Statehood Acts taken as a whole was to protect sea otters in the high seas and leave the regulation of sea otters within the three-mile limit to the States.

The Fur Seal Act of 1944 fully protects fur seals both on the high seas and within the territorial waters of the States.

### Submerged Lands Act: Generally

Section 6(m) of the Alaska Statehood Act provided that the Submerged Lands Act of 1953 was applicable to Alaska.

Since section 6(m) of the Statehood Act extended to the new State the provisions of the Submerged Lands Act, then the marine animal and plant life throughout the submerged lands, including those lands covered by the Alaska Tidelands Act, was granted to the State.

It is clear from the expressed language of section 6(m) of the Statehood Act that Congress intended the Submerged Lands Act to be applicable to Alaska in the same manner and to the same extent as all other States of the Union.

M-36650

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TO: DIRECTOR, BUREAU OF SPORT FISHERIES AND WILDLIFE

SUBJECT: STATUS OF LAWS APPLICABLE TO SEA OTTERS WITHIN ALASKA'S TERRITORIAL WATERS.

This responds to your memorandum, dated November 20, 1961, in which you requested our opinion as to whether the State of Alaska

has the sole responsibility for the management, including the harvesting, of sea otters within its territorial waters.

The Fur Seal Convention, signed at Washington July 7, 1911 (37 Stat. 1542), prohibited both pelagic sealing in the waters of the North Pacific Ocean and the killing of sea otters beyond three miles from the shore. Article IV of the Convention exempted, with some limitations, the Indians, Ainos, Aleuts and other aborigines from the provisions of the convention. The Convention was then implemented by the Act of August 24, 1912 (37 Stat. 499). It prohibited persons, subject to the jurisdiction of the United States, from killing fur seals in the waters of the North Pacific Ocean and sea otters "beyond the distance of three miles from the shore line of the territory of the United States." Subsequently, the Japanese Government, which was a party to the agreement, abrogated the convention on October 23, 1940. The Convention was finally terminated in October 1941.

It was recognized by the United States and Canada that the fur seals were still in need of protection. Accordingly, the two governments agreed to the Provisional Fur Seal Agreement of 1942, which had for its purposes the protection of the fur seals of the Pribilof Islands. This agreement did not, however, include the protection of sea otters. Similarly, the Interim Convention on Conservation of North Pacific Fur Seals (8 U.S. Treaties and Other International Agreements 2283) had for its purpose the protection of fur seals, but made no mention of sea otters.

The Fur Seal Act of February 26, 1944, as amended (16 U.S.C. 631a *et seq.*), was enacted to give effect to the 1942 Fur Seal Agreement and to give protection to sea otters. The Act of 1912, *supra*, was specifically repealed by section 18 of the 1944 act. Section 1(c) of the 1944 act defines sea otter hunting to mean:

\* \* \* the killing, capturing, or pursuing, or the attempted killing, capturing, or pursuing, of sea otters at sea, except in waters subject to the jurisdiction of the United States where other laws are applicable.

Section 2 makes it unlawful for any person subject to the jurisdiction of the United States to engage in pelagic sealing or the killing of sea otters in the North Pacific Ocean. Section 3 excepts Indians, Aleuts or other aborigines, with some limitations, from the provisions of this act. Section 14 provides that it shall be the duty of the President to protect the fur seals and sea otter herds.



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The Fur Seal Act, based on the Fur Seal Agreement, prohibits pelagic sealing at sea "whether within or without the territorial waters of the United States." Although the same act prohibits the taking of sea otters, there is no international agreement or treaty, which can be found, as a basis for the protection of sea otters either at sea or within the territorial waters of the United States. It is evident, however, that Congress, in desiring to protect the sea otters, intended that the words "at sea" contained in section 1(c) mean the high seas, and specifically excepted other waters of the United States. The intended purpose, therefore, was to regulate persons under the jurisdiction of the United States, while at the same time recognizing the general authority of the States to regulate the coastal fisheries. (See *Corso v. Tanves*, 149 F. Supp. 771; affirmed 355 U.S. 37.)

In 1947 the Supreme Court, in *United States v. California*, 332 U.S. 19, 38, held "\* \* \* that the Federal Government rather than the State has paramount rights in and power over that belt [the three-mile marginal sea belt], an incident to which is full dominion over the resources of the soil under that water area, \* \* \*." Subsequently, in 1953, Congress enacted the Submerged Lands Act (67 Stat. 29; 43 U.S.C. 1301 *et seq.*). Section 2 of the act provides:

(a) The term "lands beneath navigable waters" means—

\* \* \* \* \*

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

\* \* \* \* \*

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

Section 3 provides:

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Section 4 of the act provides:

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, \* \* \*.

The Submerged Lands Act, *supra*, when enacted was applicable only to the then existing States, and was not applicable to the Territory of Alaska. In order to rectify some problems regarding the tidelands and submerged lands of Alaska, Congress enacted the Alaska Tidelands Act of September 7, 1957 (71 Stat. 623; 48 U.S.C. 455 *et seq.*). This was interim legislation, section 2(a) of which granted to the Territory of Alaska “\* \* \* all the right, title, and interest of the United States in and to all lands within the Territory of Alaska, including improvements thereon and natural resources thereof, lying offshore of surveyed townsites in the Territory, between the line of mean high tide and the pierhead line.” The term “natural resources” was defined in section 1 to include:

\* \* \*, oil, gas, and all other minerals, but does not include fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, \* \* \*.

Section 3 provides:

Any lands which are (1) within the purview of section 2(a) of this Act, and (2) situated to the seaward of the “coastline” as that term is defined in section 2(c) of the Submerged Lands Act of 1953 (67 Stat. 29), shall be subject to the said Submerged Lands Act and, as to such lands, the Territory shall have equal title, right and interest as is accorded to States which are subject to that Act in relation to their similar lands; \* \* \*.

Thus, by the enactment of this statute, the Territory of Alaska was placed on the same general footing as the States as far as rights to the submerged lands and mineral resources of the territorial sea adjacent to surveyed townsites were concerned.

Subsequently, the Alaska Statehood Act (72 Stat. 339) was enacted and section 6(m) provided that the Submerged Lands Act of 1953 was applicable to Alaska. It was then held in an Opinion of the Solicitor, dated January 19, 1961 (M-36600), that after Statehood the Alaska Tidelands Act “\* \* \* was still of full force and effect, the grant thereunder becoming, in effect, merged with that of the Submerged Lands Act.”

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This merger exists only as to the area and resources covered by the Alaska Tidelands Act of 1957. That act expressly excluded from the grant to the Territory of Alaska marine animal and plant life. Section 6(k) of the Statehood Act transferred to the State of Alaska the grants previously made by the Alaska Tidelands Act. However, since section 6(m) extended to the new State the provisions of the Submerged Lands Act, we have no alternative but to say that the marine animal and plant life throughout the submerged lands, including those lands covered by the Alaska Tidelands Act, was granted to the State by section 6(m).

Congress, by enactment of the Submerged Lands Act, has, in effect, relinquished to the coastal States the paramount sovereign right and title of the United States in the submerged lands of the territorial sea to the extent and within the limits stated, in the Act. *United States v. Louisiana*, 363 U.S. 1 (1960). Included in this grant are the natural resources of the lands and waters within the areas covered thereby, together with "\* \* \* the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State Law \* \* \*." (43 U.S.C., sec. 1311(a) (2).) As indicated above, the term "natural resources," as defined in the Submerged Lands Act (43 U.S.C., sec. 1301(e)), is not limited to oil and gas, but includes the fisheries and other marine life.

The power to manage, administer and develop must of necessity include the power to regulate. The State of California has in fact regulated the taking of sea otters, which are defined in Webster's Third New International Dictionary as "a rare large marine otter (*Enhydra lutria*) of the northern Pacific coasts \* \* \*," by prohibiting the taking of sea otters at any time. (See F. & G.C.A., sec. 4700.)

Section 6(e) of the Alaska Statehood Act provides, among other things, that 70 percent of net proceeds from the sale of sealskins and sea otter skins shall be paid to Alaska after a deduction for the cost of the United States carrying out the provisions of the Fur Seal Act. It then provides:

Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, \* \* \*.

In a section by section analysis of a bill, S.49, similar to the one (H.R. 7999) that was enacted as the Statehood Act, the Senate Committee stated, "The subsection [sec. 6(e)], does not change the present Federal control of seal and sea otter hunting and management." (Report No. 1163, 85th Cong. 1st Sess., page 17.) If we were to interpret the above provision in the Statehood Act and the statement of the

Senate Committee to mean that the Federal Government and not the State shall regulate the taking of sea otters within the three-mile limit, we would in effect be enlarging the scope of the Fur Seal Act, *supra*, to include water specifically excepted by that act. In addition, such a narrow interpretation would result in Alaska not attaining complete "title to and ownership of the lands beneath navigable waters \* \* \* , and the natural resources within such lands and waters," within its boundaries as provided in the Submerged Lands Act.

We believe, however, that the expressed Congressional intention of the Fur Seal and Statehood Acts taken as a whole was to protect sea otters on the high seas and leave the regulation of sea otters within the three-mile limit to the States. Further, it is clear from the expressed language of section 6 (m) of the Statehood Act that Congress intended the Submerged Lands Act to be applicable to Alaska in the same manner and to the same extent as all other States of the Union. "The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act, \* \* \* ." *Organized Village of Kake v. Egan*, 174 F. Supp. 500, affirmed U.S. Supreme Court, March 5, 1962. Alaska, pursuant to the provisions of the Act of 1953, has extended its seaward boundaries to include the marginal and high seas to the extent permitted and to include the submerged lands (see S.L.A. 1959, ch. 89 sec. 1 *et seq.*).

In conclusion, we believe that Alaska may regulate the taking of sea otters within the three-mile limit. Since proper management or regulation of the resource includes the harvesting of the resource, such action by the State is within the purview of the applicable statutes. However, such State management or regulation does not extend to areas above the mean high water line within National Wildlife Refuges where Federal laws are paramount.

We believe it should also be clearly understood that:

(1) The Fur Seal Act of 1944, *supra*, fully protects fur seals both on the high seas and within the territorial waters of the States;

(2) The Fur Seal Act of 1944, *supra*, does protect sea otters, by prohibiting the taking thereof by persons under the jurisdiction of the United States on the high seas beyond the three-mile marginal sea belt; and

(3) The right of Alaska to regulate the taking of sea otters within the three-mile limit does not extend to the areas specifically recognized by section 5(b) of the Submerged Lands Act of 1953, *supra*, and by section 4 of the Alaska Statehood Act.

FRANK J. BARRY,  
*Solicitor.*

## DUNCAN MILLER

A-28657

*Decided March 29, 1963*Oil and Gas Leases: Applications—Oil and Gas Leases: Extensions—Fees—  
Accounts: Payments

Where a departmental regulation requires that the filing fee due in connection with a request for a 5-year extension of an oil and gas lease be paid before a certain date, a check for the filing fee (and rental) filed before, but erroneously dishonored by the drawee bank after, the pertinent date will be held to have been paid within the prescribed time.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision of September 2, 1960, by the Acting Director of the Bureau of Land Management holding that his oil and gas lease Montana 013760, issued effective April 1, 1955, expired by operation of law on March 31, 1960, at the end of its initial 5-year term.

On March 31, 1960, the appellant filed an application for a 5-year extension of his lease under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226; now 30 U.S.C., 1958 ed., Supp. III, sec. 226-1(a), as amended by the act of September 2, 1960, 74 Stat. 789). 43 CFR, 1961 Supp., 192.120, the departmental regulation governing the filing of extension applications, provides in part here material:

(b) The application for extension must be filed, within ninety days before the expiration date of the lease, on Form 4-1238, "Application for Extension of Oil and Gas Lease," \* \* \* [footnote reference deleted] or unofficial copies of that form in current use and must be accompanied by a filing fee of \$10 which will be retained as a service charge even though the application is later withdrawn or rejected and, unless previously paid, the sixth year's rental: \* \* \* 43 CFR 192.120(c) provides that:

(c) If during the 90 day period prior to the expiration date of the lease, the record title holder, assignee or operator files an application or request for an extension not on the prescribed form or unofficial copies thereof, or fails to file the prescribed number of copies, or pay the sixth year's rental, a notice will be issued allowing him 30 days to do so. The application will be rejected if such filing or payment is not made within the time allowed.

These provisions require that at least an informal request for an extension of the lease and a \$10 filing fee be received in the land office within 90 days before the expiration date of the lease in order for a lessee to obtain a single extension of his lease.

On the final day for filing an extension application Miller's application was filed accompanied by his check for \$210.50 for the filing fee and the sixth year's rental. The check was dated March 26, 1960, and was drawn on the First National Bank of Nevada, Las Vegas,

Nevada. The Billings land office deposited the check but it was returned by the bank as uncollectible. The appellant was advised of this by a notice of April 11, 1960, from the land office and asked to submit a cashier's check, a certified check, a bank draft, or a money order to replace the remittance. The notice also indicated that a \$10 debt was due the Government for the unpaid filing fee. Miller submitted a bank draft for the \$10 filing fee on April 25, 1960, which was 25 days after the extension application was required to be filed. In a land office decision of April 28, 1960, Miller's application for extension was denied on the ground that the filing fee must accompany the extension application which, in this instance, was required to be filed by March 31, 1960.

The decision held that a personal check which was returned as uncollectible could not be an acceptable payment of the filing fee and that the \$10 payment of the filing fee on April 25, 1960, could not place the application in good standing, although the filing fee, being a debt due the United States, was required to be paid.

Thereafter the appellant also submitted to the land office a check, dated May 14, 1960, in payment of the sixth year's lease rental. The land office returned this check to the appellant with a notice dated May 17, 1960, that appellant's oil and gas lease had expired by operation of law on March 31, 1960.

The Acting Director's decision affirmed the rejection of the appellant's application for extension for failure to pay the filing fee within the 90-day period before the expiration of the initial 5-year term of the lease. The decision referred to a departmental ruling that a lease is properly rejected where the required filing fee is not paid prior to the expiration of the primary term of the lease. *Duncan Miller*, A-28076 (November 16, 1959). The Department has also held that the submission with an oil and gas lease application of a check which is not honored, but is returned marked "Insufficient Funds," does not constitute a payment in support of the application. *J. Martin Davis et al.*, A-26564 (January 12, 1953).

In his appeal to the Director from the land office decision holding that his lease expired by operation of law, Miller asserted that failure to honor the check sent with his application for extension was an error of the bank and that the bank had promised to write to the land office to explain this. A letter of June 3, 1960, to the land office from the Assistant Cashier of the First National Bank of Nevada at Las Vegas, regarding Miller's check of March 26, 1960, for \$210.50 states that:

Recently, we returned a check to you for \$210.50 drawn on this office by our customer, Mr. Duncan Miller.

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This check was returned due to an oversight by one of our bookkeepers and we ask that if this check is still in your possession that you kindly redeposit it.

Mr. Miller has always maintained a very satisfactory account at this office and ask that this will in no way reflect on his credit standing with you. We are very sorry for the inconvenience we have caused you, please accept our apologies.

This may be fairly read as meaning that the appellant's account with the bank was satisfactory when the check of March 26, 1960, was filed with the land office and when it was returned to the land office as uncollectible. Moreover, the letter states, in effect, that the refusal to honor the check was a mistake of the bank, and for purposes of this decision the refusal will be so regarded.

The Acting Director held that even if the bank had erroneously returned the check to the land office as uncollectible, and the failure to honor the check was a mistake of the bank, the bank was the appellant's agent, not an agent of the Government.

The decisions rejecting the appellant's extension application properly held that the payment of the \$10 filing fee submitted by the appellant on April 25, 1960, was not a payment within 90 days before March 31, 1960. *Duncan Miller, supra.* Moreover, there is no basis for modifying the ruling in the *J. Martin Davis* case, *supra*, that submission with an oil and gas lease application of a check which is not honored does not constitute payment in support of an application. The facts in that case are clearly distinguishable since the check there involved remained uncollectible and there was no suggestion that it could at any time have been regarded as a good tender of payment. Thus, the only question on this appeal is whether the circumstances of this case warrant holding that the filing fee paid by Miller's first check was submitted within the time required by regulation. The appellant argues that the *Duncan Miller* case, *supra*, is not controlling in this case because in the former case, unlike the instant case, no fee was filed within the 90-day period before expiration of the lease. He contends that he submitted a filing fee within the meaning of the regulation applicable here.

Checks made payable to the Bureau of Land Management that may be cashed without cost to the Government are acceptable payment of amounts due.<sup>1</sup> Ordinarily, a check is a conditional payment and

<sup>1</sup> 43 CFR 216.30 "Forms of remittances that are acceptable. (a) Forms of remittances that may be accepted by collection officers include cash and currency, and checks, money orders, and bank drafts made payable to the Bureau of Land Management that may be cashed without cost to the Government.

"(b) Upon receipt of notice that a check or draft, whether certified or uncertified, is uncollectible, the collection officer should at once take appropriate steps to protect the interests of the Government.

"(c) Whenever the regulations in this chapter require a deposit, or payment, to be made by certified check, money order, or cash, a bank draft or cashier's check will be accepted in lieu thereof."

the condition is removed when the check is paid. 40 Am. Juris., Payment, secs. 72, 86.<sup>2</sup> Checks operate as payment as of the date given regardless of the fact that they may not be actually paid until sometime after the final date for making the payments for which they are tendered. 40 Am. Juris., Payment, sec. 86. So, when a check is submitted in satisfaction of payment of a required fee on the final day allowed for paying the fee, and the Bureau does not present the check for payment until sometime thereafter, the check, if paid by the bank upon which it is drawn, constitutes a timely payment of the fee even though this might not be determined for an indefinite time after the expiration of the final day for submitting payment.<sup>3</sup> Accordingly, in this case, the fact that the required filing fee was paid by check on March 31, 1960 (the final day for filing), does not, of itself, defeat the appellant's application if it appears that the check, when presented in the usual course of business, would be paid by the bank on which it was drawn (see footnote 2, *infra*).

The appellant's check of March 26, 1960, here under consideration, which was returned by the bank to the land office as uncollectible sometime before April 11, 1960, was retained by the land office even after it had returned appellant's second check. Consequently, when, in its letter of June 3, 1960, the Las Vegas bank asked the land office to redeposit the first check, implicitly agreeing to accept and pay it, the land office still had the check. The record does not show that a reply was made to the bank's offer of June 3. The original check, however, was not returned to Miller until July 29, 1960.

When the bank, in effect, agreed to accept (i.e., promised by implication to pay) the check, the bank became liable to the obligor for the payment of the check, regardless of the transactions between the appellant and the land office respecting the check. *Commercial*

<sup>2</sup> A check is payment of the amount for which it is drawn if the drawer has the funds to his credit in the bank on which it is drawn and the bank is in a position to pay the check on demand. *Waggoner Bank & Trust Co. v. Gamer Co.*, 213 S.W. 927 (Tex. 1919).

For a check to have the effect of payment, the drawer thereof must have sufficient funds to his credit in the bank to pay the same, or proof must be made that such check, when presented in the usual course of business, would be paid by the bank on which it is drawn. *Cornelius et al. v. Cook et al.*, 213 S.W. 2d 767, 770 (Tex. 1948).

<sup>3</sup> Although the State Constitution provides that all taxes must be paid in cash, taxes may be paid under the prevailing practice by check, and when the check is honored, even though it may not be cashed for some time after the due date for the satisfaction of the tax, the payment relates back to the date on which the check was received. *General Petroleum Corporation of California v. Smith et al.*, 157 P. 2d 356 (Arizona 1945).



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*Bank v. First National Bank*, 86 So. 342 (La. 1920).<sup>4</sup> Furthermore, if the land office had redeposited the check, and the bank had paid it in accordance with its letter of June 3, the check was entitled to acceptance as of the date the land office first attempted to present it. This result is expressly provided for by section 138 of the Uniform Negotiable Instruments Act as follows:<sup>5</sup>

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is over-due, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. (Beutel's Brannan, "Negotiable Instruments Law" (7th ed.), p. 1254.)

Thus, the check of March 26, 1960, if redeposited and paid as the bank indicated it would have been,<sup>6</sup> would have amounted to a timely payment of the filing fee and of the sixth year's rental, the check having been filed with the application for extension of March 31 (see footnote 3, *supra*). Accordingly, the record in this case does not show that the appellant failed to tender the required filing fee within the ninety-day period before expiration of the lease, but instead, shows that for approximately two months after the lease expired, it only appeared that the appellant had not tendered the necessary filing fee within the required time. This follows from the fact that the bank's letter of June 3 indicates that the check of March 26, 1960, which the appellant filed with his extension application on March 31, 1960, apparently amounted to a good tender of payment as of March 31, 1960 (see footnote 2 and section 138 of the Uniform Negotiable Instruments Act).

It appears, then, that in this case the required filing fee may be regarded as having been tendered by the appellant with his extension application before the expiration of the initial 5-year lease term, in accordance with 43 CFR 192.120 (b).

<sup>4</sup> Acceptance of a check by a bank may consist of a promise to accept an existing check or a nonexisting check when drawn; any act of a drawee bank which shows a consent to comply with the request of the maker will amount to an acceptance; and a promise to accept is in itself a virtual acceptance. 7 Am. Juris., Banks, secs. 546-551, 556.

<sup>5</sup> See also, Ogden, James, "The Law of Negotiable Instruments", sec. 94 (1931), to the effect that "a bill does not necessarily lose its negotiable character by being dishonored," and 8 Am. Juris., Bills & Notes, sec. 874.

<sup>6</sup> There is little reason for doubting that the bank would have paid the appellant's check of March 26, 1960, if the land office had redeposited it, since, by its letter of June 3, 1960, the bank almost surely made itself liable on the check. See *Commercial Bank v. First National Bank* and footnote 4, *supra*.

The same result has been reached in a similar case. In *Hamilton v. Baker*, 214 S.W. 2d 460 (Texas, 1948), a lessee holding an oil and gas lease which provided that the lease would terminate unless the annual rental were paid by a certain day submitted a timely check in payment. The bank refused payment because of insufficient funds, although, in fact, the bank had agreed to pay the check whether there were sufficient funds in the account or not. The Supreme Court of Texas held:

\* \* \* Looking to the substance rather than the form of the transactions between the parties, the check was in fact a good one at all times from the opening of the drawee bank the morning after its delivery until it was mailed back to Mays [the lessee's agent] some eight months later. \* \* \* If Mays had had ample funds on deposit to cover the check and by error some bank employee had returned it unpaid, giving as a reason that the drawer had insufficient funds to cover it, none would contend that the check was not in fact good. Such a mistake as that would not result in a termination of the lease. Now, Mays had a valid commitment from the bank to pay the check upon presentation, and so had sufficient funds available at the drawee bank to pay it when presented. The conclusion is inescapable, under all these circumstances, that there was in legal contemplation no failure to pay or tender the delay rentals seasonably, and the lease was accordingly saved for an additional year. (P. 461.)<sup>7</sup>

Accordingly, I conclude that the Acting Director's rejection of the application is erroneous. The appellant must, of course, resubmit the sixth year's rental, as required by the manager. (The rental may be regarded as having been properly tendered within the required time for the reasons already discussed in connection with the filing fee.)

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 reversed, and the case remanded for further action consistent with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

<sup>7</sup> Distinguished in *Muldron v. Texas Frozen Foods*, 299 S.W. 2d 275, 278 (Texas, 1957); *Nelson Bunker Hunt Trust Estate v. Jarmon*, 345 S.W. 2d 579, 581 (Texas, 1961).

**LONG-TERM FARMING LEASES OF INDIAN LANDS UNDER THE ACT OF AUGUST 9, 1955 (69 STAT. 539; 25 U.S.C., SEC. 415), AS AMENDED**

**Indian Lands: Leases and Permits—Secretary of the Interior—Words and Phrases**

Under the Act of August 9, 1955 (69 Stat. 539; 25 U.S.C., sec. 415), which authorizes the Indian owners of restricted tribally or individually owned lands to lease such lands, with the approval of the Secretary of the Interior, for a term of not to exceed twenty-five years "for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary," the phrase "specialized crops" is not one of limitation, and the Secretary is authorized to approve such leases if, in order to produce the crop or crops proposed to be grown, he determines that a substantial investment in the improvement of the land is necessary for that purpose and the lessee is required to make such an investment.

M-36651

April 8, 1963

TO: SECRETARY OF THE INTERIOR.

SUBJECT: LONG-TERM FARMING LEASES OF INDIAN LANDS.

In accordance with your request, we have made a study of the authority to enter into or approve long-term farming leases of Indian lands. Inquiries regarding the scope and application of existing laws have been made by the Commissioner of Indian Affairs on several occasions,<sup>1</sup> and further interpretation and application of these laws will likely be involved in the proposed development of lands on the Colorado River Indian Reservation, as well as elsewhere. Many of the proposals to lease would entail the subjugation of raw land, in some cases raw desert land, and envisage extensive clearing, leveling, draining, terracing, and soil-building, and the use of irrigation for the production of various agricultural crops. The principal problem in such proposals is that only if the lease term is of sufficient duration to permit recoupment of the developmental expenses, plus a reasonable profit, can they be made sufficiently attractive to warrant substantial expenditures of money, and in many cases such recoupment could not reasonably be anticipated in less than 25 years.

In approaching this problem it is necessary to examine and interpret the Act of July 3, 1926 (44 Stat. 894; 25 U.S.C. sec. 402a), and the Act of August 9, 1955 (69 Stat. 539; 25 U.S.C. sec. 415), as amended.

That the Act of July 3, 1926, *supra*, reads as follows:

<sup>1</sup> Most recently, SanTan Ranch Company, Inc., proposed a 25-year lease of lands within the Gila River Indian Reservation in Arizona, but is now negotiating for a lease for ten years. Also recently, the Farmers Investment Company has proposed a 25-year lease of lands of the San Xavier Indian Reservation, also in Arizona, but the matter has been deferred pending disposition of objections by the City of Tucson.

The unallotted irrigable lands on any Indian reservation may be leased for farming purposes for not to exceed ten years with the consent of the tribal council, business committee, or other authorized body representative of the Indians, under such rules and regulations as the Secretary of the Interior may prescribe.

This Act, while adequate for the leasing of tribal lands within Indian reservations, does not extend to such lands outside reservation boundaries, nor does it permit the leasing of individually owned trust or restricted lands. Moreover, it does not permit leasing for terms longer than ten years and therefore has no application to those situations where longer terms are needed for amortization of large developmental expenses.

Section 1 of the Act of August 9, 1955, as amended, *supra*, provides in part:

Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and *for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary.* All leases so granted shall be for a term of not to exceed twenty-five years, \* \* \* and except leases of land \* \* \* for grazing purposes which may be for a term not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes \* \* \* with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. (Italics added.)

The 1955 Act was amended in 1959<sup>2</sup> to permit leases on the Agua Caliente (Palm Springs) Reservation to be issued for a term of not to exceed ninety-nine years. It was again amended in 1960<sup>3</sup> to extend the ninety-nine year leasing authority to the Navajo Reservation, and in 1961<sup>4</sup> to extend that authority to the Dania Reservation and to except from renewal those leases in which the initial term extends for more than seventy-four years. The most recent amendment was enacted in 1962,<sup>5</sup> and extended the ninety-nine year leasing authority to the Southern Ute Reservation.

The regulations originally issued pursuant to the 1955 Act were published on April 19, 1956,<sup>6</sup> and are last found in published form

<sup>2</sup> Act of September 21, 1959, 73 Stat. 597.

<sup>3</sup> Act of June 11, 1960, 74 Stat. 199.

<sup>4</sup> Act of October 4, 1961, 75 Stat. 804.

<sup>5</sup> Act of October 10, 1962, 76 Stat. 805.

<sup>6</sup> 21 F.R. 2562.

April 8, 1963

as Part 171 of 25 CFR, 1949 Ed., Supp. as of January 1, 1957. Section 171.6(b) thereof provided:

Farming, and agricultural development leases which require the making of a substantial investment for the production of specialized crops, and such farm leases which require the development and utilization of the soil and water resources in connection with their operation as determined by the Secretary or his authorized representative may be executed for a term of not to exceed twenty-five years.

Section 171.1(j) provided that "specialized crops" means those crops requiring a deferred period of years for investment return."

The quoted language was carried into the January 1, 1958, revision of 25 CFR as Sections 131.6(b) and 131.1(j). The regulations were amended November 23, 1961,<sup>7</sup> and the former Section 131.6(b) now appears as Section 131.8(b), as follows:

Farming and agricultural leases for the purpose of growing specialized crops shall not exceed 25 years.

The 1961 amendments deleted the definition of "specialized crops."<sup>8</sup>

In discussing the reasons for changing the regulations in 1961, the Chief, Branch of Real Property Management, in a memorandum of November 28, 1962, to the Associate Commissioner of Indian Affairs, said: "The regulation change made the language conform literally to the words of the statute. The change was made after informal discussions among Bureau personnel and with the Solicitor's Office and it was concluded that" the 1955 Act "authorized farming and agricultural leases only in those cases where the purpose of the lease required the making of a substantial investment in the improvement for the production of specialized crops." The memorandum also noted that "the files pertaining to the revision of the regulations contain no specific mention of this particular change. The amended regulation had Solicitor's Office clearance."

It is worthy of note that, although the amended regulation was an apparent attempt to bring it within the literal limitations of the underlying statute, neither it nor the former regulation used the exact language of the statute, i.e., "the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary." (Italics added.)

<sup>7</sup> 26 F.R. 10966.

<sup>8</sup> The proposed revision of Part 131, as published in the Federal Register on July 6, 1960 (25 F.R. 6332), would have provided in Section 131.1(f) as follows:

"(f) 'Specialized crops' means:

"(1) Long life perennials which maintain profitable production over a period of years, or  
 "(2) Those crops the production of which require a substantial development investment on the described land."

In the absence of a regulation defining "specialized crops," the determination of whether a particular lease proposal is within the scope of the statute and the current regulations is in the authorized approving official. The Secretary's authority under the 1955 Act has been delegated by Section 13(n) of Secretarial Order No. 2508, of January 11, 1949<sup>9</sup> as amended,<sup>10</sup> to the Commissioner of Indian Affairs to approve farming and other leases pursuant to former Part 171, now Part 131, of 25 CFR.

Because of the doubt cast upon the regulations adopted contemporaneously with the enactment of the statute, and the uncertainty which led to their amendment in an attempt to conform to, rather than to interpret and apply, the legislative enactment, they are of little assistance in construing the statute. Although we cannot overlook the fact that a substantial number of farming leases issued under the 1955 Act, *supra*, have been approved for terms longer than ten years,<sup>11</sup> it must be recognized that they were considered for approval in accordance with the regulations as they then existed, and, as indicated above, earlier versions of the regulations were considered sufficiently questionable to require their amendment to attempt to conform to the language of the Act.

From the beginning, the administration of the 1955 Act has been troublesome because of the feeling that it limited long-term farming leases to those which called for the growing of "specialized crops," and that term was nowhere defined in the statute. The early regulations emphasized that aspect of the authority, and attempted to define the phrase administratively. Although the present regulations contain no such definition, they do limit long-term farming leases to those whose purpose is that of "growing specialized crops."

<sup>9</sup> 14 F.R. 258, January 18, 1949.

<sup>10</sup> 20 F.R. 7017 (Amendment No. 13, September 13, 1955); 23 F.R. 90 (Amendment No. 23, December 19, 1957); 25 F.R. 7192 (Amendment No. 43, July 23, 1960); 26 F.R. 3207 (Amendment No. 45, April 7, 1961); 27 F.R. 987 (Amendment No. 50, January 26, 1962).

<sup>11</sup> In a memorandum to the Deputy Commissioner of Indian Affairs dated December 17, 1962, the Chief, Branch of Real Property Management, summarizes reports from Bureau field offices as showing that under the authority of the 1955 Act 11 approved farming leases had been issued to Navajo Indians for twenty-five year terms for tribal lands on the Shiprock Irrigation Farm Training Project of the Navajo Indian Reservation in New Mexico; 12 farming leases of lands on the Fort Hall Indian Reservation in Idaho and 51 farming leases of lands on the Yakima Indian Reservation in Washington had been approved for terms exceeding ten years; and that one twenty-five year farming lease of lands within the Papago Reservation in Arizona had been approved but had been cancelled by the Superintendent and is pending in this office on appeal. In addition 4 leases for terms in excess of ten years were approved covering lands on the Colorado River Indian Reservation in Arizona under the Act of August 14, 1955 (69 Stat. 725) which authorized the Secretary, to and until August 14, 1957, to approve leases of unassigned lands on that reservation "for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary," such language being identical with that found in the Act of August 15, 1955, which we are here considering.

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In the absence of a statutory definition, and in seeking to ascertain the intent of the Congress in enacting the legislation, we are justified in turning to the legislative history of the Act. With respect to this legislation, the first reference to the phrase "specialized crops" is found in identical executive communications dated January 25, 1955, from the Assistant Secretary of the Interior to the President of the Senate and the Speaker of the House of Representatives, respectively, transmitting a proposed bill "To authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases." The communications requested that the proposed bill be referred to the appropriate committee for consideration, and recommended that it be enacted. That part of the proposed bill which concerned farming leases would authorize the Secretary to approve leases of restricted Indian lands "for those farming purposes (not to include grazing) which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary."

Except for the parenthetical reference to grazing, the quoted language of the proposed bill is identical with the italicized language of the 1955 Act heretofore quoted in this memorandum. The proposed bill and the transmittal documents were prepared in the Bureau of Indian Affairs, but the author left behind no indication of the source of the language nor explanation of what it meant to him.

The executive communications of January 25, 1955, said in part:

The present laws governing the leasing of Indian lands for public, religious, educational, recreational, residential, business or farming purposes are unduly restrictive.

After referring to the existing leasing laws and certain principal exceptions,<sup>12</sup> they said:

<sup>12</sup> "In general, these laws preclude Indians from leasing their trust lands, whether tribal or allotted, for periods longer than 5 years. The principal exceptions to this limitation are (a) lands in the State of Washington may be leased for periods up to 25 years for any of the foregoing purposes except farming or residential (Act of August 9, 1946; 25 U.S.C. 403b); (b) lands in any state which are capable of irrigation may be leased for periods up to 10 years for farming purposes in certain circumstances (Act of July 3, 1926; 25 U.S.C. 402a; Act of May 18, 1916; 25 U.S.C. 394); (c) lands belonging to incorporated tribes may be leased for periods up to 10 years for such purposes as are permitted by the tribal charters (Act of June 18, 1934; 25 U.S.C. 478); and (b) lands on the Navajo-Hopi (Act of April 19, 1950; 25 U.S.C. 635); the Port Madison, Snohomish, and Tulalip Reservations (Act of October 9, 1940; 25 U.S.C. 403a); and lands belonging to Pueblo Indians (Act of June 7, 1924, 43 Stat. 636, 641-642) may be leased on a long-term basis for a variety of purposes."

Because of the existing limitations upon the duration of leases many Indian lands that could be profitably utilized under long-term leases are idle and the Indians are deprived of much needed income. Other lands that are leased for shorter periods would bring much higher rentals to the Indians if the lands could be leased for longer terms.

The absence of authority for long-term leases discriminates against Indians who own restricted lands that are suitable for the location of business establishments, residential subdivisions, summer homes, airports, or for other purposes that require a substantial outlay of capital by the prospective lessee. It also penalizes Indian owners of raw but potentially valuable farmlands on which the cost of subjugation is too great for the Indian himself to finance. In such cases, prospective lessees are willing to undertake these expensive improvements only if guaranteed tenure by a long-term lease.

Bills were introduced in the First Session of the 84th Congress containing language identical to that proposed by this Department. On the Senate side, these were S. 34 by Senator Goldwater and S. 631 by Senator Murray and on the House side, H.R. 2681 by Congressman Udall and H.R. 2862 by Congressman Metcalf. S. 34 and H.R. 2681 were limited to the leasing of Indian lands in Arizona; S. 621 and H.R. 2862 were not so limited. H.R. 2681 was superseded by H.R. 7157, also by Congressman Udall, which would have authorized the Secretary to approve leases of restricted Indian lands for terms of not to exceed twenty-five years, without limitation as to purpose, and contained none of the language relating to farming leases recommended by this Department.

In reporting to the Chairman of the Senate Committee on Interior and Insular Affairs on March 21, 1955, on S. 34, and on March 25, 1955, on S. 621, the Assistant Secretary of the Interior repeated the language quoted above from his letters of January 25, 1955 to the President of the Senate and the Speaker of the House of Representatives. The same language was also used in reporting to the Chairman of the House Committee on Interior and Insular Affairs by letters dated March 21, 1955 on H.R. 2681, and March 25, 1955 on H.R. 2862.

In reporting on S. 34, the Senate Committee on Interior and Insular Affairs incorporated substitute language for that in the bill as introduced, and broadened the bill to make it applicable to Indians generally. In the report, the Committee explained the need for the legislation in the identical language used by the Department and above-quoted from its letters of January 25, 1955, and said:

\* \* \* In addition, these lands could be leased for farming purposes which require the making of substantial investment in the improvement of the land for the production of specialized crops. \* \* \* 13

<sup>13</sup> S. Rept. No. 375, 84th Cong., 1st Sess. 2 (1955).



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The bill was amended as reported, and was passed by the Senate on May 26, 1955.<sup>14</sup>

The House Committee on Interior and Insular Affairs held hearings on H.R. 2681, H.R. 2862, and H.R. 7157, but reported only on H.R. 7157.<sup>15</sup> It was this bill, much broader in scope than the others, which would have authorized Secretarial approval of leases of restricted individual or tribal lands for not to exceed twenty-five years, with a like right of one renewal, without limitation as to purpose. Consequently, there was no need to refer specifically to farming leases, but the Committee did say, on page 1 of its report:

Because of existing limitations upon the duration of leases many Indian lands which could be profitably developed under long-term leases are idle, and the Indians are deprived of much needed income. Other lands that are leased for shorter periods would bring much higher rentals to the owners if the lands could be leased on a long-term basis. Enactment of H.R. 7157 would remove these unfair restrictions.

The first two sentences of this paragraph are identical with the language quoted above from the Department's initial letters of January 25, 1955.

H.R. 7157 was passed by the House on July 18, 1955. S. 34 was then taken from the Speaker's table, amended by striking out all after the enacting clause and inserting the language of H.R. 7157, and passed. H.R. 7157 was then laid on the table.<sup>16</sup>

The Senate disagreed to the amendment of the House and requested a conference thereon.<sup>17</sup> The House insisted on its amendment and agreed to the conference.<sup>18</sup> The Committee of Conference recommended that the Senate recede from its disagreement to the House amendment, and agree to the same with an amendment which in effect restored the language of S. 34 with an additional provision to permit leasing for grazing purposes. The conference report explained the original Senate version in the terms of S. 34, but did not discuss the meaning of the language.<sup>19</sup> The conference report was submitted to

<sup>14</sup> 101 Cong. Rec. 7092 (1955).

<sup>15</sup> H.R. Rept. No. 1093, 84th Cong., 1st Sess. (1955).

<sup>16</sup> 101 Cong. Rec. 10760 (1955).

<sup>17</sup> Id. at 11143.

<sup>18</sup> Id. at 11375.

<sup>19</sup> " \* \* S. 34 provided for the lease \* \* \* of any restricted Indian lands \* \* \* for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by the Secretary of the Interior; "

the House,<sup>20</sup> and was agreed to by both House<sup>21</sup> and Senate<sup>22</sup> on July 29, 1955.

We have discussed the legislative history of the 1955 Act in much detail because we think it clearly shows, as concerns the Secretary's authority to approve farming leases of restricted Indian lands for terms of up to twenty-five years, that the criteria for such approval is not the crop to be produced but the investment to be made in improvement of the land.

After informal discussions with knowledgeable individuals in the Department of Agriculture as well as in this Department, we are led to the conclusion that the phrase "specialized crops" is not one which has a generally accepted and well-understood meaning in the field of agriculture.<sup>23</sup> It does not connote the same meaning as "specialty crops" which, although not a term of fixed definition, at least is often used to refer to a limited class of crops which require special knowledge for their production.<sup>24</sup> The very fact that there is no commonly understood meaning of the phrase "specialized crops," coupled with the failure to define it in the statute itself and the complete absence of any relevant discussion in the reports and debates in the legislative history of the 1955 Act, can only lead to the conclusion that it was not employed in a limiting sense but rather in a generally descriptive way to refer to the end resulting from substantial investments made in the improvement of the land subject to lease under that Act.<sup>25</sup>

<sup>20</sup> 101 Cong. Rec. 11932 (1955).

<sup>21</sup> Id. at 12092.

<sup>22</sup> Id. at 11998.

<sup>23</sup> Although the phrase was not encountered in the many Yearbooks of the Department of Agriculture nor in most of the other agricultural texts and reference works which we have examined, it is occasionally used. For example:

"Properties devoted to the production of specialized crops and livestock are either: (1) a number of properties in a community or district on which the type of production varies from that generally typical of the region, or (2) individual farms which vary from that typical of the community." *Crouse and Everett, Rural Appraisals* 235 (1956).

<sup>24</sup> Currently indexed under "Specialty Crops" in the regulations of the Department of Agriculture are almonds, filberts, walnuts, dates, raisins, grapes for crushing, and dried prunes. 7 C.F.R. Parts 981-999.100. We are informally advised that the Specialty Crops Branch of the Fruit and Vegetable Division, Agricultural Marketing Service, deals with such other commodities as hops, spices, peanuts, honey and coffee, but that the products falling within its administrative jurisdiction are subject to change by the Secretary of Agriculture at any time.

<sup>25</sup> S. 108 was introduced in the 87th Congress by Senator Anderson to amend the 1955 Act by increasing the permissible lease term from 25 years to 99 years. Although it did not become law, it would also have provided for approval of 25-year farming leases that require "the making of a substantial investment in the improvement of the land," and 10-year farming leases that do "not require the making of a substantial investment in the improvement of the land." All reference to "specialized crops" would have been eliminated. In the Senate debate on the measure, Senator Case of South Dakota inquired about the changes which the bill would make in existing law. He also said:

"Mr. President, I have examined the report on the bill, and I note a paragraph which I think satisfies the question which was in my mind.

"Part of the paragraph reads as follows:

"The 10-year limitation on grazing leases and the 25-year limitation on farming leases

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With this in mind, it seems entirely proper to conclude that you are authorized by the 1955 statute to approve those leases of tribally or individually owned restricted Indian lands which, before they can profitably be farmed, will require substantial investments in the improvement of the land. In deciding whether to approve or disapprove a lease it will be necessary to consider the crop or crops which the prospective lessee proposes to grow, and to determine whether or not a substantial investment in the improvement of the land is necessary for that purpose. If it is, and the lessee is required to make such an investment, you are authorized to approve it. If the land need not be improved in order to grow the proposed crop, or if the investment required is not substantial, the lease should not be approved.

The feasibility of growing the proposed crop or crops in the area in which the leased land lies will also be a factor to consider. A proposal to grow a particular crop in an area not climatically or geographically favorable to its production should not be approved regardless of the investment proposed to be made in improving the land.

Although the necessity for making a substantial investment in land improvement is the justification for approval of leases under the 1955 Act, the amount or substantiality of the investment will also be an element to consider in evaluating the term of a proposed lease. If the investment, plus a reasonable profit, can be recovered from anticipated crop or other farm income in ten years, there would be no basis for approving a lease for a longer term.

The conclusions which we have reached in this opinion have necessarily been expressed in the form of rather broad guidelines. Further interpretation may be required with respect to any particular lease proposal.

FRANK J. BARRY,  
SOLICITOR.

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that require substantial investments in improvements, that are contained in the present law, are retained in the bill.

"So there would be a 10-year limitation on grazing leases and a 25-year limitation on farming leases that require substantial investments in improvements.

"Therefore, I have no objection to the bill." 107 Cong. Rec. 5359 (1961).

Thus, as recently as 1961, here is another indication that Congress regarded the 1955 Act as providing for approval of those farming leases which required substantial investments in the improvement of the land and not as being limited by specialized crop production.

## MARGARET L. GILBERT

v.

## BOB H. OLIPHANT

A-29163

*Decided April 11, 1963***Contests and Protests—Rules of Practice: Private Contests**

A contest brought against a homestead entry which alleges only facts reflected by the Bureau records to constitute a charge relied upon to invalidate the entry is properly dismissed as to such charge.

**Alaska: Homesteads—Homesteads (Ordinary): Cultivation**

The breaking, planting or seeding, and tillage for a crop which constitute cultivation of the soil of a homestead entry must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

**Alaska: Homesteads—Homesteads (Ordinary): Cancellation of Entry**

A homestead entry is properly canceled when the final proof submitted by the entrymen shows on its face that he did not cultivate  $\frac{1}{16}$  of the entry in the second year of the entry and  $\frac{1}{8}$  in the third year and thereafter until final proof was submitted.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Margaret L. Gilbert has appealed to the Secretary of the Interior from a decision dated July 28, 1961, by which the Division of Appeals dismissed her contest against the homestead entries of Bob H. Oliphant on the ground that the charges listed in her complaint were reflected by the Bureau's records. Bob H. Oliphant has also appealed from the portion of the same decision which affirmed the decision of a hearing examiner canceling his homestead entries for failure to comply with the cultivation requirements of the homestead law.

The record shows that Oliphant filed notice of location of his original homestead entry, Anchorage 027911, on unsurveyed land on September 29, 1954, and that his additional entry, Anchorage 028930, was allowed April 22, 1955. He submitted final proof on March 17, 1958. This proof was rejected on August 1, 1958. He submitted final proof again on September 15, 1958. The entryman then applied on December 31, 1958, for reduction of the acreage to be cultivated on grounds of thin soil, high altitude, and the danger of severe erosion. This application was rejected on May 25, 1959. The decision announcing the rejection stated that a total of only 5.6 acres out of approximately 40 cultivable acres in the entries had ever been cultivated. No appeal from this decision was taken. On July 28, 1959, the entryman submitted final proof for a third time. Like each of

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the previous submissions, this proof failed to disclose any cultivation prior to the third year of the entries.

On February 9, 1960, Mrs. Gilbert filed a contest against the homestead entries, charging that the "cultivation is insufficient and untimely, and the entry is speculative." The charges were amplified by allegations of fact attached to the complaint. A hearing was held in Anchorage, Alaska, on October 26, 1960, at which both the entryman and the contestant were represented by counsel who presented oral testimony and participated in the cross examination of the adverse witnesses.

At the close of the contestant's case, the hearing examiner sustained the entryman's motion to dismiss the charge that his notice of location and application to enter were speculative for failure of proof to sustain this charge (Tr. 90-91).<sup>1</sup> In his decision dated March 9, 1961, the hearing examiner held that the entryman had failed to cultivate the required acreage during the second, third, and fourth entry years and canceled the original and the additional homestead entry.

In her appeal to the Secretary from the decision of the Division of Appeals dismissing the contest, Mrs. Gilbert concedes that the records of the land office, specifically the three sets of final proof filed by the entryman, the reports of field examination made as a consequence of the entryman's application for reduction of the acreage to be cultivated, and the decisions of the land office on the final proof and application for reduction, did reflect the inadequacy of cultivation charged in her contest complaint. She contends, however, that because the land office did not cancel the entries following the submissions of final proof; it evinced its conclusions that there were not sufficient facts shown by its records to warrant cancellation of the entries and that an outsider could rely upon the absence of any action looking toward cancellation as an indication that he was not precluded from contesting the entries. She reinforces this argument with the observation that the cancellation was predicated upon the finding of the hearing examiner that the testimony of the witnesses at the hearing showed that the entry should be canceled for want of cultivation.

I am unable to concur in the portion of the decision appealed from which holds that Mrs. Gilbert's contest complaint was defective because it alleged only facts reflected by Bureau records as the basis of her contest in violation of departmental regulation 43 CFR, 1961 Supp., 221.51.<sup>2</sup> This was clearly the case as to cultivation but not as to the

<sup>1</sup>The reference is to the appropriate page of the transcript of the hearing.

<sup>2</sup>This restriction on the grounds of private contests has been included in this section of the departmental regulations since March 27, 1956.

alleged speculative intent of the entryman. Thus it was not error for the land office to entertain the complaint and to provide for a hearing on this charge. But when the hearing examiner found that the evidence failed to sustain this charge, he should have dismissed the contest.

Mrs. Gilbert also alleges that the serial register was the only record of the land office available to her and that it contained only such information as "3/17/58 Final Proof Recieved," and that, consequently, the records of the land office did not reveal the inadequacy of Oliphant's cultivation.

While all the material collected by the land office, such as reports of investigation, may not be available to the public, other portions of the files, such as applications and statements of final proof, are.<sup>3</sup> There is no indication in the record that Mrs. Gilbert attempted to examine them or that she was refused permission to do so. Thus there is no merit to Mrs. Gilbert's contention that the serial register is the only pertinent public record.

In his appeal to the Secretary, Oliphant contends (1) that cancellation of his homestead entries on the basis of an invalid contest was improper, and (2) that, even if he has not met the cultivation requirements of the homestead law, his case merits equitable adjudication because he has acted in good faith, he has received no credit for his military service, the land office agreed with him that a natural clearing on the land could be used to meet the cultivation requirements, and, in any event, conditions in Alaska are such that compliance with the requirements of the homestead law is much more difficult than in the States to which the Homestead Act was originally applied.

The homestead law requires that an—

\* \* \* entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof \* \* \*. (43 U.S.C., 1958 ed., sec. 164.)

As to an additional homestead entry, the entryman is required to

\* \* \* show that he has cultivated an amount equal to one-eighth of the area of the additional entry for at least one year after the additional entry and until the submission of final proof thereon. The cultivation required with respect to the additional entry may be performed on the original entry, the

<sup>3</sup> The pertinent regulation provides:

"Unless the disclosure of matters of official record would be prejudicial to the Government, they should be made available for inspection or copying \* \* \*"

The regulation also sets out the procedure to be followed when a request to examine records is denied. See *Clarence S. Miller*, 67 I.D. 145 (1960).

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additional entry or on both, but where it is performed on the original entry, it must be in addition to that required and relied upon in making final proof on the original entry. \* \* \* (43 U.S.C., 1958 ed., sec. 213.)

An examination of the documents which comprise the entryman's third submission of final proof discloses that the entryman acknowledged that his attempted compliance with the requirements of the homestead laws commenced with the establishment of residence on the original entry on March 1, 1955. The only cultivation that he claims is, first, the clearing and planting of 13 acres of wheat, 10 acres of which was in a natural clearing, in 1957. He admits that he did not "cultivate enough." He stated, secondly, that in 1958 he had 17 acres actually cleared and planted to oats and clover but only partially cultivated. He listed, thirdly, 19 acres sowed to wheat in 1959. He did not indicate anything more as to cultivation but stated that there was no crop. One of his witnesses listed the planted acreages for four years as 7, 10, and 10 acres and the other, for 1958 and 1959, only as about 10 and about 19 acres. Neither of them made any statement as to the nature of cultivation or in regard to any harvest.

Thus the entryman's statements fail to show the cultivation required by the homestead law. The most that he claimed in his final proof documents is that he cultivated some portions of his homestead entries in the third, fourth, and fifth years, although the statute clearly requires cultivation of  $\frac{1}{16}$  of the area in the second year, as well. In this state of affairs, the inadequacy of his cultivation was apparent on the face of the documents he filed in the land office which became a part of the land office records. Thus the inadequacy of his cultivation was not a proper ground for contest of his entries and Mrs. Gilbert's complaint should have been dismissed as to this charge. But the entryman was not injured because the complaint was accepted and a hearing was held. The fact that the hearing examiner relied upon evidence adduced at the hearing is immaterial because the cancellation of the entries which his decision effected was required by the record already established before the hearing was held. *John A. Bartel*, A-29664 (October 11, 1962). Thus the Division of Appeals properly affirmed the cancellation of the entries.

It is also apparent that equitable adjudication was properly denied. The applicable statute permits the issuance of a patent if the Secretary of the Interior, or such officer as he may designate, decides "upon principles of equity and justice, as recognized in courts of equity" that "the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satis-

factorily explained." 43 U.S.C., 1958 ed., secs. 1161-1164. In this case, it is clear that there has not been substantial compliance with the law. Sufficient acreage was not cultivated and there is room for doubt that some of the effort described as cultivation actually met the requirements of the homestead law since it is admitted that some of it included only breaking the soil and planting some seed and some of it only planting without actually breaking the soil. Thus it did not include such acts done in such manner as to be reasonably calculated to produce profitable results, which the Department has held to be essential. *Charles Edmund Bemis*, 48 L.D. 605 (1922); *United States v. Charles E. Stewart*, A-28966 (September 25, 1962).

Furthermore, the entryman has not even attempted to explain his failure other than to contend that he acted in good faith and that conditions in Alaska make compliance with the homestead law very difficult. Good faith, of course, is not enough. There must be compliance with the law. The climatic difficulties of homesteading in Alaska confront all homesteaders and must be considered as factors influencing a choice in favor of or against a homestead effort but, so long as the homestead law remains applicable to Alaska and persons wish to avail themselves of the opportunity it affords for the acquisition of an extensive acreage of public land, they must be accepted as hazards of homesteading and homesteaders must contemplate compliance with the terms of the homestead law notwithstanding. The Congress may alter the law but, unless and until it does so, the Secretary is bound to enforce its terms as they are written. Thus the difficulty of complying with the law cannot be accepted as an excuse for noncompliance.

Oliphant also adverts to the fact that he has received no credit for his military service. The pertinent statute provides that military service in World War II may be credited against the cultivation and residence requirements of the homestead law for a maximum of two years. 43 U.S.C., 1958 ed., sec. 279. Although Oliphant has not stated the amount of credit he believes he is entitled to, a report from the Adjutant General, United States Army, indicates that his military service ran from January 24, 1940, to January 14, 1941, when, as the report says, he received an "Honorable Discharge Certificate of Disability for Discharge." Since the statute, *supra*, provides that only service after September 16, 1940, is creditable towards the requirement of the homestead law, Oliphant has earned less than four months



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credit toward satisfaction of the cultivation requirements, an amount which is not sufficient to relieve him of the cultivation requirements for any year. 43 CFR, 1961 Supp., 181.5 (b) (1).

If his disability was incurred in line of duty, then credit is granted for the equivalent of two years of service. However, Oliphant has not claimed or submitted any evidence to support such an allowance. In any event, the hearing examiner found, and the record supports his findings, that Oliphant had failed to satisfy the cultivation requirements for three years of his entry. Thus, even if his military service could be used to satisfy them for two years, he would still be deficient for one year. Therefore, even if Oliphant were allowed the maximum credit to which he might be entitled, it would still not be sufficient to meet the requirements of the homestead law.

Finally, it may be supposed that the land office may have advised the entryman that he was not required to demonstrate his good faith by clearing timbered land for cultivation when there was an area of land devoid of trees within his entry. But this was not a license for him to suppose that he could meet the cultivation requirements of the homestead law by merely sprinkling seed on this area without clearing the brush, breaking the soil, planting seed in an approved manner, and performing such weeding and stirring of the soil as good husbandry required for the particular crop which he sought to produce. In any event, he could not rely upon the advice of an employee of the land office to vest in him any rights not authorized by law (*Fred and Mildred M. Bohen et al.*, 63 I.D. 65 (1956); *Olyde O. Tarrant*, A-27480 (October 3, 1957)), or to excuse him from failure to meet the requirements of the homestead laws. *Morris Killen v. Hubert Lee Davidson, Jr.*, A-28871 (August 8, 1962).

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 appealed from, as modified, is affirmed.

ERNEST F. HOM,  
Assistant Solicitor.

## THOR-WESTCLIFFE DEVELOPMENT, INC.

A-29338

A-29520

A-29931

*Decided April 11, 1963***Oil and Gas Leases: Applications—Oil and Gas Leases: First Qualified Applicant—Oil and Gas Leases: Lands Subject to**

A noncompetitive offer to lease for oil and gas purposes public land upon which an earlier lease has terminated by operation of law at the expiration of the lease term, which offer is filed in advance of the period for simultaneous filing of offers announced by the land office as provided in the departmental regulations, is properly rejected.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Thor-Westcliffe Development, Inc., has appealed to the Secretary of the Interior from decisions dated November 22, 1961, March 15, 1962, and January 21, 1963, by which the Division of Appeals of the Bureau of Land Management affirmed decisions of the land offices at Cheyenne, Wyoming, and Santa Fe, New Mexico, rejecting its noncompetitive oil and gas lease offers principally on the ground that the land described in the offers was not available for leasing when the offers were filed because it had not been posted in the land offices.<sup>1</sup>

The appellant challenges the authority of the Secretary, exercised in departmental regulation 43 CFR, 1961 Supp., 192.43, to withhold public land from further oil and gas leasing following the termination of an oil and gas lease by operation of law at the expiration of its term until notice of the availability of such land for leasing is posted on a bulletin board in the land office. It contends that because subsection 17(c) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., Supp. III, subsec. 226(c)), provides that—

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

its offers, being the first offers filed for lands previously included in oil and gas leases which terminated by operation of law at the expiration of their terms, should have been accepted. It contends that the land which it offered to lease was "to be leased" because the Secretary had exercised his discretion by leasing in the past and had indicated

<sup>1</sup> Some offers were also rejected as to some land because the land was included in leases issued pursuant to prior offers. Some other offers were also rejected for violation of the 640-acre limitation set forth in regulation 43 CFR, 1961 Supp., 192.42(d). The appellant did not question these grounds of rejection in its appeals to the Director nor does it now.

The offers involved in the appeals are listed in the attached appendix.

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his willingness to lease again and that the land was "available for leasing when the offer was filed for no 'bar' to leasing appeared on the records." It thus concludes that the regulation in question exceeds the statutory jurisdiction, authority, and limitations of the Secretary and cannot be relied upon to sustain the rejection of its offers which were filed in advance of the period for simultaneous filing.

The issue presented by these appeals was raised and recently decided against the appellant by the United States Court of Appeals for the District of Columbia Circuit in *Thor-Westcliffe Development, Inc. v. Stewart L. Udall et al.*, No. 17101. In its decision of January 24, 1963, the court, in affirming the District Court's grant of summary judgment in favor of the Secretary, held that the regulation comported with the Secretary's statutory authority to prescribe necessary rules and regulations, that it was neither unreasonable nor inconsistent with the plain language of the act, and that it was not an impermissible implementation of the statutory purpose. Accordingly, the appellant's offers were properly 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), the decisions appealed from are affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

#### APPENDIX

##### A-29338

Wyoming 0153841\*

Wyoming 0157192

Wyoming 0157193

Wyoming 0157194

Wyoming 0157196

Wyoming 0157197\*

Wyoming 0157199\*\*

Wyoming 0157200\*\*

Wyoming 0157201\*\*

##### A-29520

New Mexico 0245463

New Mexico 0245464

New Mexico 0245466

New Mexico 0245468

New Mexico 0245469

New Mexico 0245471

New Mexico 0245473

##### A-29931

New Mexico 0245472\*

\*Offer rejected in part because land was included in existing oil and gas lease issued pursuant to a valid prior offer.

\*\*Offer rejected also for violation of the rule requiring an offer to cover 640 acres.

## UNITED STATES

V.

KELLY SHANNON ET AL.

A-29166

*Decided April 12, 1963***Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery**

To satisfy the requirement for discovery on a placer mining claim located for decorative building stone and clay before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before that date and when such showing is not made the mining claim is properly declared null and void.

**Mining Claims: Discovery—Mining Claims: Contests**

A mining claimant has the burden of proving in a contest against his claim that a discovery has been made after the Government has made a prima facie case that the claim is invalid for want of a discovery of a valuable mineral deposit.

**Mining Claims: Common Varieties of Minerals**

Building stone suitable for construction purposes which is found in pleasing colors, which splits readily and can be polished satisfactorily, but can be used only for the same purposes as other available building stone is a common variety of building stone and not locatable under the mining laws since its special characteristics do not give it a special distinct value.

**Mining Claims: Common Varieties of Minerals**

Clay found on a mining claim which the claimant believes to be valuable but which laboratory tests show to be unsuitable for an oil-bleaching material or as a catalytic agent even with acid treatment to increase its absorbency cannot be regarded as an uncommon variety of clay on the basis of one sale for mixing in stone plaster.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Kelly Shannon, Helen B. Harrell, Mary M. Sprague, Carl E. Pagh, Mrs. Rose M. Pagh, Alma M. Dillman, Ray E. Dillman, Josephine M. Shannon, Hazel V. Key, James W. Key, E. H. Kitchen, and H. C. Clarke have appealed to the Secretary of the Interior from a decision dated August 7, 1961, by which the Acting Chief, Division of Appeals, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void their five placer mining claims located in Kern County, California, for agatized rock and clay. The declaration was predicated upon evidence introduced at a hearing on June 22 and 23, 1960, in the course of contest proceedings brought in the name of the United States against the five claims.

In their appeal to the Secretary, the appellants contend that the Bureau of Land Management ignored the mining laws and the decisions of the courts in its determination of what constitutes a discovery of valuable mineral deposits and thus attempted to usurp

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the function of the Congress by formulating new and additional tests of discovery and that the decision appealed from disregards the evidence introduced by the claimants and bases the decision upon selected portions of the Government's evidence in derogation of section 7 of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1006(c)). To support their first contention, the claimants contend (1) that the act of July 23, 1955 (30 U.S.C., 1958 ed., secs. 611-615), is not applicable to their claims; (2) that the Government has the burden of proving that the claims are invalid; (3) that a showing of commercial ore is not essential to establish a discovery on a mining claim; and (4) that the stone found on their claims is not a common variety as described in section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611).

The record in this case discloses that the claimants allege that three of the claims were located previous to enactment of the act of July 23, 1955, section 3 of which (*supra*) declares that:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws \* \* \* "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

The Burway No. 1, they assert, was located on December 2, 1939, the Fool's Paradise on May 3, 1948, and the Eight Kids on May 15, 1951. An application for patent (Los Angeles 0161525) to these three claims, totaling 320 acres, was filed on November 25, 1958, alleging that they contained valuable deposits of decorative building stone, bentonite, clay, some silver, gold and/or tungsten. They assert that the Hit Parade and the Ace in the Hole were located on June 1, 1957. No application for patent including these claims has been filed. The Bureau initiated contests against all five claims.

At the consolidated hearing on these contests, the issue stated by the hearing examiner was the validity of the claims arising from the Government's charges that minerals had not been found within the limits of the claims in such quantities as to constitute a valid discovery; that the materials present on the claims could not be marketed at a profit; and that an actual existing market had not been shown to exist for the materials. In the course of the hearing, the claimants eliminated their claim to a discovery of gold, silver, tungsten, and uranium (Tr. 32-34)<sup>1</sup> and based their case on decorative building stone, which

<sup>1</sup> This and subsequent references are to the appropriate page or pages of the transcript of the hearing.

they referred to as agate, and clay, which they referred to as Fuller's earth and Montmorillonite.

It is apparent that as to the three claims for which a patent application was filed, location procedures were, at least, attempted before common varieties of minerals were declared not to be locatable under the mining laws. But the mining law declares that:

\* \* \* no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. (30 U.S.C., 1958 ed., sec 23.)  
and

Claims usually called "placers," including all forms of deposit, \* \* \* shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; \* \* \*. (30 U.S.C., 1958 ed., sec. 35.)

Hence, the fact that the claimants staked out the boundaries of their claims and recorded the location notices before July 23, 1955, does not make their claims valid.

In *Cole v. Ralph*, 252 U.S. 286, 295-296 (1920), the United States Supreme Court declared:

A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land. *Gwillim v. Donnellan*, 115 U.S. 45, 49; *Swanson v. Sears*, 224 U.S. 180.

While the two kinds of location—lode and placer—differ in some respects, a discovery within the limits of the claim is equally essential to both. \* \* \*

Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. *Waskey v. Hammer*, 223 U.S. 85, 90-91; \* \* \*. Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has "nothing to do with locating or holding a claim before discovery." *Union Oil Co. v. Smith*, *supra*, p. 350. In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. \* \* \*

As to the two claims for which no application for patent was filed, their validity must, clearly, depend upon a showing of a discovery and also that the mineral deposits claimed are outside the purview of common varieties within the meaning of the act of July 23, 1955.

The mining law requires a discovery of a valuable mineral deposit to validate a mining claim but does not define "discovery." However, the standard applied by the Department in *Castle v. Womble*, 19 L.D. 455, 457 (1894), was expressly approved by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Thus the rule is that:

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Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Because the mineral deposits which the claimants allege they had discovered are nonmetalliferous minerals often of widespread occurrence, it is necessary, in order to meet this test, to show present marketability. The claimants have characterized this requirement as legislation by the Department with no judicial support except in the decision of the United States Court of Appeals for the District of Columbia in *Foster v. Seaton*, 271 F. 2d 836, 838 (1959), in which the court approved such requirement as essential "to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining." The claimants refuse to be bound by this decision on the ground that it is contrary to decisions of the Supreme Court of the United States, although no decisions as to which it is *contra* are cited. However, the Department is bound by this decision and by the decision in *Ickes v. Underwood*, 141 F. 2d 546 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 713 (1944), which the claimants have not challenged. In the latter case, the court said (at page 549):

The decision of the Secretary of the Interior, in the present case, turned upon his finding of fact that the deposits of sand and gravel in question were neither presently nor prospectively valuable for mineral use, before or at the time of the appropriation of the land for public use. His decision, and the finding upon which it is based, have abundant support in the record. Moreover, the decision was clearly within the scope of his authority; and in the absence of fraud or imposition is conclusive.

Thus it was proper to require a showing of present marketability as an element of the discovery of valuable mineral deposits on the claims in controversy.<sup>2</sup>

Likewise, there is ample judicial support for placing upon the claimants the burden of establishing the validity of the claims by a

<sup>2</sup> It should also be noted that in four separate recent decisions by the United States District Courts in Nevada and Arizona, against attacks substantially the same as that made by the appellants here, the courts have sustained the requirement for a showing of present marketability and cited *Foster v. Seaton*, *supra*. The cases are as follows, the departmental decision attacked in each being given after the case citation:

*The Dredge Corporation v. E. J. Palmer et al.*, Civil No. 366, D.C. Nevada, decided September 25, 1962; appeal pending (*Clear Gravel Enterprises, Inc., et al.*, A-27967, A-27970 (December 29, 1959)).

*The Dredge Corporation v. J. Russell Penny et al.*, Civil No. 396, D.C. Nevada, decided September 25, 1962; appeal pending (*United States v. The Dredge Corporation*, A-28022 (December 18, 1959)).

*Shuck v. Helmandollar*, Civil No. 682-Prescott, D.C. Arizona, decided December 7, 1961; no appeal taken (*United States v. Thomas R. Shuck et al.*, A-27965 (February 2, 1960)).

*Mulkern v. Hammitt*, Civil No. 299, D.C. Nevada, decided February 19, 1963 (*United States v. G.C. (Tom) Mulkern*, A-27746 (January 19, 1959)).

preponderance of the evidence after the Government had made out a prima facie case in favor of their invalidity. In *Ickes v. Underwood*, *supra*, a case in which the Bureau of Land Management contested a mining claim located for sand and gravel, at pages 548 and 549, the court said:

\* \* \* The Government may dispense its bounty on such terms as it sees fit; \* \* \*

Appellees would bring themselves within the compass of public land cases, in which the applicants occupied contract relationships with the Government, such as the case of *Payne v. Central Pacific Railway Company* [255 U.S. 228, 41 S. Ct. 314, 65 L. Ed. 598 (1921)]. There the Railway Company had accepted an offer made by the Government; had constructed agreed units of railroad; had made required selection of indemnity lands, all in conformity with the statutory requirements. It was under those circumstances that the Supreme Court said: "The railroad then had been constructed and equipped as required by the granting act *and nothing remained to be done by the grantee or its successor to fulfill the conditions of the grant and perfect the right to a patent.* The rule applicable in such a situation is that 'a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof' [at page 237 of 255 U.S.] \* \* \* (Italics supplied.) In that case the Court pointed out in express terms the fact which distinguishes it from the present case, i.e., 'Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step of one who by full compliance has earned the right to receive the title.' [At pages 234, 235 of 255 U.S.] Here, appellees [who claimed only location of their mining claim] have merely taken the initial steps in seeking to secure a gratuity from the Government. They are in no position to compel action, or to coerce the executive in the exercise of its discretion."

As the court observed in *Foster v. Seaton*, *supra*, as to holders of unpatented contested mining claims:

\* \* \* The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely a ruling that they have complied with the applicable mining laws. \* \* \* Until he has fully met the statutory requirements, title to the land remains in the United States. *Teller v. United States*, 8 Cir., 1901, 113 F. 273, 281. Were the rule otherwise anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary. 271 F. 2d at 838.

Since the claimants' contention that a showing of commercial ore was required is predicated upon their opposition to the testimony given at the hearing which tended to show that a reasonably prudent man would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine, it is not necessary to consider this contention beyond the observation that no such requirement was made.

Because of the absence of a showing of discovery before July 23, 1955, on the three claims and because of the subsequent date of the lo-



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cation of the two claims, their entire case depends upon a determination whether the stone and the clay found on the claims are common varieties within the meaning of section 3 of the act of July 23, 1955. The evidence on this point has been carefully examined. Such examination discloses that stones composed of crystalline quartz referred to as Jasperized agate or agatized Jasper have been unearthed singly by digging on the claims. The claimants base their case upon the assertion that this stone is very beautiful; that it looks like marble when it is polished and that it can be used for facings on buildings and decorative stone around fireplaces and for landscaping purposes. They showed some sales, approximating 400 tons from 1956 through 1958, for amounts ranging from \$44 to \$186. But all of this tends to show nothing more than a limited use as building stone which, the Department has held consistently, is not indicative of an uncommon variety of stone. *United States v. J. R. Henderson*, 68 I.D. 26 (1961); *United States v. D. G. Ligier et al.*, A-29011 (October 8, 1962). However, their best customer was a rock dealer who has an interest in other claims in which Shannon also has interests. The Government witness took samples to 15 other rock dealers all of whom indicated that they were not interested in purchasing any of such stone.

The claimants showed sales of two loads of clay material for mixing in stone plaster in January 1958. The purchaser, who is their best rock purchaser, testified that he purchased 12 tons of clay in January 1958, and sold it to a plastering contractor (Tr. 281-282). He added: "Frankly, I don't know whether it was good or bad, because he didn't ask for more." (Tr. 282.)

The chemical tests on samples taken by the Government's witness show that it is not suitable for an oil-bleaching material or as an absorbent; that it is not naturally absorbent and does not become sufficiently so even with acid treatment so that there is very little chance that it could be used as a catalytic agent (Tr. 85, 91). Furthermore, it is a calcium clay, rather than a sodium clay, and for that reason is not nearly so suitable for industrial purposes (Tr. 93, Exhibit D).

In the light of this evidence, it is quite clear that the clay cannot be regarded as an uncommon variety because it has some property giving it distinct and special value. Of like import is *United States v. Mary A. Matthey*, 67 I.D. 63 (1960), and cases cited therein.

Thus I conclude that the claimants have failed to show a discovery on any of the claims which would exempt these claims from the application of the act of July 23, 1955, or to show that any of the claims is exempt from the application of this act because there is a discovery of an uncommon variety of stone or clay. The hearing examiner and the Division of Appeals properly found the claims to be null and void with-

out usurping the function of the Congress or disregarding any of the claimants' evidence.

In their brief on appeal the appellants incorporated a motion to dismiss the contests. The motion is based on the same grounds as the appeal.

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 appealed from is affirmed and the motion to dismiss is denied.

ERNEST F. HOM,  
*Assistant Solicitor.*

### ESTATE OF MARY RAMONA DISERLY YOUPEE BROWN

IA-1294

*Decided April 15, 1963*

#### Indian Lands: Descent and Distribution: Claims Against Estates—Rules of Practice: Generally

An Indian's written authorization for payment of her funds to a creditor, which has been filed with the Bureau of Indian Affairs during the lifetime of the Indian and not revoked by the Indian or disapproved by the Bureau, need not be resubmitted by the creditor as the basis for a claim against the estate of the Indian after her death; and the authorization so filed removes it from the application of the probate regulation which prohibits the filing of claims against Indian estates after the conclusion of the probate hearing.

#### APPEAL FROM A DECISION BY AN EXAMINER OF INHERITANCE

Lizzie S. Manning, an Indian, appealed to the Secretary of the Interior from a decision by an Examiner of Inheritance, dated February 2, 1962, denying her petition for a rehearing in the matter of the estate of Mary Ramona Diserly Youpee Brown, deceased Fort Peck allottee No. 3170. The appellant had filed her petition for rehearing because of the Examiner's decision of December 11, 1961, wherein appellant's interest in this matter was handled by the Examiner in the following manner:

The claim of Lizzie S. Manning or Lizzie Smith Manning, Ft. Peck allottee #885, for money loaned, is hereby disallowed for the reason that the said claim was filed after conclusion of the hearing, was not supported by an affidavit, and was otherwise insufficient in form.

In his decision denying the petition for rehearing the Examiner did not purport to touch the merits of the alleged claim, but merely cited the following provision in the Departmental probate regulations as barring him from considering the matter:

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No claims filed after the conclusion of the hearing shall be considered unless the claimant can present satisfactory proof that he had no actual notice of the hearing and that he was not on the reservation or otherwise in the vicinity during the period when the public notices of the hearing were posted. (25 CFR 15.23 (e))

The probate record on this case does not show that the appellant was personally notified of the hearing on the above estate, to be held at the Fort Peck Indian Agency, Poplar, Montana, on July 27, 1960. The first information she apparently had regarding the hearing is indicated by her letter of July 26, 1960, to the Examiner of Inheritance, written from her home in Ashland, Wisconsin. In that letter the appellant stated that she had "just received" the Poplar Standard<sup>1</sup> from which she noted that the estate of the above decedent was posted for hearing on the following day. Since appellant, or someone in her behalf, did not or could not make arrangements to be present at the hearing, appellant set out in her letter to the Examiner the basis for her interest in the proceedings. A portion of her letter reads as follows:

\* \* \*

During Mrs. Brown's lifetime and while I was living in Poplar, I gave her various amounts of cash when she was down and out and in need of food with the understanding that she would repay me. As she was unable to repay me, she authorized the Superintendent of the Ft. Peck Agency to pay me from her account the first \$1,000 coming into her account. Her signed authorization is on file in the Ft. Peck Agency office. Also, her individual Indian account was marked accordingly. In addition, I gave the Superintendent of the Ft. Peck Agency numerous cancelled checks to substantiate this claim, and they are supposed to be in a vault in his office.

If the authorization Mrs. Brown signed some year ago still stands and a claim is not necessary against her estate in order for payment of the first \$1,000 coming into her account to be paid to me, kindly disregard this statement as a claim \* \* \*

The principal allegations in this letter were substantially reiterated in a later affidavit of the appellant, dated October 18, 1960, which was filed with her petition for a rehearing.

The appellant's letter of July 26, 1960, was not received by the Examiner until July 28, 1960, the day after the probate hearing. There appears to be no question that appellant was not on the reservation or otherwise in the vicinity during the period when the public notices of the hearing were posted. Thus, the procedural point on which the Examiner based his decision, and which raises the question on appeal, is whether, in the circumstances of this case, the appellant is bound by the notice of the hearing received through a newspaper item one day before the hearing date, but to which the Examiner did

<sup>1</sup> A newspaper publication in Poplar, Montana, covering local news items.

not receive appellant's response until the day after the hearing. We think not.

The notice of the hearing which the appellant apparently received only by a chance reading of a newspaper no doubt placed her in a dilemma. So far as she knew and as her letter of July 26, 1960, to the Examiner indicates, the authorization for payment to her from the decedent's account was filed during the decedent's lifetime and was on record at the agency office. In fact, there has been submitted in support of appellant's allegations on the point a copy of what purports to be a letter of authorization, dated August 27, 1953, addressed by the decedent to the Superintendent of the Fort Peck Agency, asking that he pay to the appellant "the sum of One thousand and 00/100 dollars (\$1,000) from any monies credited to my account at the present time or to be credited in the near future." On this letter we also observe the following initialed note:

This is due Mrs. Manning on loans Ramona secured from her. OK for Ck to be endorsed over to Mrs. Manning.

Obviously, the proof offered by the appellant is not determinative regarding the merits of the authorization to her, and no finding on that point is made in this decision. Nevertheless, what has been presented indicates a written record at the local agency office of some arrangement by the decedent during her lifetime to pay the appellant. In these circumstances, the appellant reasonably believed that the authorization, so filed, need not be resubmitted by her as the basis for a claim to be presented in the probate proceedings on the estate. The fact that the authorization had been filed and placed on record at the agency during the decedent's lifetime removes it from the limitations of 25 CFR 15.23(e), *supra*, which apply to claims filed after the conclusion of a probate hearing.<sup>2</sup>

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Section 210.2.2A(3)(a), Departmental Manual, 24 F.R. 1348), the decision of the Examiner of Inheritance, denying appellant's petition for a rehearing, is reversed. The case is hereby remanded for the sole purpose of permitting the Examiner, after notice to all interested parties, to consider appellant's allegations on their merits.

EDWARD WEINBERG,  
*Acting Solicitor.*

<sup>2</sup> Under 25 CFR 15.4 of the probate regulations known claimants, as well as presumptive heirs, are required to be served personally or by mail with a copy of the notice of hearing. 61 I.D. 37, 38 (1952).

## MYRTLE A. FREER ET AL.

A-29221

*Decided April 2, 1963***Color or Claim of Title: Good Faith**

An application to purchase public land under the Color of Title Act is properly rejected where the applicant shows only that his grantor went on the land and occupied it without any apparent right and the applicant occupied the land under a conveyance from his grantor for much less than the 20 years required by the Color of Title Act.

**Color or Claim of Title: Generally—Color or Claim of Title: Good Faith**

Where a color of title application is filed for an island in a river and the only color of title or claim of title relied upon by the applicant must be founded upon a patent and subsequent conveyances issued for abutting lots on the river bank and upon an interpretation of State law that such a conveyance of riparian land carries title to the island, the application must be rejected where it appears that the interpretation of State law was changed before the running of the 20-year period required for a holding in good faith under the Color of Title Act.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Myrtle A. Freer, Andrew J. Freer, Jr., and Willis W. Ritter have separately appealed to the Secretary of the Interior from a decision dated August 7, 1961, whereby the Division of Appeals, Bureau of Land Management, affirmed land office decisions rejecting their respective applications to purchase tracts under the Color of Title Act, as amended (43 U.S.C., 1958 ed., sec. 1068 *et seq.*).

The applications were filed as class 1 claims under the act. Class 1 claims are allowable only where it is shown to the satisfaction of the Secretary of the Interior

\* \* \* that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, \* \* \* 67 Stat. 228, 43 U.S.C. 1958 ed., sec. 1068.

The claim of Mrs. Freer originated in a deed issued on March 20, 1936, by her husband, Andrew J. Freer, Sr., purporting to convey a two-thirds interest in a certain island to her. Andrew J. Freer, Jr.'s, claim originated in a deed issued on October 30, 1945, by his father, Andrew J. Freer, Sr., purporting to convey a one-third interest in the same island to him. There is evidence that Mrs. Freer and her husband did build a house and reside on the island as early as 1917. There is, however, no evidence at all of any purported conveyance of the island to Andrew J. Freer, Sr. In fact, there is not

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even an assertion that prior to the conveyances made by him he thought he owned the island, or any explanation as to why he might have thought he owned the island. Clearly, therefore, a basic requirement of the color of title act, that the claimant must have possessed the land under claim or color of title, is completely lacking so far as Freer, Sr., is concerned. *Marion M. Pontius*, A-27473 (November 7, 1957.) Mrs. Freer and Freer, Jr., acquired color of title in 1936 and 1945, respectively, but Mrs. Freer was cognizant in 1954 that she did not have title to the land. Andrew J. Freer, Jr., was also aware in 1954 that he did not have title to the land. Their holding of the land thereafter cannot be said to have been in good faith under claim or color of title, *Marion F. Pontius, supra*, and their holding prior thereto was not for the required twenty years. The Freer color of title applications were therefore properly rejected.

Appellant Ritter's application is for three islands in the Snake River, Idaho, surveyed as lots 9, 10, and 11, sec. 17, T. 8 S., R. 14 E., B.M., Idaho, in response to applications for survey filed in April 1955. The appellant's application is based upon his and his predecessors' ownership of land on the east bank of the Snake River lying opposite the islands (lots 5 and 8, sec. 17). Lots 5 and 8 were patented by the United States on February 25, 1896. On September 12, 1902, the lots were included in a conveyance which described the lands conveyed by metes and bounds, the west boundary being described as the Snake River. This description did not vary in subsequent conveyances, including the final one to appellant executed on July 10, 1954. Appellant concedes that in the chain of title commencing with the patent from the United States there is no reference to any islands in the river.

The Bureau rejected Judge Ritter's application on the ground that neither he nor his predecessors had any color of title to the islands, there being no instrument in writing purporting to include the islands.

On this appeal Judge Ritter contends vigorously that he and his predecessors had color of title to the islands by virtue of the patent from the United States and the subsequent conveyances. His contention is based on the argument that until 1915 the Idaho law was that a riparian owner takes title to the thread of the stream, including all small islands, whether the stream is navigable or nonnavigable and that the Idaho law is still the same as to nonnavigable streams. He concludes that the patent and conveyances must be read in light of the Idaho law in existence at the time and that, so read, they constitute color of title to the islands.

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It is unnecessary to determine here whether a general interpretation of law as to the effect of a conveyance satisfies the statutory requirement for a showing of a color of title. Assuming that it does, it would not help the appellant here. The patent from the United States to lots 5 and 8, Section 17, was issued on February 25, 1896. The first decision by the Idaho Supreme Court holding that a patentee of riparian land gained title to an island lying between his land and the thread of the stream was *Johnson v. Johnson*, 95 Pac. 499, decided March 23, 1908. The case was one of first impression (see page 503). It is hard to see how the patent issued in 1896 and the conveyance made in 1902 could be said to have been made with this ruling in mind.

But this does not matter. Assuming that they were, the fact is that on February 6, 1915, the Idaho court in *Callahan v. Price*, 146 Pac. 732, cited by appellant, overruled *Johnson v. Johnson* and held that a riparian owner did not gain title to an island lying between his riparian land and the thread of a navigable stream. This ruling came down shortly before the lapse of 19 years after issuance of the patent. Thereafter, appellant's predecessor then holding title to lots 5 and 8 had no basis for believing that his ownership of those lots entitled him to ownership of the three islands lying opposite them. In other words, there could be no good faith holding of the islands under claim or color of title subsequent to February 6, 1915. And, since any previous good faith holding in reliance upon the prior interpretation of Idaho law was for less than 20 years, a basic requirement of the color of title law has not been and cannot be fulfilled.

The appellant has not addressed himself to this point. He has, however, said that the navigability of the Snake River has never been determined at the point where the three islands are located. He has also said that *Callahan v. Price* did not change the Idaho law as to nonnavigable streams. However, in *Willis W. Ritter et al.*, A-27755 (December 22, 1958), in which the Department affirmed the dismissal of his protest against the survey of the same three islands, the Department accepted determinations by the courts and this Department that the Snake River is navigable. Among other decisions, the Department cited *Johnson v. Johnson, supra*, in which the Idaho court was concerned with the ownership of an island in the Snake River perhaps five miles or so from the three islands in question. Discussing the question of what constitutes a navigable river, the court concluded that the Snake River is a navigable stream. 95 Pac. at 507. As was the case in 1958, we see no reason to hold

that the river is not navigable where the three islands are located. Therefore, we would be unable to accept any contention that the river is nonnavigable where the islands are located and that the appellant and his predecessors continued to have color of title despite *Callahan v. Price*.

*Callahan v. Price* was the result of the decision of the United States Supreme Court in *Scott v. Lattig*, 227 U.S. 229 (1913), which reversed a decision of the Idaho court following the rule in *Johnson v. Johnson*. The United States Supreme Court held that an island in the Snake River which was in existence at the time Idaho was admitted to the Union but which had not been surveyed did not pass with a patent to land on the bank of the river and remained public land of the United States. Appellant argues that the islands involved in *Scott v. Lattig* and in *Callahan v. Price* are much different from the three islands involved here from the standpoint of size and their separation from the shore. If the distinction is sound, the only legal significance of it would be that it would be necessary to conclude that title to the three islands passed from the United States with the issuance of the patent to lots 5 and 8 in 1896, and we would be left with no color of title case at all. So, too, is the effect of appellant's argument that until *Callahan v. Price*, his predecessors actually had legal title to the islands. In any event, in the Department's decision of December 22, 1958, dismissing appellant's protest against the survey of the islands, the Department held that title of the islands is in the United States. The appellant cannot attack that conclusion and still maintain his application.

It is unnecessary to discuss at length appellant's contention that the color of title act does not require a claimant to have color of title in all cases but permits him to apply if he has merely "claim of title" as distinguished from "color of title." In this case, any claim of title that the appellant and his predecessors have rests upon the interpretation of Idaho law prior to *Callahan v. Price*. Such claim of title could not have been held in good faith after that decision was issued.

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 appealed from is affirmed.

ERNEST F. HOM  
Assistant Solicitor.



## CLAUDE P. HEINER

A-29103

*Decided April 22, 1963***Coal Leases and Permits: Permits**

An application for a coal prospecting permit is properly rejected where information becomes available as to the existence and workability of coal deposits in the land after the filing of the application.

*Henry D. Mikesell, A-24112 (March 11, 1946), rehearing denied (June 20, 1946), overruled to extent inconsistent.*

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Claude P. Heiner has appealed to the Secretary of the Interior from a decision dated June 26, 1961, by which the Acting Appeals Officer of the Bureau of Land Management affirmed a decision of the Colorado land office rejecting his application for a coal prospecting permit on certain public land in the Gunnison National Forest in Delta County, Colorado, on the ground that the land is known to contain commercial coal deposits so that it is subject to leasing rather than prospecting under section 2 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 201).

In his appeal to the Secretary, Heiner contends that the land covered by his application had not been drilled or otherwise prospected to determine the character, analysis, or workability of any coal seams that may be contained therein at the time he filed his application on July 5, 1960, so that it was not then known to contain commercial coal deposits and was, accordingly, subject to the prospecting provisions of the Mineral Leasing Act. He concludes that a prospecting permit should be issued on the basis of the information available with respect to the land covered by his application at the time the application was filed.

The land office decision was based upon a report of the Geological Survey that the land applied for is adjacent to or contains extensions of a workable coal deposit. The Geological Survey has reported subsequently that the information upon which its earlier report was based was obtained after the filing of Heiner's application.

The statute which authorizes the Secretary to issue coal prospecting permits provides:

Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years \* \* \*. (30 U.S.C., 1958 ed., sec. 201 (b).)

The language of the statute is definite and specific—the Secretary is not required, but he is permitted, to issue coal prospecting permits on public land if prospecting or exploratory work on that land “*is necessary to determine the existence or workability of coal deposits*” (Italics supplied). It must be interpreted as permitting issuance of a prospecting permit only when the Secretary does not know of the existence or workability of coal deposits. There is nothing in this language which restricts the Secretary, when he reaches an application for action, to a consideration only of information available at the time the application was filed and prevents him from considering subsequent information which establishes the existence and workability of coal deposits when the issuance of a permit is considered. On the contrary, the statute seems clearly to say that the Secretary has authority to issue a permit only when at the time he proposes to act he believes that prospecting work is necessary.

In apparently the only other instance in which the Department considered whether knowledge of coal deposits acquired after the filing of an application for a coal prospecting permit should be taken into account, the Department said that the determination of the character of the land to see whether a permit should be issued is to be made at the time when an application has been perfected. *Henry D. Mikesell*, A-24112 (March 11, 1946); motion for rehearing denied (June 20, 1946). The Department nonetheless recognized that an applicant acquires no vested right in the land described in his application or in the mineral deposit therein by the filing of his application. It follows that an applicant is not entitled to the issuance of a permit merely because of an absence of knowledge of workable coal deposits which obtains at that time. The Department referred in the *Mikesell* decision to “the unusual circumstances of the particular situation and of the equities on behalf of Mikesell,” thus suggesting that the ruling therein made was influenced by those factors. However this may be, to the extent that the *Mikesell* decision is inconsistent with the position taken in this case, it is overruled as not being in accord with a proper interpretation of the statute.

I conclude that the Secretary has no authority to issue a coal prospecting permit when at the time he acts on the application for a permit he has information as to the existence and workability of the coal deposits in the land applied for.<sup>1</sup>

<sup>1</sup> In a similar situation, the Department held recently that an application for a potassium prospecting permit is properly rejected when the land applied for is determined to contain valuable deposits of potassium as of a time after the filing of the application. *Sawyer Petroleum Company, H. Byron Mock*, 70 I.D. 9 (1963).

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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 appealed from is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

ESTATE OF HARRIS EUGENE RUSSELL  
UNALLOTTED OSAGE INDIAN

IBCA-1275

*Decided May 2, 1963***Indian Lands: Descent and Distribution: Wills**

Testimony of lay witnesses not present at the execution of the will, establishing that testator was in poor health, that he was unable to manage his property, that he customarily used intoxicants to excess, and that he appeared to be intoxicated at different times on the day the will was executed; does not meet the burden of proving testamentary incapacity placed upon contestants where testimony of scrivener and attesting witnesses, and the rationality of the will support a contrary finding.

**Indian Lands: Descent and Distribution: Wills**

Where a decedent, in the six-month period following a divorce, during which Oklahoma law prevented remarriage to any party other than the divorced spouse, executed a will devising property to "my wife"; his divorced spouse, in attempting to establish that an alleged subsequent marriage between herself and the decedent, during said period, revoked the will by operation of law, cannot, where circumstances rule out the possibility that any other former spouse was the intended devisee, successfully maintain the position that because she was not the decedent's wife at the time he executed the will, she was not provided for in the will.

**APPEAL FROM THE SUPERINTENDENT, OSAGE AGENCY**

The decision of the Superintendent of the Osage Indian Agency, dated October 30, 1961, disapproving eight wills of Harris Eugene Russell, a deceased unallotted Osage Indian, has been appealed to the Commissioner of Indian Affairs by Mrs. Genevieve Jewell Ray, insofar as it disapproves the will of June 8, 1960; by Cleo Bascus Russell and Ronald Gene Russell, insofar as it disapproves the will of October 7, 1959; and by Carol Jean Logan, Jacquelyn Logan, and Leroy Elrod Logan, Jr., insofar as it disapproves the will of March

27, 1958.<sup>1</sup> The appellants are represented by T. F. Dukes, McCoy and Kelly, and P. D. Lindsey, respectively.

The decedent, Harris Eugene Russell, died December 31, 1960, a resident of Hominy, Oklahoma. Under the terms of his purported last will, dated June 8, 1960, the decedent devised and bequeathed to his son, Ronald Gene Russell, \$1,000 and 160 acres of land; and a life estate in his Osage headright and in 360 acres of land to his "wife" (without further identification), with remainder interest to his first cousin of the half blood, Genevieve Jewell Ray, to whom he also left two improved lots in Hominy and the residue of his estate.

The will of October 7, 1959, for which Cleo Bascus Russell (decedent's wife at that time) and Ronald Gene Russell are the proponents, left decedent's entire estate to them. In the will of March 28, 1958, for which the Logans are the proponents, decedent left everything, except a bequest to his son of \$100, to Carol Jean, Jacquelyn, and Leroy Elrod Logan.

A petition for approval of the last will and testament (June 8, 1960) of Harris Eugene Russell was filed with the Superintendent of the Osage Indian Agency by T. F. Dukes, named executor in the will, and Genevieve Jewell Ray. Objections to the approval of the will were filed by Cleo Bascus Russell, Ronald Gene Russell, and the Logans. The allegations included undue influence, lack of testamentary capacity, improper execution, and revocation by operation of law. A hearing on the approval or disapproval of the eight wills was held before a Field Solicitor to whom hearing authority had been delegated.

Between 1936 and his death in 1960 at the age of 43, the decedent entered into five or six marriages with three women. Four were terminated by divorce and one was annulled. He executed eight wills during the last 15 years of his life, and, because of excessive use of intoxicants and inability to manage his property, he was under guardianship during the last six years of his life. The decedent was afflicted with sugar diabetes which, aggravated by his use of intoxicants, necessitated amputation of his legs. He was hospitalized from

<sup>1</sup> Under Section 8 of the Act of April 18, 1912 (37 Stat. 86), adult members of the Osage Tribe of Indians, not mentally incompetent, may dispose of their restricted estates by will in accordance with the laws of the State of Oklahoma, and subject to the approval of the Secretary of the Interior. The function of approval or disapproval in this respect was delegated to the Superintendent of the Osage Indian Agency under regulations of the Department (25 CFR 17.12). At the time this appeal was instituted Section 17.14 of those regulations (subsequently amended to provide for a direct appeal to the Secretary of the Interior) provided for an appeal from the Superintendent's action to the Commissioner of Indian Affairs, and for a further appeal to the Secretary. For administrative reasons, the Commissioner of Indian Affairs referred the present appeal directly to the Secretary for action.

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time to time for both diabetes and alcoholism. The decedent's marriages were to Cleo Bascus, 1936-1937; Lena Boyiddle, 1938-1944; Pearl DeRoin, 1947-1952; Pearl DeRoin, 1952-1954; and Cleo Bascus, 1954-1960. A sixth marriage was alleged to have been consummated between decedent and Cleo Bascus in June 1960. Ronald Gene Russell, the decedent's only offspring, was born of the first marriage. Circumstances surrounding the marriage and the boy's physical features apparently raised doubt in decedent's mind that Ronald was his issue. A decree of divorce from Cleo Bascus Russell was entered March 4, 1960, and sometime in June 1960, after executing his last will on June 8, 1960, decedent took up residence with her and their son at Mrs. Russell's home in Oklahoma City. The decedent stayed with Mrs. Russell about three months before returning to Hominy to live with relatives. A petition for divorce was filed in his behalf November 4, and this action was pending when he died the following month. The foregoing facts adduced at the hearing were, except the sixth marriage, uncontroverted.

The Superintendent of the Osage Indian Agency based his decision on the number of wills executed, the numerous changes in beneficiaries, and on findings that the decedent was a chronic alcoholic and that he lacked testamentary capacity because of mental immaturity.

Genevieve Jewell Ray and the Logans based their appeal on allegations that the Superintendent's action was an abuse of discretion in that the evidence adduced at the hearing required approval of the wills they proposed. Ronald Gene Russell and Cleo Bascus Russell, satisfied with the Superintendent's disapproval of all the wills because of their standing as heirs, appealed only to protect their interest in the 1959 will in the event of reversal.

The allegations of undue influence and improper execution, not having been supported by evidence during the hearing, are not now in issue. The issues remaining to be resolved are whether the evidence adduced at the hearing supports a finding that decedent had the requisite testamentary capacity in executing any of the last three wills, and, if he had such capacity, whether a revocation by operation of law resulted from having thereafter married a woman who had not been provided for in the will.

The Supreme Court of Oklahoma has defined testamentary capacity as a state of mental capacity which would enable a person to understand in a general way the nature of the business then ensuing, to

bear in mind in a general way the nature and situation of his property, to remember the objects of his bounty, and to plan or understand the scheme of distribution.<sup>2</sup> It has held that while inability to transact business,<sup>3</sup> adjudication of mental incompetence and appointment of a guardian,<sup>4</sup> sickness or bodily weakness,<sup>5</sup> and habitual intoxication<sup>6</sup> may be considered in determining testamentary capacity, they are not conclusive. The Oklahoma courts have also held that in order to invalidate a will for lack of testamentary capacity, evidence must show that the condition existed at the time the will was executed, and that such condition precluded an understanding of the nature and consequences of the act.<sup>7</sup> Prior and subsequent acts may have bearing only to the extent that they assist in determining the mental status at the time of execution.<sup>8</sup> Oklahoma law accords a testator a presumption of sanity, and places upon the contestants the burden of proving a lack of testamentary capacity.<sup>9</sup>

The appellants have not met this burden. The hearing produced conflicting testimony on the question of decedent's sobriety, health, and mental capacity during the period in which the last three wills were executed, and on June 8, 1960, the day the last will was executed, in particular. The only testimony on the decedent's condition at the time of the execution of the last will was that of the scrivener and the attesting witnesses. These witnesses concurred in the position that decedent's mind and memory were clear, that he was not intoxicated, that he appeared to appreciate the significance of the transaction, and that the act of executing the will was of his own volition. The only witnesses who offered contradicting testimony were the lawyer of one of the contestants and that lawyer's secretary. These witnesses testified that they had seen the testator in an intoxicated condition on April 8, 1960, both before and after the time the will was executed, but they were not present at the execution of the will. It is the testator's condition when he executed the will which is decisive. Testimony establishing the testator's reputation as a drunkard and his intoxication at times other than that when the will was executed cannot constitute a proper basis for a Superintendent's determination of the issue of testamentary capacity. The testimony of the scrivener and attesting witnesses, which was not overcome by the testimony of con-

<sup>2</sup> In re Nitey's Estate, 75 Okla. 389, 53 P. 2d 215 (1935).

<sup>3</sup> In re Tayrien's Estate, 117 Okla. 216, 246 Pac. 400 (1926).

<sup>4</sup> In re Shipman's Estate, 184 Okla. 56, 85 P. 2d 317 (1938).

<sup>5</sup> *Ibid.*

<sup>6</sup> In re DeVine's Estate, 188 Okla. 423, 109 P. 2d 1078 (1941).

<sup>7</sup> In re Shipman's Estate, 184 Okla. 56, 85 P. 2d 317 (1938).

<sup>8</sup> In re Mason's Estate, 185 Okla. 278, 91 P. 2d 657 (1939).

<sup>9</sup> In re Blackfeather's Estate, 54 Okla. 1, 153 Pac. 839 (1915).

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testant's counsel and counsel's secretary, is supported by the rationality of the will itself. Having made provision for decedent's son and recently divorced wife, and having made no gifts to persons other than those related by blood or marriage, the last will cannot be said to be unnatural, and in view of decedent's marital history and his doubt about his son's paternity, the will could not be characterized as unfair to his heirs.

Appellants Cleo Bascus Russell and Ronald Gene Russell have argued that decedent and Cleo Bascus Russell entered into a common law marriage after the execution of the last will, and that the will was revoked by operation of law pursuant to 84 OSA 107 because the "wife" provided for in the will was not identified; that Cleo Bascus Russell was not decedent's wife at that time; and that, therefore, she was not provided for in the will as required by said statute. The pertinent text of statute states, "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked \* \* \* unless she is provided for in the will."

A marriage to Cleo Bascus Russell having been terminated four months before the will was executed, it appears that decedent had no wife at the time of executing the will because the six-month period following a divorce decree, during which remarriage to anyone other than the divorced spouse was prohibited by 12 OSA 1280, had not expired.<sup>10</sup> Thus, the gift to "my wife" created an uncertainty. However, an uncertainty arising upon the face of a will may be resolved pursuant to 84 OSA 152 by ascertaining the testator's intention from the words of the will and the circumstances under which the will was made. From 1954 until his death, the decedent had no wife other than Cleo Bascus, and within a few days of executing the last will he began living with her once more. At that time he was prohibited by 12 OSA 1280 from marrying anyone else. Establishing that a common law marriage was consummated at that time could only serve to support further a finding that Cleo Bascus Russell was the person referred to in the will as "my wife"; thus, in this case, establishing one of the conditions required by the statute—a subsequent marriage, would tend to negate the existence of the other required condition—failure to provide for the after-married spouse in the will.

It is determined, in the light of the whole record, that on June 8, 1960, Harris Eugene Russell possessed the requisite testamentary capacity for executing a valid will; that he was not subjected to undue

<sup>10</sup> *Yeats v. State*, 30 Okla. Cr. 320, 236 Pac. 62 (1925).

influence, fraud or coercion; that the execution of said will complied with the laws of the State of Oklahoma; and that said will revoked all prior wills, and was not itself revoked by operation of law. Therefore, pursuant to authority delegated to the Solicitor by the Secretary of the Interior [sec. 210 2.A (3) (a), Departmental Manual, 24 F.R. 1348], the action of the Superintendent of the Osage Indian Agency, dated October 30, 1961, disapproving the last will and testament of the decedent, dated June 8, 1960, is hereby reversed, said will is approved, and the Superintendent is directed to enter an order certifying such approval.

EDWARD WEINBERG,  
*Deputy Solicitor.*

**GEORGE N. KEYSTON, JR., LTD.**

A-29133

A-29524

*Decided May 7, 1963*

**Oil and Gas Leases: Applications—Regulations: Generally**

Where the regulation in effect when an oil and gas lease offer is filed in the name of a partnership requires a certified copy of the articles of association and showings as to the qualifications of the member partners to accompany the offer, the mere reference by serial number to another case record where showings have been filed is not adequate and the offer is properly rejected.

**Oil and Gas Leases: Applications**

The inclusion of offers in drawings simply establishes the order in which they will be considered and does not constitute a determination that a given offer is valid or waive any defect in such offer; thus a defective offer drawing first priority must be rejected.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Appeals to the Secretary of the Interior have been filed by George N. Keyston, Jr., Ltd., a limited partnership, from separate decisions rendered by the Division of Appeals, Bureau of Land Management, dated July 13, 1961, and February 21 1962, affirming Utah land office decisions rejecting its oil and gas lease offers Utah 061037 and 059787 for noncompliance with departmental regulation 43 CFR 192.42(e) (6). That regulation relates to requirements for filing an offer and provides that:

If the offer is made by an association (including a partnership), it must be accompanied by a certified copy of the articles of association and the same showing as to the citizenship and holdings of its members as required of an individual.

Both offers here, filed in the name of the partnership, were signed by a general partner and drew first priority in drawings held in con-



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nection with simultaneous oil and gas lease offer filings. There were no accompanying documents setting forth the names of the other partners, their qualifications and holdings, or a copy of the articles of association of the partnership. However, in item 5(a) of the lease offer form where blank spaces are furnished for a designation of the offeror's citizenship or whether the offeror is a corporation "or other legal entity," there was inserted a reference to an Anchorage land office serial number.

Appellant contends essentially that this reference to a record where presumably the necessary showings had been filed when the two offers in question were filed met the requirements of the above-quoted regulation and of Form 4-1158, the required lease offer form, and asserts that it should not be deprived of the statutory preference afforded by the Mineral Leasing Act of 1920, as amended (30 U.S.C., 1958 ed., Supp. III, sec. 181 *et seq.*), to the first qualified applicant. Appellant attempts to show that there is no clear requirement precluding its referral to another case record in order to make these showings. Appellant relies on subsection (d) of item 5 of the offer form wherein the offeror certifies that he is 21 years of age or over "(or if a corporation or other legal entity, is duly qualified as shown by statements made or referred to herein)." Appellant contends that this provision may be interpreted as permitting a partnership to refer to a record by serial number for the information required by the above-quoted regulation.

The applicable regulation, quoted above, is absolutely clear that an offer made by a partnership "must be accompanied" by the required showing. No exception is stated or can be implied. The immediately following regulation makes the same mandatory requirement for a showing where the offeror is a corporation. 43 CFR 192.42(f). However, this regulation, unlike the one on partnerships, expressly permits showings regarding corporate qualifications to be made by referral to the serial number of a case record where such showings had been accepted.<sup>1</sup> The specific inclusion of the alternative in the regulation on corporations clearly indicates that it cannot be read into the immediately preceding regulation on partnerships.

Turning to the lease offer form that was used for appellant's offers, it is to be noted that item 5(a) of the Special Instructions repeats the requirement of the applicable regulation that an offer filed by a partnership "must be accompanied" by a showing of the citizenship

<sup>1</sup> It may be noted that a new regulation has been proposed which would permit the showing of the articles of association of a partnership and other associations to be satisfied by reference by serial number to a record in which such evidence had previously been filed, together with a statement as to any amendments thereof. Proposed Rule Making: 43 CFR 192.42(n), 27 F.R. 9998 (Oct. 11, 1962).

and holdings of its members. Again no exception or alternative is stated.

Paragraph 9 of the General Instructions on the form provides that if there is noncompliance with item 5(a) of the Special Instructions, the offer "will be rejected and returned to the offeror and will afford the applicant no priority." Likewise the regulations specifically provide for the same penalty if there is noncompliance with item 5(a) of the Special Instructions. 43 CFR 192.42(g) (1) (vii).

It is incontestable then that both the pertinent regulation and instructions on the lease form require a partnership to accompany an offer with the showing prescribed and do not permit the requirement to be satisfied by a mere reference to another case record in which such showing may have previously been filed.

The appellant would have the regulation and instructions negated by the statement in item 5(d) of the offer that the offeror certifies that it, "if a corporation or other legal entity, is duly qualified as shown by statements made or referred to herein." Item 5(d) does not purport to say what statements are required. The requirements can be found only in the regulations and instructions, and only what the latter prescribes as to the form, content, and time of filing of the statements can be controlling. Item 5(d) merely refers to the statements that are required to be filed or that may be referred to *as provided elsewhere*. The obvious reason for including in item 5(d) the phrase "or referred to herein" is that the item refers to showings by a corporation and references to such showings in other records is expressly permitted by the applicable regulation pertaining to showings by corporations.

The cases cited by the appellant relating to the application of regulations which are vague and unclear are not relevant in that regard as the regulation here is not subject to more than one meaning.

Appellant also contends, in effect, that the inclusion of its offers in the drawings indicated that they had been considered as valid offers and that leases must issue. However, the fact that the offers were included in the drawings did not constitute a determination that all of the requirements had been met or that any defect in them had been waived, as the drawing simply established the order in which offers would be considered. *Duncan Miller*, A-28946 (August 6, 1962).

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 decisions appealed from are affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

## EMILY K. CONNELL

A-29176

*Decided May 7, 1963***Oil and Gas Leases: Applications—Oil and Gas Leases: 640-acre Limitation—Public Lands: Riparian Rights**

The rejection of an offer for failure to comply with the 640-acre minimum limitation because nonnavigable river bed lands adjacent to the public land applied for were available for lease will be affirmed where appellant does not show that the river bed lands were not available for lease, as an offer for lease under the Mineral Leasing Act will not be accepted as an offer for the Government's riparian rights to the river bed lands unless such lands have been properly described and rentals submitted for them.

*Clayton Phebus*, 48 L.D. 128 (1921); *A. W. Glassford, et al.*, 56 I.D. 88 (1937); Associate Solicitor's opinion M-36512 (July 29, 1958), overruled to extent inconsistent.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Emily K. Connell has appealed from a decision by the Acting Chief, Division of Appeals, dated August 7, 1961, affirming a decision of the New Mexico land office which rejected her oil and gas lease offer for lands totaling 326.15 acres, including meandered lots which are uplands of the Canadian River in Oklahoma. The reason for the rejection was that as there were lands available for leasing in the river bed adjacent to those applied for, the offer did not comply with Departmental Regulation 43 CFR, 1961 Supp., 192.42(d).

That regulation 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 Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*).

Appellant contends that it was not necessary to apply for the river bed lands and that the regulation should not be applied in these circumstances as a "trap for the unwary" whereby "title-breakers would be enabled to find a vacancy in a filing and thereby destroy the rights of prior claimants." She contends that the regulation should not be interpreted to apply to the situation here, and that where an offer has included all the land available under the official survey that is sufficient. On the question of surveying, she alleges that a metes and bounds description of river bed lands would be worthless, would not be based on an actual survey, and would just "float" as it would have to tie to the meander of the river. She also contends that she did file for all of the land available for leasing as a lessee would take the Govern-

ment's interest in the riparian rights to the river bed by virtue of a lease to the uplands.

Appellant was informed by the land office that she could amend her offer to include the river bed lands but that there was a conflicting application, including part of such lands, which would have priority of filing over her offer, when amended, as to the land in conflict.

Although appellant objects to the interpretation and application of the 640-acre rule, it is incumbent upon this Department to reject an offer for less than 640 acres where it appears that adjacent lands are available for lease. *Halvor F. Holbeck et al.*, A-27704 (November 18, 1958), which involved an application for certain river bed lands but which did not include other river bed lands or adjacent uplands which were available for lease. This Department must determine whether a lease offer has fully met the requirements of the Mineral Leasing Act and the regulations issued pursuant thereto before accepting it, as section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., Supp. III, sec. 226(c)), requires that a noncompetitive lease be issued to the first qualified applicant if a lease is to issue. Thus if there are conflicting offers and a lease is issued for less than 640 acres, but is subsequently discovered that adjacent lands were available for leasing when the offer was filed, the lease must be canceled. *R. S. Prows*, 66 I.D. 19 (1959), and cases cited therein.

Although appellant has made some allegations regarding surveying problems, they are without merit. As the river bed land is unsurveyed it would have to be described by meter and bounds connected with a corner of the public land surveys by courses and distances. 43 CFR, 1961 Supp., 192.42a. See *Halvor F. Holbeck*, 62 I.D. 411 (1955), where the Department contemplated leasing the bed of a non-navigable body of water even though the uplands were already leased. As illustrated there, any difficulties in ascertaining a proper metes and bounds description of the public land available for lease would not preclude such a requirement. Moreover, the conflicting offer, New Mexico 0149944, described the river bed land without difficulty.

The appellant has posed the question as to whether or not the Canadian River is navigable. This question is relevant as the beds of navigable bodies of water within a State pass to the State on the date of its acquiring Statehood, and the question of navigability is a Federal one to be determined in Federal courts. *United States v. Oregon*, 295 U.S. 1, 14 (1935). However, title to the beds of nonnavigable bodies of water does not pass to a State upon its admission into the Union, but remains in the United States. *Hardin v. Shedd*, 190 U.S. 508, 519 (1903). Appellant has not submitted anything to show

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that the Canadian River is navigable. The Supreme Court of Oklahoma has recognized that the river is nonnavigable. *State v. Warden*, 198 P.2d 402 (Okla. 1948); see also *Anderson-Pritchard Oil Corp. v. Key Okla. Oil Co.*, 299 Pac. 850 (Okla. 1931), similarly as to the North Canadian River. The possible eventuality that a further judicial proceeding may be necessary to resolve the question here does not preclude this Department from asserting the Federal Government's claim to river bed lands to which it owns the uplands; thus, without appellant's showing more, it must be presumed that the river bed lands in question are Federal lands.

Appellant in contending that she applied for all of the lands available for lease, as a lease would include the Government's riparian rights to river bed lands, relies on *Hardin v. Jordan*, 140 U.S. 371 (1891), and *Clayton Phebus*, 48 L.D. 128 (1921). In the first case, the Supreme Court is considering the ownership of the beds of meandered, nonnavigable bodies of water after the adjoining uplands had been patented, held that the United States by patenting the uplands parted with title to the pertinent submerged land and that the question of the rights of the patentee to such land would be determined by State law, unless there was something in the patent or in other circumstances to indicate that the Government intended to reserve title to the submerged lands. In the *Phebus* case, this Department rejected a prospecting permit application for the bed of a nonnavigable body of water because all of the uplands had been patented without mineral reservation except for lots covered by prospecting permits or applications. The Department stated that the prospecting permits covering the land abutting upon the meandered nonnavigable body of water also embraced the adjacent submerged area. A subsequent decision, *William Erickson*, 50 L.D. 281 (1924), overruled the *Phebus* case by holding that the bed of a nonnavigable body of water could be leased apart from the uplands. Appellant contends that this ruling should be narrowly construed. However, the important aspect of that decision is the recognition that the law of a State regarding the rights of riparian owners, which appellant contends should be followed, is not binding upon the United States before it has parted with ownership of the uplands. That aspect was suggested in *Hardin v. Jordan*, *supra*, also.

Since the *Erickson* case, *supra*, the Department has leased both the uplands adjacent to nonnavigable bodies of water and the beds of such bodies to the extent of the Government's interest in them unless there has been some reason for refusal to lease. In *A. W. Glassford, et al.*,

56 I.D. 88, 91 (1937), the following statement is quoted from an unpublished departmental decision, *Henry C. Trigg*, A-17559 (October 31, 1933), discussing the effect of the Mineral Leasing Act on the riparian right doctrine:

From the general tenor of the leasing act it is evident that Congress intended that all operations under oil and gas prospecting permits or leases should be conducted upon a per-acre basis. Rentals are to be paid by the acre; individual applications are limited to a certain number of acres on a known geologic structure and to a certain number of acres within the bounds of a particular State. It is evident that it was not within the intention of Congress that any person whose application called for a specific tract of land, including a certain number of acres, should receive rights on any larger tract containing a greater number of acres. Congress, then, has, in effect, set up a scheme for the exploitation of public lands containing oil and gas, which of necessity excludes the applicability of the common-law concept granting to riparian owners rights in a stream bed to the center thereof.

That quotation clearly answers appellant's contention that the common law riparian rights doctrine should be applied to Federal oil and gas lease offers, by showing that the intent of Congress abrogates the applicability of that doctrine to leases under the Mineral Leasing Act. Insofar as the *Phebus* case, supra, and the *Glassford* case, supra, may imply anything to the contrary, they are overruled. As in any conveyance the intent of the grantor governs what actually is conveyed. Appellant, in effect, construes her offer as one for the river bed lands also since she cannot be construing a lease which has not been granted. However, this Department in applying the Congressional scheme for oil and gas leasing cannot accept an offer as including the riparian rights to the river bed lands unless such lands are properly described and rental is submitted for the acreage involved. Cf. *Sidney A. Martin*, *C. C. Thomas*, 64 I.D. 81 (1957).

As appellant did not apply for the adjacent river bed lands and has not shown that such lands were not available for leasing when her offer was filed, the decision of the Bureau rejecting the offer on the basis of the 640-acre rule is proper. This conclusion is somewhat at variance with that reached in an Associate Solicitor's opinion M-36512 (July 29, 1958), wherein it was concluded that the 640-acre rule should be applied to beds of nonnavigable waters adjacent to public lands only where the land office records show that the submerged lands belong to the United States. However, as was noted in that opinion, there would be little information available in the Bureau for making a determination as to whether the overlying waters may or may not be navigable and hence as to whether the underlying lands are Federal or State lands. In fact, it would be rare if there was some notation on the land office records regarding

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the ownership of river bed lands. Nevertheless, the possible uncertainty of title in these circumstances cannot operate as an exception to the mandatory rule prescribed in the regulations in an adjudicative proceeding involving conflicting offers, when the regulation has not prescribed any such exceptions. Therefore, we are compelled to apply the 640-acre rule here regardless of any lack of notation on the land office records, where the Bureau has determined that the river bed land is Federal land available for lease and an appellant does not show that the determination was erroneous. To the extent that the opinion of July 29, 1958, is inconsistent with this conclusion it is overruled.

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 appealed from is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

#### APPEAL OF EARL B. BATES NURSERY

IBCA-368

*Decided May 13, 1963*

#### Oil and Gas—Statutory Construction: Generally

A communication from a contracting officer to a contractor, in order to amount to a decision, must, at least, be so worded as to fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended.

#### Contracts: Contracting Officer

When the contracting officer makes a decision under the "disputes" clause, he acts in a quasi-judicial capacity. The decision must represent his own judgment, rather than a determination dictated to him by another not authorized by the terms of the contract.

#### BOARD OF CONTRACT APPEALS

The Department Counsel has moved that the Board should dismiss the appeal for lack of timeliness since appellant has failed to appeal "the finding and decision contained in the Contracting Officer's letter of December 11, 1962." Department Counsel argues that "the Contracting Officer's letter of December 11, 1962, had all the necessary requirements of a 'Findings and Decision' and should be so regarded

to the detriment of the Contractor." The letter of December 11, 1962, reads as follows:

Earl B. Bates Nursery  
3814 Whites Creek Pike  
Nashville 7, Tennessee

Dear Mr. Bates:

On November 9, 1962 you sent us your letter concerning Contract No. 14-10-0131-867, Planting and Miscellaneous Construction, Visitor Center Area, Fort Donelson National Military Park. You stated that you feel you have a justifiable appeal based on Section 30, Errors and Omissions of general provisions. Item 17 was considerably less than the estimate of 160,000 sq. feet which appeared in the bid.

We did advise you to submit your bid (we also advised other bidders not to change items or estimated quantities in their bidding) on items and estimated quantities as shown on the bid schedule. We recall you were having trouble locating some of the trees and shrubs and was interested in substituting these items.

This matter was taken up with our Southeast Regional Office and Eastern Office of Design and Construction. Both are in agreement that final settlement be based on as-built measurements. The final payment for work on this contract is not changed by more than 25%. The following statement appeared on the bid form for this project.

*Note:* The quantities shown for the total bid will be used for the purpose of canvassing the bids and awarding the work. However, the Contracting Officer shall have the right to increase or decrease any or all of those quantities by 25%, or increase or decrease any or all of those quantities by any amount, provided that the total cost of the work shall not be changed by more than 25%. They feel any increase or decrease is clearly covered and bids submitted accordingly.

If we can be of further assistance to you, please feel free to call upon us at any time.

Sincerely yours,  
R. G. Hopper

It is apparent from the text of this letter that it does not constitute a formal decision which would require the taking of an appeal.<sup>1</sup>

This Board held in *Central Wrecking Corporation*.<sup>2</sup>

\* \* \* In order for a decision to have that effect [start the running of the appeal period] it must, at least, fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended.

<sup>1</sup> Refer *Construction Company*, IBCA-209 (October 20, 1960), 67 I.D. 457, 462, 60-2 BCA par. 2831, 2 Gov. Contr. par. 561.

<sup>2</sup> IBCA-69 (March 29, 1957), 64 I.D. 145, 149, 57-1 BCA par. 1209; Refer *Construction Company, fn. 1, supra*; cf. *Spaw-Glass, Inc.*, IBCA-282 (November 3, 1961), 68 I.D. 329, 61-2 BCA par. 3185, 3 Gov. Contr. 587.



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The last sentence in the December 11, 1962, letter specifically negatives finality of action and left the door open for the contractor "to establish his brand" or claim.<sup>3</sup>

Hence, there has been no formal findings of fact or decision on the part of the contracting officer disposing of the claim presented by the contractor on November 9, 1962.

Throughout these proceedings, and specifically in his letters dated February 4, 1963 and April 29, 1963, appellant has complained that he received

an answer from Mr. Hopper, but in all of the wording, nowhere had he conveyed *HIS* convictions on this matter, but rather the convictions of others.

Although the letter of December 11, 1962, was signed merely "R. G. Hopper," appellant himself states that he knew that Mr. Hopper was either the contracting officer or acted for the contracting officer. In fact, appellant specifically asks that Mr. Hopper should exercise his independent judgment as contracting officer.

The appeal file shows that the contract was signed on behalf of the United States by the Acting Regional Director, Southeast Region, National Park Service, as contracting officer. After it had been signed, the Acting Regional Director designated Mr. Hopper, the Superintendent, Fort Donelson National Military Park, "as the Contracting Officer's Representative, to act in behalf of the Contracting Officer in all matters relating to the execution and completion" of the contract. Pursuant to Clause 1 of Standard Form 23A (March 1953 ed.) the term "Contracting Officer" includes "his duly appointed successor or *his authorized representative.*" (Italics supplied.)

It follows that the findings of fact and decision may be made either by the Regional Director (or an Acting Regional Director) or by the Superintendent (or an Acting Superintendent). In either event they must represent the judgment of the official who makes them,<sup>4</sup> rather than a determination dictated to him by another not authorized by the terms of the contract.<sup>5</sup> The observance of these precepts is necessary, since the contracting officer in making a decision acts in a quasi-judicial capacity and is bound to observe a high standard of impartiality.<sup>6</sup>

<sup>3</sup> *Keystone Coat & Apron Mfg. Corp. v. United States*, Ct. Cl. No. 524-56 (June 8, 1960); cf. *Bostwick-Batterson Co. v. United States*, 283 F. 2d 956, 959 (Ct. Cl. 1960).

<sup>4</sup> *John A. Johnson Contracting Corporation v. United States*, 132 Ct. Cl. 645, 659-61 (1955).

<sup>5</sup> *Climactic Rainwear Co., Inc.*, 115 Ct. Cl. 520, 559-560 (1950).

<sup>6</sup> *Gila Construction Company, Inc.*, IBCA-79 (Sept. 21, 1956), 63 I.D. 378, 380, 56-2 BCA par. 1074. Of course, the contracting officer may utilize the services of others in obtaining data and otherwise assisting him in the preparation of a decision and findings of fact. But the decision must be "his decision." *John A. Johnson Contracting Corporation v. United States*, fn. 4 *supra*.

It is noted that the Handbook of the National Park Service entitled "*Procurement and Contracting, Part II—Construction Contracts*," pages 7 and 8, refers contracting officers specifically to the guidelines contained in the publication "Construction Contract Findings of Fact, Their Use, and How to Prepare them," issued by the Bureau of Indian Affairs under memorandum dated March 25, 1957.<sup>7</sup> Further, the National Park Service Handbook sets forth an example of a concise *caveat* to be included in a decision.<sup>8</sup>

The contracting officer's letter of December 11, 1962, contains *no caveat* "to put the appellant on notice that he must appeal in the event of disagreement."<sup>9</sup>

#### CONCLUSION

Consequently, the matter is remanded to the contracting officer for the issuance of an appropriate findings of fact and decision on the claim presented on November 9, 1962.

Should the contractor be dissatisfied with the findings of fact and decision, it will be necessary for him to take a new appeal to the Board within 30 days after their receipt.

PAUL H. GANTT, *Chairman.*

I CONCUR:

HERBERT J. SLAUGHTER, *Member.*

### OIL AND GAS LEASING ON LANDS WITHDRAWN BY EXECUTIVE ORDER FOR INDIAN PURPOSES IN ALASKA

Alaska: Indian and Native Affairs—Indian Lands: Leases and Permits: Oil and Gas—Withdrawals and Reservations: Generally

Lands in Alaska which have been withdrawn by Executive order for Indian purposes or for the use and occupancy of any Indians or tribe may be leased for oil and gas development pursuant to the act of March 3, 1927.

Oil and Gas—Statutory Construction: Generally

The act of May 11, 1938, repealed only those parts of the act of March 3, 1927, which were inconsistent therewith, and did not affect the authority established in the earlier act to lease, for oil and gas development, lands withdrawn by Executive order for Indian purposes or for the use and occupancy of Indians.

<sup>7</sup> "The last paragraph of the decision should call the contractor's attention to his right of appeal and where the appeal should be filed."

<sup>8</sup> The caveat was added to the Handbook in March 1962, about eight months prior to Mr. Hopper's letter of December 11, 1962.

<sup>9</sup> Refer *Construction Company*, fn. 1 *supra*.

## WITHDRAWN BY E. O. FOR INDIAN PURPOSES, ETC.

May 14, 1963

**Alaska: Oil and Gas Leases—Statutory Construction: Legislative History**

The language and legislative history of the act of March 3, 1927, together with the avowed purpose of establishing a uniform policy for leasing all Executive order reservations for Indian purposes, compel the conclusion that the 1927 act is applicable to lands in Alaska.

**Alaska: Oil and Gas Leases—Withdrawals and Reservations: Generally—Executive Orders and Proclamations—Words and Phrases**

Lands in the Tyonek Reserve (Moquawkie Reservation) in Alaska which were “\* \* \* withdrawn from disposal, and reserved for the U.S. Bureau of Education \* \* \*” by Executive Order No. 2141, February 27, 1915, were “\* \* \* withdrawn for Indian purposes or for the use and occupancy of \* \* \* Indians \* \* \*” within the meaning of the act of March 3, 1927.

M-36652

May 14, 1963

TO: SECRETARY OF THE INTERIOR.

SUBJECT: OIL AND GAS LEASING ON LANDS WITHDRAWN BY EXECUTIVE ORDER FOR INDIAN PURPOSES IN ALASKA.

In response to a request from the Commissioner of Indian Affairs, I have examined the subject of oil and gas leasing on lands withdrawn or reserved by Executive order for Indian purposes in Alaska with a view to determining whether such reserved or withdrawn lands are subject to leasing under the tribal mineral leasing acts of March 3, 1927,<sup>1</sup> and May 11, 1938.<sup>2</sup> Specifically, the Commissioner has requested advice as to the legal status of the Tyonek Reserve (Moquawkie Reservation) for purposes of leasing the lands within the reserve for oil and gas development.

The subject of leasing for minerals other than oil and gas on lands withdrawn or reserved for Indian purposes in Alaska was previously considered by Solicitor J. Reuel Armstrong who, in an unpublished memorandum dated September 7, 1955, concluded that “\* \* \* legislation is essential which would definitely describe or fix authority with respect to the leasing for mining purposes of lands within the Klukwan and like Indian Reservations in Alaska.” The question before the Solicitor at that time involved the leasing of an Executive order Indian reservation for the mining of iron ore pursuant to the act of May 11, 1938, *supra*. I have concluded that nothing in the 1955 mem-

<sup>1</sup> 44 Stat. 1347, 25 U.S.C., sec. 398a.<sup>2</sup> 52 Stat. 347, 25 U.S.C., sec. 396a.

orandum or the authorities cited therein would preclude the leasing of lands within the Tyonek Reserve (Moquawkie Reservation) for oil and gas development pursuant to the act of March 3, 1927.

*Act of March 3, 1927*

As codified in 25 U.S.C., sec. 398a, section 1 of the act of March 3, 1927,<sup>3</sup> provides as follows:

Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title.<sup>4</sup>

The view has been advanced that, in enacting the 1927 leasing act, Congress recognized Indian title to lands reserved or withdrawn by Executive order for the benefit of Indians.<sup>5</sup> However, for our present purposes, and for reasons hereinafter discussed, it is not necessary to determine whether Congress has recognized Indian title to lands withdrawn for Indian purposes by Executive order.

The only questions left for determination are (1) whether the 1927 leasing act is applicable to lands withdrawn by Executive order for Indian purposes in the State of Alaska, and (2) whether Tyonek Reserve (Moquawkie Reservation) consists of "Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use and occupancy of any Indians or tribe \* \* \*," within the meaning of the 1927 act.

*Legislative History of the 1927 Act*

Nothing in the 1927 act itself or in the legislative history of the act would make it expressly inapplicable to Indian lands in Alaska.

<sup>3</sup> 44 Stat. 1347, 25 U.S.C., sec. 398a.

<sup>4</sup> Section 398 which codified the act of May 29, 1924 (43 Stat. 244), provides:

"Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under [the preceding section], may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner." (May 29, 1924, ch. 210, 43 Stat. 244.)

<sup>5</sup> See Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627 (1960).

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The purposes of the legislation are set out in the House and Senate reports on the bill<sup>6</sup> as follows:

1. Permit the exploration for oil and gas on Executive-order Indian reservations.
2. Give the Indian tribes all the oil and gas royalties.
3. Authorize the States to tax production of oil and gas on such reservations.
4. Place with Congress the future determination of any changes of boundaries of Executive-order reservations or withdrawals.
5. Extend relief to permittees and applicants who in good faith expended money in development looking to the discovery of oil and gas under the general leasing act of February 25, 1920, upon Executive order Indian reservations, at a time when such lands were held to come within the terms of the said act. (S. Rept. No. 1240, at p. 3; H.R. Rep. No. 1791, at p. 3.)

The report further explained the purposes of this legislation as follows:

The first section of the bill *establishes a uniform policy for the leasing of all Indian reservation lands for oil and gas mining purposes*, under the supervision of the Bureau of Indian Affairs \* \* \*. (Italics supplied.)

\* \* \* \* \*

In general, the congressional policy toward the disposal of the wealth of Indian-Executive-order reservations has been a uniform one for 50 years, the proceeds from the natural resources as well as the use of the surface having been allowed to the tribes or credited to them, and this policy, continued in the bill now reported, is in evident accord with equity and with the historical fact that the greater part of all the existing Indian reservation area has been created since 1871, the date when the treaty-making power with the Indians was ended. (S. Rept. No. 1240, at p. 4; H.R. Rep. No. 1791, at pp. 3-4.)

Since one purpose of the 1927 legislation was the establishment of a uniform policy for the leasing of all unallotted Indian lands for oil and gas, it would subvert such purpose to hold that the act was inapplicable to such lands in Alaska.

In addition to the Senate and House reports on this legislation, extensive hearings were held on the bills introduced in the Second Session of the 69th Congress,<sup>7</sup> and on similar legislation in the First Session of the 69th Congress.<sup>8</sup>

The hearings on all of these bills were printed and published.<sup>9</sup>

<sup>6</sup> S. Rep. No. 1240; H.R. Rep. No. 1791, 69th Cong., 2d Sess. (1927).

<sup>7</sup> S. 4898 and H.R. 15021, 69th Cong., 2d Sess. (1927).

<sup>8</sup> S. 1722, S. 3159, and H.R. 9133, 69th Cong., 1st Sess. (1926).

<sup>9</sup> See *Hearings Before a Subcommittee of the Senate Committee on Indian Affairs on S. 1722 and S. 3159*, 69th Cong., 1st Sess. (1926); *Hearings before the Senate Committee on Indian Affairs on S. 3159 and S. 4152*, 69th Cong., 1st Sess. (1926); *Hearings Before a Subcommittee of the House Committee on Indian Affairs on H.R. 9133*, 69th Cong., 1st Sess. (1926); *Hearings Before the Senate Committee on Indian Affairs on H.R. 15021*, 69th Cong., 2d Sess. (1927).

While it is apparent that Congress, in enacting the 1927 act, was primarily concerned with the leasing of Navajo lands in New Mexico, Utah and Arizona, no effort was made to restrict the operation of the 1927 act to leasing of Navajo lands only. Again, the purpose of this legislation was to establish a uniform leasing policy on *all* Executive order Indian lands.

With one exception, the record in all of the hearings above-cited is barren of any reference to the then Territory of Alaska. In the *Hearings Before a Subcommittee of the House Committee on Indian Affairs on H.R. 9133*,<sup>10</sup> there were extensive discussions concerning the taxation of the proceeds from rents, royalties, or bonuses derived from oil and gas leases authorized by the proposed bill. In this connection, the subcommittee reprinted, as part of the record of the hearings, several exhibits including a summary of State laws imposing severance taxes or making special provisions relative to the taxation of natural resources.<sup>11</sup> One of the references cited therein is *Alaska, Laws, 1923*, ch. 101, p. 274, imposing a license tax on mining operators in the Territory of Alaska. The inclusion of a reference to the Alaska Territorial Laws by the subcommittee would indicate that the members of the subcommittee considered the 1927 act to apply to lands in Alaska in the same manner as in the States.

The debates on this legislation in the House and Senate are no more conclusive on the present issue than the hearings and reports. The floor debate in the Second Session of the 69th Congress on S. 4893 was extremely brief<sup>12</sup> and no reference was made to the Territory of Alaska therein. There was extended debate on S. 4152 during the First Session of the 69th Congress,<sup>13</sup> but again, no reference is made therein to the application of the proposed legislation to lands in the Territory of Alaska.

I have set forth in the footnote a number of relevant excerpts from the 1926 debates which illustrate the general purpose and scope of this legislation.<sup>14</sup> The relevant portions of the record indicate that

<sup>10</sup> 69th Cong., 1st Sess. (1926).

<sup>11</sup> Exhibit 1, *Hearings, op. cit., supra*, p. 91.

<sup>12</sup> See 68 Cong. Rec. 2793-95 (1927).

<sup>13</sup> See 69 Cong. Rec. 10912-925, 11381-11398 (1926).

<sup>14</sup> See 69 Cong. Rec. 10913 (Senate debate):

"Mr. La Follette. \* \* \* The first section of the bill endeavors to lay down a policy with regard to the leasing of oil and gas on Executive-order reservations" \* \* \*.

\* \* \* \* \*  
"Mr. Bratton. \* \* \* Prior to 1871 the method of establishing reservations for the occupancy of Indians was through treaties entered into between the United States and the

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Congress was primarily concerned about leasing for oil and gas on Executive order reservations in certain Western States wherein large portions of land were withdrawn for Indian purposes. The lack of any reference to withdrawn or reserved lands situated in the Territory of Alaska indicates that those who debated and discussed the bill on the floor and in hearings were either uninformed or unconcerned about lands withdrawn for Indian purposes in Alaska. But again, the language used in the legislation finally enacted, together with the avowed purpose of establishing a uniform policy for leasing all Executive order reservations for Indian purposes, compel the conclusion that the 1927 act is applicable to lands in Alaska which have been reserved or withdrawn by Executive order for Indian purposes or for the use and occupancy of Indians.

This same conclusion was reached in a Solicitor's Opinion rendered April 19, 1937 (56 I.D. 110), wherein, in dictum, it was stated that:

\* \* \* the acts of June 30, 1919 (41 Stat. 34), and March 3, 1927 (44 Stat. 1347), have been passed prohibiting the withdrawal of public lands of the

Indian tribes. Reservations were created and established in that manner. In 1871 the procedure was changed and the method of creating reservations by treaty was discontinued. The new method was adopted which was to create such reservations by Executive orders entered by the President from time to time. Under that method various reservations were created. At the present time they are located in 10 different States, and the area aggregates about 23,000,000 acres of land. It is that land with which we are dealing in this bill."

See 69 Cong. Rec. 10914 (Senate debate) :

"Mr. Bayard. Is not the pending bill predicated upon the theory that this property belongs to the United States of America and not to the Indians?"

"Mr. Jones of New Mexico. Whether it belongs to the United States of America or to the Indians, makes no difference, so far as this bill is concerned."

\* \* \* \* \*

"Congress has complete control of Indian lands, and regardless of title, regardless of their interest in those lands Congress has the right to legislate with respect to the development of oil in them and to provide for royalties, and so forth."

See 69 Cong. Rec. 10916 (Senate debate) :

"Mr. Bratton. That [Navajo reservation] is one of the reservations involved. This bill covers every Executive-order reservation in the 10 States of the Union, and embraces 22,000,000 or 23,000,000 acres of land."

"Mr. Wheeler. Of course, I understand that; and, as far as I am concerned, I think it should cover them all. I think the Indians should be given title to it without a question."

\* \* \* \* \*

See 69 Cong. Rec. 11384 (House debate) :

"It is the purpose of this legislation to lease the remaining 22,000,000 acres of Executive-order Indian reservation lands for the development of oil and gas by giving complete power to the Commissioner of Indian Affairs to designate under what rules and regulations this land shall be leased. *It includes all remaining Executive-order Indian lands within the United States including the Indian lands situated within 10 States.*" \* \* \* (Italics supplied.)

United States for Indian reservations or the enlargement of existing reservations except by act of Congress. These acts would appear to apply to Alaska \* \* \*. 56 I.D. at 112.

On January 31, 1938, Secretary of the Interior Ickes, in a letter to the Speaker of the House, regarding a bill which was later enacted as the act of May 31, 1938,<sup>15</sup> made the following statement:

As section 4 of the act of March 3, 1927 (44 Stat. 1347), *which has been held applicable to Alaska*, provides that reservations of public lands for Indian purposes cannot be made except by act of Congress, there is no authority of law for permanently reserving the small tracts of public domain that will be needed for the purposes indicated. (Italics supplied.)

The holding to which Secretary Ickes had reference was apparently the Solicitor's Opinion of April 19, 1937, *supra*. There is apparently no other reported case which has reached the question of the applicability of the 1927 act to lands in Alaska.

#### *Effect of the Act of May 11, 1938*

The question has been raised as to whether the act of May 11, 1938,<sup>16</sup> applicable to unallotted Indian lands, repealed the act of March 3, 1927. In an unpublished letter of January 25, 1963, to the attorneys representing the Navajo Indians, the contention that the 1938 act repealed the taxing authority established by the 1927 act and related legislation was rejected. In that letter, the position was taken that the 1938 act repealed only those acts or parts of acts which were inconsistent therewith,<sup>17</sup> and that nothing in the later act was inconsistent with those provisions in the earlier acts which granted the various States the authority to tax the proceeds from leasing thereunder. In this regard, I have concluded that there is nothing in the 1938 act which is inconsistent with the sale of oil and gas leases on lands withdrawn by Executive order for Indian purposes as authorized by the 1927 act, and that, consequently, the leasing authority established in the earlier act has not been repealed.

It is also pertinent to note at this point that the Native Village of Tyonek, in a suit filed in the United States District Court for the District of Alaska,<sup>18</sup> has asserted that such lands may be leased pursuant to the 1938 act rather than under the 1927 act. Such a contention, if sustained, would require the conclusion that Tyonek Reserve

<sup>15</sup> 52 Stat. 588, 48 U.S.C., sec. 381.

<sup>16</sup> 52 Stat. 347, 25 U.S.C., secs. 396 a-f.

<sup>17</sup> The act of May 11, 1938, ch. 198, sec. 7, provided as follows: "All Acts or parts of Acts inconsistent herewith are hereby repealed."

<sup>18</sup> *Native Village of Tyonek v. Bennett*, No. A-17-63 (Filed Apr. 2, 1963).



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(Moquawkie Reservation) consists of " \* \* \* unallotted lands within [an] Indian reservation or lands owned by [a] tribe, group, or band of Indians \* \* \*," within the meaning of the 1938 act. Since the 1927 act provides the specific legislative authority for leasing lands withdrawn by Executive order for Indian purposes, we need not consider whether the Indians own the lands in question or whether Tyonek Reserve is the type of "reservation" contemplated in the 1938 act. These further questions are reserved until such time as they are presented in a case requiring such a determination.

*Status of Tyonek Reserve (Moquawkie Reservation)*

As stated above, it is necessary here to determine whether Tyonek Reserve (Moquawkie Reservation) consists of " \* \* \* unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe \* \* \*," within the meaning of the act of March 3, 1927.

The Tyonek Reserve was withdrawn by Executive Order No. 2141, February 27, 1915. That withdrawal was phrased as follows:

It is hereby ordered that the tract of land hereinafter described, be, and the same is hereby withdrawn from disposal, and reserved for the use of the U.S. Bureau of Education, subject to any existing vested right.<sup>19</sup>

The question has arisen as to whether the withdrawal above quoted was made for Indian purposes or for the benefit of the Indians. In this regard, the Bureau of Education in Alaska formerly performed many of the functions and services now provided by the Bureau of Indian Affairs.<sup>20</sup> That this withdrawal is, in fact, a withdrawal for Indian purposes, is in evidence in the official papers concerning the withdrawal. In a letter from the Commissioner of the General Land Office to the Secretary of the Interior, on February 23, 1915,<sup>21</sup> the following statement appears:

I have the honor to present a request of the Commissioner of Education, \* \* \* asking that a suitable tract of land along the northwest shore of Cook Inlet to

<sup>19</sup> A copy of Executive Order No. 2141 is attached hereto as Appendix A.

<sup>20</sup> Administrative jurisdiction over the educational and medical services for the natives of Alaska was transferred from the Office of Education to the Office of Indian Affairs by Secretarial Order, pursuant to authority contained in the act of March 4, 1931 (46 Stat. 1552, 1568). See Order No. 494, March 14, 1931, and Order No. 497, March 24, 1931.

<sup>21</sup> A complete copy of the letter of February 23, 1915, is attached hereto as Appendix B.

be known as the Moquawkie Reserve, may be withdrawn from all other kinds of disposal, *and reserved for the use and benefit of Alaskan natives under the care and instructions of said Bureau and its superintendents.* (Italics supplied.)

In the letter dated February 25, 1915,<sup>22</sup> from the Secretary of the Interior to President Wilson, it was stated:

I have the honor to transmit herewith a draft of an Executive Order, providing for the withdrawal and reservation of a tract of land on the west shore of Cook Inlet, for the use of the U.S. Bureau of Education *and for the benefit of Alaskan natives of that region, under said Bureau* \* \* \*. (Italics supplied.)

And finally, in a letter dated March 5, 1915,<sup>23</sup> to the Secretary of the Interior from the Secretary to the President regarding the signed Executive order, the following language appears:

\* \* \* the President on February 27th signed an Executive order providing for the withdrawal and reservation of a tract of land on the West shore of Cook Inlet for the use of the U.S. Bureau of Education *and for the benefit of Alaskan natives of that region.* (Italics supplied.)

Upon concluding that the Tyonek Reserve consists of a " \* \* \* withdrawal created by Executive order for Indian purposes or for the use or occupancy of \* \* \* Indians \* \* \*," within the meaning of the act of March 3, 1927, it necessarily follows that these lands are leaseable for oil and gas development pursuant to the last-cited statute.

In light of the conclusions reached herein, I have advised the Commissioner of Indian Affairs that the lands within the Tyonek Reserve (Moquawkie Reservation) may be leased for oil and gas development under the act of March 3, 1927, if the Bureau, with the consent of the natives of the Village of Tyonek, finds it desirable to do so.

FRANK J. BARRY,  
*Solicitor.*

## EXHIBIT A

### EXECUTIVE ORDER

It is hereby ordered that the tract of land hereinafter described, be, and the same is hereby withdrawn from disposal, and reserved for the use of the U.S. Bureau of Education, subject to any existing vested right.

<sup>22</sup> A complete copy of the letter of February 25, 1915, together with a copy of the draft of the proposed Executive order is attached hereto as Appendix C.

<sup>23</sup> A complete copy of the letter of March 5, 1915, is attached hereto as Appendix D.

## WITHDRAWN BY E. O. FOR INDIAN PURPOSES, ETC.

May 14, 1963

## Description of Tract

Beginning at Granite Point, a headland projecting into Cook Inlet about five miles southwest from Tyonek, and approximately in latitude  $61^{\circ}01'$  North and longitude  $151^{\circ}21'$  West, which point is also marked by large rocks exposed at low tide;

Running thence westward with the shore one-half mile to a point, thence north to the middle of the main current of the Chuit River, eight miles more or less; thence with the main channel of said stream to where it discharges into Cook Inlet; thence along the shore thereof southwesterly to the point of beginning; estimated to include 25,000 acres.

WOODROW WILSON

THE WHITE HOUSE,  
27 February, 1915.

[No. 2141]

## EXHIBIT B

February 23, 1915.

Withdrawal of Alaska Public Land, for use of the Bureau of Education, to promote welfare of Natives

THE HONORABLE  
THE SECRETARY OF THE INTERIOR  
SIR:

I have the honor to present a request of the Commissioner of Education, supporting a prior recommendation of his local subordinate Mr. Chas. M. Robinson, teacher of a U.S. Public School, asking that a suitable tract of land along the northwest shore of Cook Inlet to be known as the Moquawkie Reserve, may be withdrawn from all other kinds of disposal, and reserved for the use and benefit of Alaskan natives under the care and instruction of said Bureau and its superintendents.

In support of the request, it may be said that the proposition appears not only feasible but necessary to the success of the general purpose of aiding the natives to practice self-support and industry in such remote regions. Experience has shown that where such tribes

have been hemmed in by white intrusion and their natural facilities for sustenance taken away, they sometimes require Government aid against starvation.

The tract selected by Mr. Robinson appears to include about 40 square miles of unsurveyed and unappropriated land, with about 12 miles of frontage on Cook Inlet. Upon the middle of this shore it is desired to establish a new village of model arrangement, and to assist the natives of other small groups to be gathered from a distance, and combined in one clean, wholesome, and well-trained community, with one school for their instruction in such arts as may be beneficial.

The only prior claim known to exist within said area is a Russian Mission surveyed at Tyonek, containing 4.23 acres. The nearest rectangular surveys are about 50 miles to the eastward.

I therefore recommend that said tract be withdrawn for the purposes stated, and have prepared a form of withdrawal for Executive consideration, with a map derived from the best sources now available, herewith.

The following description is believed to fix without uncertainty the boundary of the area desired:

Beginning at Granite Point, a headland projecting into Cook Inlet about five miles southwest from Tyonek, and approximately in latitude  $61^{\circ}01'$  North, longitude  $151^{\circ}21'$  West, which point is also marked by large rocks exposed at low tide;

Running thence westward with the shore one-half mile, thence north to the middle of main current of Chuit River eight miles more or less; thence with the main channel of said stream to where it discharges into Cook Inlet; thence along the shore thereof southwesterly to the point of beginning; estimated to include 25,000 acres.

Very respectfully,

CLAY TALLMAN,

*Commissioner.*

#### EXHIBIT C

*February 25, 1915.*

My dear Mr. President:

I have the honor to transmit herewith a draft of an Executive Order, providing for the withdrawal and reservation of a tract of land on the west shore of Cook Inlet, for the use of the U.S. Bureau of Education and for the benefit of Alaskan natives of that region,

May 14, 1968

under said Bureau. The area is estimated at 25,000 acres, and its position is shown by the accompanying diagram.

Favorable action thereon is recommended.

Cordially yours,

A. A. JONES,  
*Acting Secretary.*

### EXHIBIT C

#### EXECUTIVE ORDER

It is hereby ordered that the tract of land hereinafter described, be, and the same is hereby withdrawn from disposal, and reserved for the use of the U.S. Bureau of Education, subject to any existing vested right.

#### Description of Tract.

Beginning at Granite Point, a headland projecting into Cook Inlet about five miles southwest from Tyonek, and approximately in latitude 61°01' North and longitude 151°21' West, which point is also marked by large rocks exposed at longitude;

Running thence westward with the shore one-half mile to a point, thence north to the middle of the main current of the Chuit River, eight miles more or less; thence with the main channel of said stream to where it discharges into Cook Inlet; thence along the shore thereof southwesterly to the point of beginning; estimated to include 25,000 acres.

### EXHIBIT D

Dear Mr. Secretary:

March 5, 1915.

Referring to the letter from Acting Secretary Jones of February 25th, the President on February 27th signed an executive order providing for the withdrawal and reservation of a tract of land on the West shore of Cook Inlet for the use of the U.S. Bureau of Education and for the benefit of Alaskan natives of that region.

Sincerely yours,

J. P. TUMULTY,  
*Secretary to the President.*

## UNITED STATES v. PAUL F. AND ADELINE A. COHAN ET AL.

A-28785

*Decided May 20, 1963***Mining Claims: Special Acts—Mining Claims: Withdrawn Land—Mining Claims: Power Site Lands**

Since lands in national forests which are included in roads, roadbeds, and rights-of-way are withdrawn from mineral entry and are not open to location, mining, and patenting under the mining laws, entry on such lands is not authorized by the act of August 11, 1955, opening certain lands in power withdrawals to mineral entry, and an order under that act relating to placer mining on such lands is not authorized.

**Mining Claims: Special Acts—Mining Claims: Power Site Lands**

The fact that other remedies may exist against interference in the use of public land from placer mining operations does not preclude the prohibition of placer mining under the act of August 11, 1955.

**Mining Claims: Special Acts—Mining Claims: Power Site Lands**

Permission to carry on placer mining operations on condition that the locator shall, following placer operations, restore the surface of the claim to the condition it was in immediately prior to those operations may be granted under the act of August 11, 1955, where it appears that placer mining would not substantially interfere with other uses of the land for recreational purposes or for homesites since no actual plans for such other uses have been completed and such uses are not anticipated within the reasonably near future.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

The United States, through the Forest Service of the Department of Agriculture, has appealed to the Secretary of the Interior from separate decisions of December 16, 1960, by the Director of the Bureau of Land Management conditionally permitting mining on two gold placer claims, the Brown Horse No. 1 and the Maytag, both of which are located on lands within the Nez Perce National Forest, Idaho. The Maytag and portions of the Brown Horse No. 1 are also in power site classification No. 166 made in January 1927.<sup>1</sup> The Maytag was located on October 11, 1958, by Ernest Butler, and the Brown Horse No. 1 was relocated on October 13, 1958, by Paul F. and Adeline A. Cohan.

<sup>1</sup>The Maytag placer is located in unsurveyed township 29 N., R. 7 E., Boise Meridian. The Director held that the land is within power site No. 166 according to the mineral survey of the claim (No. 3538 Idaho). The ruling that the Maytag is situated within power site No. 166 is accepted for purposes of this decision, there being nothing in the appeal record which is inconsistent with the ruling.

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Mineral lands in national forests are subject to location and entry under the general mining laws unless otherwise withdrawn or reserved (43 CFR 185.33). With exceptions not here relevant, lands which are withdrawn from entry under the public land laws and reserved for power development or power sites were opened to entry by the act of August 11, 1955 (30 U.S.C., 1958 ed., secs. 621-625), for the location and patenting of mining claims, and for the mining, development, beneficiation, removal, and utilization of the mineral resources in the lands, but any use of the lands entered under this act, other than for mineral development as set forth in the act, is expressly prohibited. The act was intended to encourage mineral development on lands within power withdrawals, but also to protect land within power reserves from placer operations which might be detrimental to other uses of the land or injurious to recreational, grazing, and scenic values of the land. See *U.S. Code Cong. & Ad. News*; 84th Cong., 1st Sess., Vol. 2, p. 3006 (1955), for Congressional Committee reports on the bill which became the act of August 11, 1955. Thus, the act provides that if the Secretary of the Interior determines after a public hearing that placer operations will substantially interfere with other uses of the lands, mineral entry may be restricted by an order completely prohibiting placer mining, or by an order permitting placer mining only if the mining claimant agrees to restore the surface of the claim to the condition in which it was before the placer operations were begun.

At the request of the Forest Service, hearings were held under the act of August 11, 1955, to determine whether placer mining operations on the Brown Horse No. 1 and the Maytag would substantially interfere with other uses of the land included within the claims.

Both claims are located along the South Fork, Clearwater River, in an area where some mining has been carried on for many years. Only a very small portion of the land included in either claim is suitable for mining, but because placer mining might damage Forest Service roads and injure scenic and recreational values, the Forest Service requested that this Department prohibit placer mining on both claims. A fisheries biologist for the State of Idaho Department of Fish and Game submitted testimony in both hearings that unrestricted placer mining on these claims would cause serious damage to fish through harmful deposits of silt or other pollutants, and that unrestricted

mining might seriously hamper fishing and recreational use of the waters in the area.

The hearing on the Brown Horse No. 1 (contest M.L. No. 292) was held before an examiner at Grangeville, Idaho, on May 6, 1959. The Forest Service presented evidence that a forest highway which crosses the claim would be damaged by unrestricted placer mining operations, particularly by mining operations within the highway right-of-way; that, in addition, a part of the claim is needed for a public campground and recreational area and placer mining would damage the recreational values of the site. The examiner found that the evidence clearly supported the Forest Service's contentions that placer mining on the claim would substantially interfere with the present road as constructed on the claim and a proposed roadway and would destroy the area as a recreational site. He therefore concluded that placer mining on the claim should be prohibited.

The hearing on the Maytag (contest M.L. No. 293) was held on May 7, 1959, at Grangeville, Idaho, before an examiner. The Forest Service contended that existing forest service roads (one a forest highway) which cross the claim would be damaged by placer mining activities and that erosion damage, stream pollution, and destruction of valuable forest land would result from unrestricted placer mining and injure the area for use for summer homesites, a use to which the Forest Service proposes to devote the land. The examiner held that the Forest Service presented sufficient evidence that placer mining on the Maytag would substantially interfere with the highway system crossing the claim, cause soil erosion, eliminate any use the land might have for summer homesites or as a recreational area, and cause stream pollution. The examiner concluded, accordingly, that placer mining operations conducted on the claim would substantially interfere with other uses of the land within the claim and should be prohibited.

The Director's decisions reversed the examiner's decisions and held, in effect, that since there was no clear and substantial evidence of present use or of use in the reasonably near future of these lands for a public or governmental purpose, there being no actual program for recreational or homesite use of the land within these claims, the prohibition of placer mining was not warranted. Accordingly, the Director held that the claimants might engage in placer mining on condition that following placer operations they restore the surface of each of the claims to the condition in which it was immediately prior to those operations, and directed that no placer mining be per-



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mitted until after the claimant filed with the State Supervisor a bond in the amount of \$3,000 to assure restoration of the surface of the claim.<sup>2</sup>

It must be emphasized at this point that this Department is not authorized to permit mining under any conditions by the claimants or by anyone else on or within the roads, the roadbeds, the rights-of-way for roads, or on or within any other improvements created by or under the authority of the Forest Service. Forest lands in the actual use and possession of the United States, on which the United States has made valuable and permanent improvements are withdrawn from entry under the mining laws. *United States v. Schaub*, 103 F. Supp. 873, 875, 876 (D. Alaska 1952), affirmed *United States v. Schaub*, 207 F. 2d 325 (9th Cir. 1953). In the *Schaub* case, *supra*, the courts held that land in a national forest which was in actual use and occupation as an access road is withdrawn from mining and that no right under the mining laws could be initiated on land in the Tongass National Forest which was included in an access road. Even a memorandum reserving an area in the forest for the use of the Bureau of Public Roads withdraws the land from location under the mining laws (*Schaub v. United States, supra*; and see Departmental Instructions, 44 L.D. 513 (1916), excepting improvements such as roads in national forests from public land patents).

Accordingly, under the act of August 11, 1955, this Department may not permit mining on Forest Service roads, trails, rights-of-way for roads, or roadbeds within these claims as the land is withdrawn from mining, and the Director's decisions which permit mining on the claims after the claimants file the required bond must be modified to indicate that the order does not permit mining upon any land within the boundaries of the claim covered by improvements of the Forest Service such as roads, roadbeds, and rights-of-way, which land is considered to be in the actual use and occupation of the United States and so reserved from entry under the mining laws. *United States v. Schaub, supra*.

<sup>2</sup> The Director's decision on Butler's appeal, unlike his decision on the Cohans' appeal, did not state that the bond was to assure restoration of the surface of the claim to the condition in which it was immediately before placer operations were begun. However, section 2(b) of the act provides that moneys received from any bond or deposit shall be used for the restoration of the surface of the claim involved, and any money received in excess of the amount needed for the restoration of the surface of that claim shall be refunded. In addition, the syllabus of the Director's decision on Butler's appeal indicates plainly that the bond requirement is the same as that stated in the Cohan decision.

The Director's decisions hold also that since highways are amply protected by law, the Forest Service's contention that they would be damaged by placer mining operations on these claims is not supported and consequently the assertion was dismissed. The ruling is incorrect. The fact that the United States may have remedies under various statutes other than the act of August 11, 1955, in the event of injury to a Forest Service road from placer mining, such as recovering damages therefor, is not a valid reason for allowing placer mining under the act of August 11, 1955, on lands within a mining claim adjoining a Forest Service road if evidence at a hearing shows that such mining would substantially interfere with, obstruct, or injure the road. The act of August 11, 1955, provides a remedy which is different from and additional to other remedies such as that of trying to recover damages after an injury has been committed, and presumably Congress was aware of such other remedies when the act was passed. Moreover, to refuse to prohibit placer mining under the act solely because of the existence of another remedy in the event of injury to public lands from placer mining might make completely inoperative the provision authorizing the Secretary to prohibit placer mining. Accordingly, the implication in the Director's decisions that the existence of another remedy for injury to or interference with Forest Service roads bars or precludes the prohibition of placer mining under the act of August 11, 1955, is erroneous, and the Director's decisions are set aside to the extent that they so hold.<sup>3</sup>

For the same reasons, the ruling in the Director's decisions to the effect that stream pollution would be an insufficient cause for restricting operations because the police power of the State can effectively control pollution is not correct, and this ruling in the Director's decisions is also set aside. In this connection, it is noted that the case of *Pacific Gas & Electric Co. et al.*, 66 I.D. 264 (1959), is cited in the Director's decisions in support of the ruling regarding stream pollution. There is nothing, however, in the cited decision, which involved a private protestant's use of water downstream from a claim, that warrants the conclusion in the Director's decisions regarding stream pollution. If, as in the instant case, a river is stocked with

<sup>3</sup> In *United States v. Mrs. Reho Wolfe*, A-23361 (Aug. 18, 1960), cited in the Director's decision, the Department, after considering all of the circumstances, refused to completely prohibit placer mining on a claim although the Forest Service argued that such mining would destroy a Forest Service trail. The Department stated in the *Wolfe* case that if mining operations threatened the trail, the Forest Service might protect it by legal remedies available to any landowner against destruction of his property by adjoining uses. This statement, however, is not to be read as a ruling that the existence of other legal remedies, in and by itself, precludes the prohibition of placer mining under the act.

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fish, and the public uses the banks of the river for fishing, this may be a recreational use of land along the river and of the river bed, which use is subject to protection under the act of August 11, 1955. If evidence at a hearing indicates that debris from placer mining thrown into the river would be detrimental to the fish in the river adjoining the claim, a convincing showing that placer mining substantially interferes with recreational use of land along the river and of the land in the river bed might be made.

It seems clear that under the act of August 11, 1955, the Secretary may preclude the possibility of such interference with the recreational use of forest land resulting from placer mining by prohibiting it and the fact that another remedy may exist against mining claimants who cause injury by dumping waste into a stream is not, in itself, a bar to an order prohibiting placer mining under this act.

However, with the exception of the matters just discussed, which require modification of the Director's decisions, the conclusions in the decisions that mining may be conditionally permitted on this land after the claimants file the required bond to assure restoration of the surface of the claim appear to be proper. The absence of actual plans by the Forest Service for recreational or homesite uses of the land makes highly conjectural the possibility that placer mining would interfere with these uses of the land. Since the claimants may not mine on any land within these claims containing Forest Service improvements such as roads, roadbeds, and rights-of-way for roads, a prohibition of placer mining on such land is neither necessary nor authorized by the act. Moreover, uncontradicted testimony at both hearings indicated that an extremely small proportion of the land within the claims can be mined in any event, because large boulders, timber, and similar factors make placer mining for gold unfeasible. In the circumstances, the conditional allowance of placer mining seems appropriate.

It is noted, incidentally, that there is evidence of use of the land within these claims for homesites. It has already been mentioned that the act of August 11, 1955, prohibits entry thereunder except for the purpose of mineral development, and presumably consistent use of the land for any other purpose amounts to trespass.

For the reasons discussed herein the Director's decisions are modified to accord with this decision, and the order to the mining claimants permitting them to engage in placer mining on condition that they file a bond and that following placer operations they restore

the surfaces of the claims to the condition in which they were immediately prior to those operations should indicate that the permission to engage in placer mining does not extend to any Forest Service improvements within the boundaries of the claims.

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 decisions of the Director of the Bureau of Land Management are modified and the cases are remanded to the Bureau for action consistent with this decision.

EDWARD WEINBERG,  
*Deputy Solicitor.*

**UNITED STATES v. FRANK MELLUZZO ET AL.**

**A-29074**

*Decided May 20, 1963*

**Mining Claims: Common Varieties of Minerals**

A mining claim, the validity of which is challenged under section 3 of the act of July 23, 1955, is properly held to be null and void when the claimant's evidence shows that the great bulk of sales of stone from the claim are for ordinary construction purposes and that only two small sales of a better quality of the stone were made for lapidary purposes.

**Mining Claims: Common Varieties of Minerals**

Where a mining claim contains a large deposit of quartz suitable for ordinary construction purposes but scattered in the deposit are small pockets of pink or rose quartz suitable for lapidary purposes, it is questionable whether the pockets can be considered as a separate deposit of an uncommon variety of stone apart from the general deposit of which they are a part.

**Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery**

Two sales of an uncommon variety of stone for \$260 in a period of two years fall far short of establishing that the stone constitutes a valuable mineral deposit which will establish the validity of a mining claim.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Frank and Geno Melluzzo have appealed to the Secretary of the Interior from a decision dated June 6, 1961, by which the Acting Appeals Officer affirmed a decision of a hearing examiner declaring their Pink Lady lode and Pink Lady placer mining claims, within the Tonto National Forest in Maricopa County, Arizona, embracing substantially the same land, null and void for want of a discovery of a locatable mineral within the claims as such minerals are defined in

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the mining laws, particularly section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611).

It is established in this case that the claims were located in 1958 for the large quantities of pink quartz which are exposed in a huge outcrop on the claims. The hearing examiner found that the contestees had established that quartz has been removed from the claims and marketed at a profit and that a continuing market exists for it. He found, however, that the pink quartz exposed on the claims is a "common variety" of mineral within the meaning of the mining laws and, therefore, not a locatable mineral. He concluded that the claims are null and void for this reason. The Acting Appeals Officer affirmed on the same ground.

In their appeal to the Secretary, the appellants concede that the successful marketing of the mineral exposed on the claim is immaterial if, in fact, it is not a mineral for which a mining claim could be located in 1958. They base their case for the validity of the claims upon the contention that the pink quartz found on the claims is an uncommon variety of stone, which is semiprecious in character, and that it is, therefore, a locatable mineral.

Section 3 of the act of July 23, 1955, *supra*, reads in applicable part:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws; \* \* \*. "Common varieties" \* \* \* does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*.

At the time the claims were located the applicable departmental regulation provided:

"Common varieties" as defined by decision of the Department and of the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. \* \* \* (43 CFR, 1961, Supp., 185.121(b).<sup>1</sup>

The Government's sole witness, the mining engineer who examined the claims, estimated that there are 40,000 to 50,000 tons of pink quartz on the appellants' claims, at least 40,000 tons in two other deposits in the same area and at least a million tons outcropping for several miles on the east side of the Huachuca Mountains in the State of Arizona (Tr. 80-81, 76-77).<sup>2</sup> There are other deposits in the ad-

<sup>1</sup> This regulation was amended on September 7, 1962 (27 F.R. 9138), but without change so far as the questions in this case are concerned.

<sup>2</sup> This and subsequent references are to the pages of the transcript of the hearing.

joining State of New Mexico and a very large deposit in South Dakota (Tr. 77-78). He testified that the pink quartz could be used as decorative stone in fireplaces, patio walls and planters and for tombstones and coping (Tr. 30-31). He disparaged the use of the pink quartz for jewelry purposes, testifying that after exposure to heat and weather the pink color fades from pink quartz and that the use of the quartz found on the claims as a gem could not extend beyond a limited sucker trade.

The appellants' contention that the pink quartz found on the claims has special and distinct value and is therefore an uncommon variety of stone is based principally upon the fact that rose quartz, which they say the pink quartz is, is classified by numerous authorities as a gem stone or semi-precious stone. They point to testimony by Frank Melluzzo, their sole witness, that he sold 500 pounds of cutting rose quartz at 50 cents per pound to a local lapidary shop (Tr. 102) and 20 pounds of the same at the same price to a rock shop in Colorado (Tr. 105). There was also introduced into evidence at the hearing rose quartz from the claims that had been fabricated into costume jewelry.

However, Melluzzo, who is in the stone business, testified that the pink quartz had been used in a fountain, for entry-way floors, table tops, lamps and book ends, and in an island traffic divider (Tr. 89, 92-93). Sales slips were introduced into evidence showing that except for the two sales of 520 pounds to the lapidary and rock shops, some 82 tons were sold presumably for construction and similar purposes. The great majority of sales were at \$35 per ton; others ranged from \$20 to \$40 per ton. (Contestees' Ex. F, G, J1-J37). The sales records show that the 82 tons were sold for a total amount of approximately \$6,135.<sup>3</sup>

The evidence reveals then that of total sales of pink quartz from the claims only  $\frac{3}{10}$  of one percent by weight and 4 percent by value was sold for lapidary purposes at 50 cents per pound. The remainder was sold for construction or similar purposes generally for \$35 per ton, which converts to .0175 cent per pound. Thus the great bulk by far of the pink quartz was sold for the ordinary uses to which any colored building stone is put.

Appellants attempt to distinguish pink quartz from common varieties of stone solely on a price basis. They contend that common stone is sand, rock and other materials which can generally be purchased for anywhere from 25 cents a yard or ton to \$4, \$5, or \$10

<sup>3</sup> One or two of the sales slips are not quite clear and the total sales of approximately \$6,135 compiled from the slips does not accord with Melluzzo's testimony of sales of \$5,575.52 (Tr. 121).

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per ton and that distinctive stone, like the pink quartz, which sells for \$25 to \$35 per ton and selected pieces at 50 cents per pound is certainly not common stone.

The answer to this contention is that there is nothing in the statute to show that price is the pertinent criterion for determining whether a mineral is a common variety. It is only a factor that may be of relevance. There is a far greater discrepancy between the price of 50 cents per pound at which 520 pounds of pink quartz were sold and the price of .0175 cent per pound at which 82 tons were sold than between the price of \$10 per ton which the appellants would say marks a common variety of stone and \$25 per ton which they say would mark an uncommon stone.

Section 3 of the act of July 23, 1955, *supra*, provides that a *deposit* of common varieties of stone shall not be deemed a valuable mineral *deposit* under the mining laws and that the term "common varieties" does not include *deposits* which are valuable because the *deposit* has some property giving it distinct and special value. Assuming that the small amount of pink quartz in the claims sold for lapidary purposes can be considered as having a distinct and special value, the question arises whether this particular quartz can be segregated from the mass of pink quartz on the claims and considered to be a deposit by itself or whether it is to be regarded simply as a part of one deposit of pink quartz. The evidence indicates that there is a single outcrop of quartz on the claims which consists of white, pink, yellow, and reddish quartz (Tr. 18). Melluzzo testified that in mining the pink quartz, "every now and then you run into maybe fifty or a hundred pounds of rose quartz that has qualities in there that are free of any chips or cracks or any seams that can be cut and faceted into stones for earrings, rings and brooches. That type of rock I sell to lapidaries for 50 cents a pound \* \* \*" (Tr. 89). This clearly indicates that small pockets of lapidary pink quartz are scattered in the great mass of lower quality pink and other quartz.

In the physical circumstances presented here, I am inclined to the view that the lapidary pink quartz cannot be said to constitute a *deposit* of mineral as distinct from the deposit of lower grade pink and other quartz throughout which it is disseminated, and that there is on the claims but one deposit of stone which can fairly be described only as a common variety of stone.

It is not necessary, however, to rest the decision on this ground, for even if the lapidary pink quartz were to be considered as a separate distinct deposit by itself, the appellants have produced nothing in the way of substantial or persuasive evidence that it is a valuable mineral

deposit. Two sales totaling 520 pounds for \$260 in the two years following the location of the claims fall far short of establishing that the lapidary pink quartz constitutes a valuable mineral deposit.

The claims were properly declared null and void for lack of discovery of a valuable locatable deposit of mineral.

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 appealed from is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

### CLAIM OF MRS. HANNAH COHEN

TA-247

*Decided May 22, 1963*

#### Torts: Licensees and Invitees—Torts: Parks

In accordance with Wyoming law, a visitor to Yellowstone National Park is held to be an invitee. The duty owed to the visitor by the Government is to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger. The Government is not an insurer of the safety of the visitor.

#### Torts: Parks

The mere fact that loose stones or gravel are present on an outdoor walk in a national park, and cause a visitor to the park to fall, does not establish either that the walk is dangerous *per se*, or that the walk is maintained in a negligent manner. In the absence of facts showing that the Government employees had a reasonable opportunity to discover the presence of the stones or gravel on the walk, and to remove them, no negligent or wrongful act can be imputed to the Government employees.

#### ADMINISTRATIVE DETERMINATION

Mrs. Hannah Cohen, of Providence, Rhode Island, by and through her attorneys, Decof, Abatuno and Brill, of Providence, Rhode Island, has timely appealed from the administrative determination (T-D-0-75) of September 18, 1962, by the Field Solicitor, Omaha, Nebraska, denying her claim in the amount of \$2,500 for personal injuries.

Appellant states<sup>1</sup> that on Thursday, June 22, 1961, she and her husband—

purchased ticket for admission to Yellowstone National Park, Permit No. 2914. After parking car, walked by museum toward Basin. [She] slipped on loose gravel located on incline toward Basin used by visitors to reach the Basin.

<sup>1</sup> Standard Form 95, Claim for Damage or Injury, submitted by appellant.



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The Field Solicitor held that the legal status of the claimant at the time of the accident was "that of a licensee by invitation or permission," and that there was no "negligence or want of ordinary care on the part of the Government to warrant a finding in favor of the claimant."

The notice of appeal excepts to the original determination in general in that it is against the evidence and against the law.

The notice of appeal excepts to the original determination specifically in that it involves "a misconstruction of the applicable law." The attorneys for the claimant argue as follows:

My clients paid a consideration to enter the premises of the Yellowstone National Park. Clearly, since there was a benefit flowing to the Yellowstone National Park, my client would enjoy the status of a business invitee and be entitled to a duty of ordinary care under the circumstances. The presence of loose gravel in an area designated as and used as a walk, particularly when my client was instructed to use this area to walk upon, constituted active negligence in this case, which was the proximate cause of my client's injuries.

In this notice of appeal, the appellant, through her attorneys, relies upon the fact that she paid an admission fee to enter the Yellowstone National Park to establish her legal status as a "business invitee," and thereby also establish that the Government owed to her "a duty of ordinary care under the circumstances." The payment of an admission fee in itself does not make a visitor to Yellowstone National Park a "business invitee."<sup>2</sup>

In *Claypool v. United States*,<sup>3</sup> the United States District Court for the Southern District of California, in construing Wyoming law, states:

We are not inclined to attach any importance, for the purposes of this opinion, to the fact that plaintiff paid a so-called "entrance fee" upon admission to the Park [Yellowstone National Park]. Such fee did not give the plaintiff herein the status of a "business" invitee, and did not increase or affect the quantum of care owed the plaintiff by the defendant.

\* \* \* plaintiff was not a "business" invitee. \* \* \*

\* \* \* \* \*

We do not believe it is necessary, for the purposes of this opinion, to make any fine distinction as to the exact status occupied by plaintiff when he entered the Park; nor do we deem it necessary to formulate a broad and inclusive definition of the quantum of care owed by defendant to the plaintiff. \* \* \*

Since it was not necessary in *Claypool* for the court to rule on the exact status of the visitor, the court's statement that the visitor was

<sup>2</sup> *Ashley v. United States*, Civil No. 0839, D. Neb., Mar. 6, 1963; *Claypool v. United States*, 98 F. Supp. 702, 705 (S.D. Cal. 1951).

<sup>3</sup> *Supra* note 2.

not "a business invitee" appears to be a dictum. It should also be noted that the court refers to only one Wyoming case,<sup>4</sup> and rejects that case as "not [being] in point." The court relies for its construction primarily on statements in "*American Jurisprudence*" and the "*Restatement of the Law of Torts*" to determine the legal status of the visitor.

The United States District Court for the District of Nebraska decided the precise point of the legal status of visitors to Yellowstone National Park in Wyoming in *Ashley v. United States*.<sup>5</sup> After a review of the Wyoming cases, the court states:

The court finds that the plaintiff was an invitee and that under the Wyoming law the defendant owed to plaintiff a duty to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger.

Therefore, appellant is correct that under the law of Wyoming she was an invitee at the time of the fall, rather than a licensee by invitation or permission as stated in the original determination.<sup>6</sup> However, although the status of the visitor was incorrectly stated in the original determination, the duty of care applied in the original

<sup>4</sup> *Dudley v. Montgomery Ward & Co.*, 64 Wyo. 357, 192 P. 2d 617 (1948).

<sup>5</sup> *Supra* note 2. *Ashley* considered specifically whether the plaintiff who was bitten by a bear while he was sitting in a car in Yellowstone National Park was "a licensee as the government claims or an invitee as plaintiff claims." Judge Van Pelt concluded that an ordinary visitor to that part of the park which lies in Wyoming is considered to be an invitee. It would create difficult and cumbersome administration problems if a different degree of care applied in different parts of the park because the park is located in more than one state. Part of Yellowstone National Park lies in Montana. However, the laws of Wyoming and Montana appear to be uniform in deciding the legal status of a visitor to a national park. In *Williams v. United States*, Civil No. 20670, E.D. Mich., Oct. 6, 1961, it was ruled that a visitor who was bitten by a bear while hiking in Glacier National Park, Montana, was an invitee.

Of course, any comparison of the legal status of visitors to Federal property in the various states must be made with caution since the difference in the facts of the cases make any direct comparison difficult. The following are examples of how visitors to Federal property have been classified in other jurisdictions. In the District of Columbia the ordinary visitor is considered a licensee by invitation. *Furjer v. United States*, 208 F. 2d 524 (D.C. Cir. 1953) (Jefferson Memorial); *Martin v. United States*, 225 F. 2d 945 (D.C. Cir. 1955) (Washington Monument). In *McNamara v. United States*, 199 F. Supp. 879 (D.D.C. 1951) (Capitol Building); Judge Holtzoff states: "Under the law of the District of Columbia a sightseer in a public building is not an invitee but is a licensee by invitation." The *McNamara* case is of particular interest since Judge Holtzoff while sitting in the Southern District of California in *Peets v. United States*, 165 F. Supp. 177 (S.D. Cal. 1958) (Fort Ord, Cal., cafeteria), considered a visitor at Fort Ord, California, to be an invitee where plaintiffs visited their son stationed there while in military service. In *Smith v. United States*, 117 F. Supp. 525 (N.D. Cal. 1953) (Los Padres National Forest), the camper was also held to be an invitee. However, a would-be hunter in *Chinca v. United States*, 190 F. Supp. 643 (N.D. Cal. 1961) (Shasta National Forest), was considered by the court as a licensee.

<sup>6</sup> *Kathryn M. Rogers*, 63 I.D. 150 (1956), will no longer be followed.

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determination is tantamount to the duty owed to an invitee, and does not represent the duty owed to a licensee, under the laws of Wyoming. On page 3 of the appealed determination the Field Solicitor states:

The Park Service is not an insurer of the safety of visitors to National Parks, but is required to exercise only ordinary care to make the places reasonably safe for such visitors.

The duty of care quoted from the original determination is the duty of care claimed by the appellant through her attorneys in the notice of appeal and in a subsequent letter<sup>7</sup> as well as the duty imposed by Wyoming law. Therefore, there is no disagreement as to the extent of the duty owed by the Government to the appellant.

The issue before us is as to whether or not there was a breach of the duty which was the proximate cause of the appellant's injuries.

Appellant contends that the presence of loose gravel on the walk is negligence, and constitutes a breach of the duty owed to her. She further contends that the breach of the duty was the proximate cause of her injuries. The appellant neither alleges nor proves the amount of loose gravel on the walk; or how long prior to the accident the gravel had remained on the walk.

It is usually difficult, and often impossible, for the claimant in an accident such as this to secure such information. However, in order to be able to render a determination that is fair and equitable to all parties, the Department of the Interior in the assembly and consideration of the evidence resembles more an impartial judicial body than a party litigant. Further, since the Department is usually in a better position to secure the evidence, it has assumed the burden of investigating claims and of obtaining all available material evidence.<sup>8</sup> The applicable procedures are set forth in the Departmental Manual, Chap. 451.2.

<sup>7</sup> Letter of January 24, 1963, from appellant's attorneys to Assistant Solicitor, Branch of Claims and Contract Appeals, Department of the Interior. *Schultz v. United States*, 174 F. Supp. 488 (D. Me. 1959), cited by appellant, is not applicable since an inherently dangerous practice was involved.

<sup>8</sup> *James Robinson*, TA-217 (Oct. 17, 1961). The reverse of this situation is, of course, an exception to this general statement. Where evidence lies peculiarly within the knowledge or within the control of the claimant, such as repair bills, estimates of repairs and the extent of personal injuries, claimant must come forward with such evidence. The refusal or failure on the part of a claimant to furnish evidence within his knowledge or control may result in the denial, in appropriate cases, of his claim.

An investigation of appellant's claim has been conducted and the administrative record (appeal file) establishes that the fall occurred on an asphalt surfaced outdoor walk in the park. The walk was in good condition at the time of the accident.

The Field Solicitor found, and the evidence supports the conclusion that the condition of the walk was not one that was more hazardous than should be anticipated by a visitor to a national park.<sup>9</sup> The walk involved is located in an outdoor area. It is quite possible and may be anticipated that dirt and small stones from surrounding areas may get on a walk in a national park. Our holding in *Grace Christenson*,<sup>10</sup> is particularly applicable to the instant case:

Even if small stones or loose gravel on the trail did cause the fall, this does not establish either negligence or a wrongful act on the part of the Government through its employees. At best, claimant establishes that she fell on Government property. Under ordinary circumstances, the mere happening of an accident does not impute negligence to anyone. The present case is no exception.

The administrative record establishes that the walk is not dangerous *per se*. There is nothing in the record to indicate that a Government employee had a reasonable opportunity to discover the presence of the gravel on the walk and remove it. To attribute the appellant's injuries to the negligent or wrongful act of Government employees in the absence of supporting evidence would be conjectural.<sup>11</sup>

In summary, the record establishes that the walk was not dangerous *per se*. Further, there is no evidence that it was maintained in a negligent manner.

#### CONCLUSION

Therefore, the determination of the Field Solicitor, Omaha, Nebraska, of September 18, 1962 (T-D-0-75), denying the claim of Mrs. Hannah Cohen, is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

<sup>9</sup> Cf. *Joseph R. Santandreu*, TA-212 (Feb. 7, 1961) (fall on trail in Zion National Park, Springdale, Utah).

<sup>10</sup> TA-244 (Sept. 14, 1962) (fall on trail at Tonto National Monument, Roosevelt, Arizona).

<sup>11</sup> Cf. *Mrs. Hattie L. Schubert*, T-695 (Mar. 24, 1955) (fall on trail in Mammoth Cave National Park, Kentucky).

**PEARL CHRISTIAN  
WILLIAM WESLEY PETERS**

A-29265

Decided May 31, 1963

**Public Lands: Generally—Public Lands: Riparian Rights**

The owner of riparian lots does not own public land within an unsurveyed island in a navigable stream lying between the riparian lots and the thread of the stream which was in existence when the State was admitted to the Union.

**Color or Claim of Title: Generally**

A decree of a State court holding that the owners of riparian lands have title to portions of a specific island lying in a navigable stream opposite the riparian lands and that title to the island lands passes with a conveyance of the riparian lands is sufficient to constitute color of title to support a color of title claim, and it is immaterial whether subsequently conveyances are made of the riparian lands as including parts of the island or without mention of the island.

**Color or Claim of Title: Generally**

A general rule of law followed by a State that the owner of riparian land on a navigable stream has title to an unsurveyed island lying between the riparian land and the thread of the stream, does not in itself, in the absence of a ruling by a State court as to a particular island, give the riparian owner color of title to the particular island.

**Color or Claim of Title: Generally**

Color of title to portions of an island based upon a decree by a State court, which holds that riparian owners on the bank of a navigable stream own such portions of the island as are included within the lines drawn from the riparian land perpendicular to the thread of the stream, does not extend to portions of surveyed lots on such island which fall outside such lines.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Mr. Pearl Christian and William Wesley Peters have separately appealed to the Secretary of the Interior from a decision dated October 2, 1961, by which the Division of Appeals, Bureau of Land Management, affirmed the rejection of their applications to purchase certain lots of public land comprising an island in the Wisconsin River within Iowa County, Wisconsin, by the St. Paul office of the Bureau of Land Management, but remanded the applications to afford an opportunity for submission of further evidence in support of them. The applications were filed pursuant to the Color of Title Act, as amended (43 U.S.C., 1958 ed., sec. 1068 *et seq.*).

Section 1 of the Color of Title Act, 67 Stat. 227, as amended, provides:

70 I.D. 6

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for 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 State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre: \* \* \* (43 U.S.C., 1958 ed., sec. 1068.)

A claim filed under the conditions described in (a) above is commonly referred to as a class 1 claim and one filed under the conditions described in (b), as a class 2 claim.

Land in Iowa County on the south side of the Wisconsin River was surveyed in 1833 and 1834 and the plat of the southern portion of T. 8 N., R. 3 E., 4th Prin. Mer., was approved August 12, 1834. The plat shows the meanders of the south bank of the Wisconsin River through the township and the land to the south of it. Fractional section 24 is a triangular area, the eastern half of which consists of lot 1, containing 52.28 acres, and lot 2, containing 64.53 acres, numbered from east to west. The western half contains a normal  $SE\frac{1}{4}SW\frac{1}{4}$  to the south of lot 3, containing 44.85 acres, and a normal  $W\frac{1}{2}SW\frac{1}{4}$  to the south of lot 4, containing 19.77 acres. Lots 1, 2, 3, and 4 are river bank lots. The plat also shows in the river to the north of section 24 a long, narrow island, the head, or upstream extremity, of which is located at about the midpoint of the north boundary of lot 1. It extends along the entire northern boundaries of lots 2, 3, and 4. The island was not surveyed. The land north of the river was surveyed in 1840 and 1842. The plat of survey, approved December 20, 1842, shows the island but again the island was not surveyed.

On July 8, 1839, a patent was issued to James Davis, Jr., covering the  $E\frac{1}{2}SW\frac{1}{4}$  ( $SE\frac{1}{4}SW\frac{1}{4}$  and lot 3) and the  $E\frac{1}{2}SE\frac{1}{4}$  (lot 1) of section 24, containing 137.13 acres. On January 5, 1841, a patent covering lot 2, containing 64.53 acres, was issued to David Walter Jones. On November 10, 1855, a patent covering the  $NW\frac{1}{4}SW\frac{1}{4}$  and lot 4, sec 24, containing 59.77 acres, was issued to Samuel T. Wood.

Peters acquired title to lots 1 and 2 in 1938. In 1947, Christian acquired title to all of the  $W\frac{1}{2}$  of fractional section 24, including

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lots 3 and 4, which his deed indicated, included "part of Metcalf Island." Both purchasers found the narrow river channel between their land and Metcalf Island dry during portions of the year. They used portions of the island in front of the riparian lots as pasture for cattle and sheep. On October 6, 1949, the Bureau of Land Management office at St. Paul, Minnesota, notified Christian of the impending survey of the islands in the Wisconsin River. Christian receipted for this letter on October 10, 1949. He was thus chargeable from that date with notice that the Bureau of Land Management then regarded the islands as public land of the United States because official surveys of privately owned land are not made. There is no evidence that Peters received a notice of such character.

The plat of survey, approved on October 12, 1951, shows the island north of section 24 divided into four lots numbered 7, 8, 9, and 10 from west to east, by extension due north of the quarter section and sixteenth section lines, so that lot 7, containing 33.33 acres, is directly north of lot 4; lot 8, containing 58.60 acres, north of lot 3; lot 9, containing 55.48 acres, north of lot 2; and lot 10, containing 16.82 acres, north of the western portion of lot 1.

On October 12, 1960, Mrs. Christian receipted for a notice from the Bureau of Land Management addressed to her stating that the St. Paul office believed that she asserted some claim to lots 7, 8, 9, and 10 and that, if she did not have a patent to them, she should protect her rights by filing an application, under the Color of Title Act or some other law, within 60 days. A like notice was sent to Peters at the same time.

Christian filed a class 1 claim under the Color of Title Act, as amended, alleging that he and his predecessors in title for the past 30 years had assumed they had good legal title to what is now referred to as lots 7 and 8; that they had pastured this land with other land; that they had fenced part of it; that from time to time they had taken firewood from it and cleared and seeded parts of it. He also pointed out that in 1905 the Wisconsin Supreme Court reversed a judgment of a trial court in favor of the defendant in a damage suit brought in behalf of the former owners of lots 1, 2, and 3 against a person who cut growing timber on the island in front of those lots. The Supreme Court noted that the trial court based its judgment upon the plaintiff's failure to show title to the island, but reversed on the ground that:

\* \* \* a grant of lands on the bank of a navigable stream, made without limitation or reservation as to the adjacent islands, vests in the purchaser the

title to any unsurveyed island lying between the bank and the thread of the stream. This ownership is predicated upon the ground that the riparian proprietors in this state are, by concession of the state, the owners of the river bed adjoining their land to the thread of the stream, and that this ownership extends to any island or dry land which may be formed thereon. [citing cases]

\* \* \* Since there is no dispute but that plaintiff and his assignors were the owners of the river bank included within lots 1, 2, and 3 at the time of the alleged trespasses, under the established principle of the foregoing cases there can be no question as to their ownership of that part of the island situated on the river bed between this bank and the thread of the stream. There is nothing in the evidence to indicate but that this is an unsurveyed island formed upon that part of the bed of the river which is owned by the riparian proprietors. Under such circumstances, the original grant by the government carried with it the right of ownership to the island, in all respects as it did to the bed of the stream. \* \* \* (*Sliter v. Carpenter*, 102 N.W. 27, 28.)<sup>1</sup>

Peters filed a class 2 claim, alleging that he had used lots 9 and 10, believing them to be his own and had paid taxes upon them. His list of tax payments made by him and his predecessors in interest shows payments from 1898 through 1959 on different parcels of land. In a number of these years up to 1940 and 1941 lots 1 and 2 can be identified, but there is no indication of the payment of taxes on any part of Metcalf Island before 1912. There are indications of payment on an acreage of 64.53 acres on the island through 1929 and on an acreage of 13.80 acres on the island through 1959. On appeal to the Director of the Bureau of Land Management, Peters also relied upon the decision of the Wisconsin Supreme Court in *Sliter v. Carpenter*, *supra*.

The Division of Appeals noted, in the decision affirming the rejections of the Wisconsin office, that both appellants seemed to be abandoning their color of title applications and substituting a contention that they owned the lots listed in their applications. The decision denied any title to the island in them but held that the decision of the Wisconsin Supreme Court was a writing upon which a claim of color of title could be based as to island land in front of the three lots (not including lot 7 in front of lot 4) to which it referred. The decision states that there is no writing purporting to convey lot 7 which sufficiently identifies it, and that, in any event, the appellants did not show improvements or cultivation to support a class 1 claim or payment of taxes to support a class 2 claim. The Division of Appeals remanded the applications to permit Christian to submit

<sup>1</sup> This decision followed the earlier announcement of the Wisconsin court in *Chandos v. Mack*, 46 N.W. 803 (1890), in which the justification for the assumption that title to an unsurveyed island passes to the State is that by its failure to survey the island before disposal of the land bordering a navigable stream the United States evidences its abandonment of the island.



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evidence of cultivation on lot 8 and to Peters to amend his application to allege a class 1 claim and to submit evidence to support it or, in default of such action, for closing of the cases.

On appeal to the Secretary, Christian reiterates his previous contentions and submits affidavits stating that some cultivation was done in 1948, 1956, and 1958 and that evidence of such action is still visible on lots 7 and 8.

Peters contends that he has title to lots 9 and 10 under the Wisconsin decision relied upon and that, even if he did not have title, he would still have a good class 2 color of title claim because he or his predecessors have paid all of the taxes levied on the land by State and governmental units and "if for some or any reason no taxes were levied then such nonpayment in a particular year does not jeopardize his claim." He has made no attempt to file a class 1 claim.

Christian's evidence of cultivation in 1956 and 1958 does not help him because the evidence submitted refers to activity at a time subsequent to the date when he was notified of his want of title to the land. *Edward T. Harris, Sr.*, A-27785 (January 19, 1959); *Walter G. Kreuter*, A-29065 (October 22, 1962), and cases cited therein. However, his evidence of cultivation in 1948 may be sufficient to support a class 1 color of title claim.

Any contention by the appellants that they own the island lots in front of their riparian lots must be rejected. As far as this Department is concerned, the decision of the United States Supreme Court in *Scott v. Lattig*, 227 U.S. 229 (1913) is dispositive of the issue. The Court said in that case:

Bearing in mind, then, that Snake river is a navigable stream, it is apparent, first, that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream—the thread being the true boundary of the State—passed from the United States to the State, subject to the limitations just indicated, and, second, that the subsequent disposal by the former of the fractional subdivisions on the east bank carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership. \* \* \*

But the island, which we have seen was in existence when Idaho became a State, was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the State or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws \* \* \*. (Pp. 243, 244.)

In accordance with these views, I conclude that the lots now surveyed on the island in question are public land. *Willis W. Ritter*, A-27755 (December 22, 1958).

The question remains whether either appellant has a claim or color of title to the island lots applied for so as to entitle him to acquire the lots under the Color of Title Act.

It seems clear from the record that prior to 1905 there was no conveyance to the predecessors in interest of either appellant of any part of the island. That is, there was no written instrument of conveyance which in terms referred to any part of the island. In 1905, or more precisely, on January 10, 1905, the Wisconsin Supreme Court held in *Sliter v. Carpenter, supra*, that by concession of the State of Wisconsin the owners of lots 1, 2, and 3 of section 24 owned the parts of the island lying in the river between the banks of those lots and the thread of the stream. The court said that the interest in the island "attaches and is appurtenant to the bank, and passes by conveyance of the title to the bank, unless it be separated therefrom by deed of conveyance" (p. 28).

Thereafter, commencing on October 30, 1915, conveyances in the chain of title to Christian specifically referred to lot 3, "including part of Metcalf Island," and lot 4, "including part of Metcalf Island." The Peters chain of title is not so specific. Apparently conveyances in it described only lots 1 and 2 and did not mention the island.

Although the question whether the decree of a court holding title to specific land to be in specific persons constitutes color of title appears to be a question of first impression, I agree with the Bureau that it does. In effect, the court's decree is a confirmation in writing that certain specific land has been conveyed by the State to the riparian owners. This, I believe, may reasonably be considered to fulfill the requirement of the Color of Title Act for showing a color of title.

The decree of the court, however, did not touch upon the ownership of the part of the island lying opposite lot 4. But the ruling of the court as to the ownership of the parts of the island lying opposite lots 1, 2, and 3 simply followed the rule established in 1890 in *Chandos v. Mack*, 46 N.W. 803, which might equally well have applied to the ownership of the part of the island lying opposite lot 4. But the fact nonetheless is that the court's decision did not cover that land.

This raises the question whether a general interpretation or rule of law laid down by a court affecting title to real property can be accepted as constituting color of title for any specific piece of property. This question was raised but not decided in the recent case of *Myrtle A. Freer et al.*, 70 I.D. 145 (A-29221, April 2, 1963), where the same issue was raised in a color of title case affecting an island in the Snake River, Idaho. I believe the answer must be in the negative. Rules of law furnish a guide as to how a court may decide a case. But there is no assurance that any particular case will be decided in ac-

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cordance with an established rule until a decision is made in that case. There is always the possibility of some difference in fact or situation which will make inapplicable the general rule. Thus the Attorney General of Wisconsin, in repeating the rulings in *Chandos v. Mack* and *Sliter v. Carpenter* as representing the law of Wisconsin, cautioned that each case must be considered on the basis of its own individual facts. 37 Op. Atty. Gen. (Wis.) 267 (1948).

It follows that the general rule of law laid down in *Chandos v. Mack* and applied to part of Metcalf Island in *Sliter v. Carpenter* cannot be accepted as constituting color of title to the remaining portion of the island lying opposite lot 4.

The fact, however, is that apparently in reliance on *Sliter v. Carpenter*, the owners of lots 3 and 4, as stated earlier, in 1915 and thereafter conveyed both lots 3 and 4 as each including a part of Metcalf Island. We have, therefore, subsequent to 1915, conveyances including part of the island in the conveyance of lot 4. Except for the question of the sufficiency of a description reading simply "part of Metcalf Island," which will be considered later, there is color of title to the part of the island lying opposite lot 4.

Turning to the *Peters* case, which was initiated and has been maintained as a class 2 claim, it is clear that it must fail as such because there was no color of title to the portions of Metcalf Island lying off lots 1 and 2 on or before January 1, 1901. The color of title did not commence until the *Sliter* case was decided in 1905. The *Peters* claim can therefore be maintained only as a class 1 claim and must meet all the requirements for that class of claim.

It is to be noted that, unlike the *Christian* chain subsequent to 1905, conveyances in the *Peters* chain after that date apparently referred only to conveyances of lots 1 and 2. They did not mention any part of Metcalf Island as being conveyed with lots 1 and 2. However, in view of the court's statement in the *Sliter* case that appropriate portions of the island pass by conveyance of title to the bank unless separated therefrom by the deed of conveyance, I think the deeds in the *Peters* chain can only reasonably be construed to convey parts of the island lying opposite lots 1 and 2.

*Peters* thus far has refused to convert his application from a class 2 claim to a class 1 claim. He has insisted that he owns the land in lots 9 and 10 on the island, a contention already rejected. Unless he is able to show compliance with a class 1 claim, his application must be rejected.

In this connection, *Christian* was required to show cultivation and improvements on land in the island. With his present appeal, he

has submitted affidavits that 20 acres on the island were bulldozed, disked, and seeded in 1948, 1956, and 1958. The last two years do not count, of course, since they came after he learned that he did not have title to the land. The asserted cultivation in 1948 is the only significant work that must be considered.

One important factor remains to be considered. As stated earlier, lots 7, 8, 9, and 10 on Metcalf Island were created by the projection due north of the north-south lines of lots 1, 2, 3, and 4 of section 24. However, the Wisconsin River does not flow in a due east-west direction, but in a northwest direction. The Wisconsin law is established that a riparian land owner does not own to the thread of the stream by a straight projection of the side lines of his land on the bank. He owns only the bed contained in a projection of his side lines in a direction which is at right angles to the thread of the stream. *Farris v. Bentley*, 124 N.W. 1003 (1910); *Metropolitan Inv. Co. v. City of Milwaukee*, 161 N.W. 785 (1917). Thus, Christian and Peters do not have color of title to lots 7, 8, 9, and 10 as surveyed on Metcalf Island because the side lines of those lots run due north and south and do not intersect the thread of the Wisconsin River at right angles. Accordingly, the land on the island to which either Christian or Peters may perfect a class 1 claim will have to be established by agreement of the parties or by special survey.<sup>2</sup>

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.22A (4)(a), Departmental Manual; 24 F.R. 1348), for the reasons stated herein, the decision appealed from is affirmed in part; reversed in part, and remanded for further appropriate action in light of the considerations here expressed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## CLOSURE AT GLEN CANYON DAM

### Statutory Construction: Legislative History

Where Congress specifically prohibited the construction of works for the protection of Rainbow Bridge National Monument with funds appropriated for fiscal years 1961, 1962 and 1963 for the construction of Glen Canyon Dam and Reservoir, the legislative history related to the appropriation acts expresses the Congressional intention to suspend those provisions of Sections 1 and 3 of the Colorado River Storage Project Act relating to the taking of protective measures to preclude impairment of the Monument and precluding the construction of any dam or reservoir within any national park or monument.

<sup>2</sup> Because of the Wisconsin law, the indefiniteness of the conveyances in the Christian chain of title of "part of Metcalf Island," included in lot 4, may be considered cured.

March 18, 1963

### Statutory Construction: Generally

Notwithstanding the requirements of the Colorado Storage Project Act for the protection of the national parks and monuments, the Congress, in enacting the Public Works Appropriation Acts for 1961, 1962 and 1963, manifested the intention that construction and initiation of storage behind Glen Canyon Dam should proceed on schedule without constructing proposed works for the protection of Rainbow Bridge National Monument, and therefore the Secretary would not be warranted in deferring closure of the water diversion tunnels at Glen Canyon Dam.

### Statutory Construction: Generally—Statutory Construction: Legislative History

Congress may supersede or suspend the provisions of a basic act by an appropriation act provision which is in the form of a limitation on the availability of funds, and inquiry must be had to the legislative history of any such appropriation act provision to determine the intentions of Congress in this regard.

M-36653

March 18, 1963\*

TO: SECRETARY OF THE INTERIOR

SUBJECT: DEFERMENT OF CLOSURE AT GLEN CANYON DAM

It is being urged that the provisions of the Public Works Appropriations Acts for fiscal years 1961, 1962 and 1963 prohibiting the availability of funds for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument leave unimpaired the provisions of Sections 1 and 3 of the Colorado River Storage Project Act (Act of April 11, 1956, 70 Stat. 105). The latter provides that the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument and state the intention of Congress that no dam or reservoir constructed under the authorization of the Act shall be within any national park or monument.<sup>1</sup> Consequently, it is contended that you are under an obligation, or at least have discretion, not to effect closure at Glen Canyon until such

\*Not in chronological order.

<sup>1</sup>The Appropriation Act provision is as follows:

*Provided*, That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any National Monument.

The pertinent provisions of Sections 1 and 3 of the Colorado River Storage Project Act read:

*Provided further*, That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument. (Sec. 1)

It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument. (Sec. 3)

time as funds have been made available by the Congress for the protective works and they are placed in operation.

In urging that you are now obligated to maintain the diversion tunnels open, reliance is being placed upon a conclusion of law included in the order of the District Court denying plaintiffs' motion for a preliminary injunction in *National Parks Association v. Udall* (U.S. District Court, District of Columbia, Civil No. 3904-62), which if granted would have required the keeping open of the diversion tunnels at Glen Canyon Dam until protective measures for the Monument had been effectuated.<sup>2</sup> The District Court concluded, *inter alia*, that "The provisions of the Colorado River Storage Project Act remain in force. Their execution lies within the discretion of the Secretary." However, the District Court also concluded that plaintiffs were without standing to sue. That being the case, the conclusion of the Court as to the present effectiveness of the provisions of the Storage Project Act is not binding and we are free to examine the issue.<sup>3</sup>

Not only are you not under any Congressional mandate to keep the diversion tunnels open but your failure to effect closure would be at complete variance with the present state of the law applicable to the Glen Canyon Unit, for the Congress has effectively suspended the pertinent provisions of the Colorado River Storage Project Act and has manifested the intention that construction and initiation of storage should proceed on schedule.

There can be no doubt of the power of Congress to supersede or suspend the provisions of a basic act by a provision in an appropriation act. *United States v. Dickerson*, 310 U.S. 554 (1930). And this it may do even though the language it employs is in the form of a limitation on the availability of funds rather than an explicit statement of modification or supersession. *Ibid*; *United States v. Lovett*, 328 U.S. 303 (1946). Inquiry must be had to the legislative history of the appropriation provision to determine the intentions of Congress.

The precise issue now before us was disposed of by the Supreme Court in the *Dickerson* case, *supra*. In *Dickerson*, basic law provided for payment of a bonus to re-enlisting servicemen. In a subsequent appropriation act Congress included a proviso prohibiting the availability of appropriations for the payment of such bonuses in language very much like that restricting the availability of appropriated funds for the construction of protective works in the case of Rainbow Bridge. Plaintiff, a re-enlistee, brought suit in the Court of Claims for

<sup>2</sup> Subsequent to the District Court's refusal to grant a preliminary injunction, the United States Court of Appeals for the District of Columbia Circuit likewise refused to issue such an injunction and the Supreme Court declined to intervene.

<sup>3</sup> The issue was given only casual consideration, *passim*, by the District Judge. It was not briefed in the proceedings before him and the Court, in fact, declined to hear argument on the subject.

March 18, 1963

a re-enlistment bonus contending that the appropriation bill proviso merely made appropriate funds unavailable but left the basic law, which provided for the bonus, intact and unaffected. Plaintiff sought to preclude resort to the legislative history of the proviso, which clearly showed that Congress had intended the proviso to suspend the basic law, on the ground that the language was clearly and specifically in the form of a limitation on the availability of funds and, therefore, resort could not be had to legislative history to give broader effect to the plain meaning of the language of the proviso. The Supreme Court, however, proceeded to examine the legislative history to determine what Congress had really intended.

The Court concluded that while the proviso was cast in the form of a limitation on the availability of appropriations, Congress had intended to and did thereby suspend the substantive obligation to pay the enlistment bonus. The Court stated:

The respondent contends that the words of Sec. 402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are words of art or have a settled meaning. See *United States v. Perry*, 50 F. 743, 748 (C.C.A. 8th). The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. \* \* \* The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction (310 U.S. 354, 561-62)

An examination of the circumstances surrounding the enactment of the appropriation limitation for the current and the two preceding fiscal years leaves no doubt that Congress intended to suspend the operation of the provisions of Sections 1 and 3 of the Colorado River Storage Project Act insofar as Rainbow Bridge National Monument is concerned.<sup>4</sup>

Glen Canyon is the key unit of the Colorado River Storage Project. It alone will account for 900,000 kilowatts of the total planned installed capacity for the entire Storage Project of about 1,200,000 kilowatts. It will, therefore, provide the lion's share of the power revenues necessary to return the Project's cost to the treasury. Of the Project's one billion dollar estimated total cost, well over 90 per-

<sup>4</sup> Since the question is not before us, it is unnecessary to consider at length whether the Appropriation Act provision has effected a permanent repeal of the pertinent provisions of Sections 1 and 3. Giving effect to the legislative history of the Appropriation Act provision, I incline to the conclusion that permanent repeal has been effected.

cent is reimbursable and, in turn, over 90 percent of that reimbursable cost will be met from hydroelectric power revenues. Out of a total of approximately 34,500,000 acre-feet of storage planned at the four storage units of the Storage Project, Glen Canyon alone will provide over 28,000,000. Beginning with fiscal year 1961, the year for which, in pursuance of an orderly construction program, appropriations for protective works were first sought and considered by the Congress, almost \$75,000,000 has been appropriated to continue construction on the Glen Canyon Unit, including the financing of the manufacture of the turbines and generators, and over \$42,000,000 has been appropriated for construction of the transmission grid.

To argue that the Secretary of the Interior is obligated, or even possessed of discretion, to maintain the diversion tunnels in open condition until and unless the Congress reconsiders its present stand and provides funds for construction of the protective facilities for Rainbow Bridge is to suggest that it was the intent of Congress in appropriating these vast sums to provide an empty monument to the engineering profession while prohibiting its use. The magnitude of the appropriations themselves raise the strongest presumptions against ascribing such an anomalous intention to the Congress. The only way in which such a conclusion can possibly be supported is by refusal to consider the very legislative materials which demonstrate its invalidity. Here, as in *Dickerson* and in *Lovett*, a glance at the legislative history of the last three appropriation acts demonstrates that the Congress has indeed intended a substantive change and that much more than a mere question of appropriations is involved.

The Congress in considering Glen Canyon appropriation requests has at all times acted against a background of full knowledge and information regarding the progress of construction, the remaining construction program and the schedule for closure of the diversion tunnels and the initiation of power generation. Information has been regularly relayed to Congress not only in the process of appropriation hearings but, as well, by the annual reports which are made by the Secretary of the Interior to the Congress pursuant to Section 6 of the Colorado River Storage Project Act. In an attachment to this memorandum, there are summarized, but by no means completely, instances in which the Congress has been made aware of the filling schedule and other relevant matters.

That the Congress intended construction and operation of Glen Canyon to proceed notwithstanding its refusal to finance construction of protective works is shown by the reports of the House and the Senate Appropriation Committees in connection with the fiscal year 1961 appropriations:



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*Glen Canyon Unit.*—An appropriation of \$23,535,000 is recommended, a reduction of \$3,500,000 in the budget estimate of \$27,035,000. This action deletes the funds programmed for protection of the Rainbow Bridge National Monument. It has been estimated that the total cost of protecting this Bridge would be in the vicinity of \$20,000,000. Access to this national monument will not be affected by the construction of Glen Canyon dam and reservoir, in fact it will be improved to some extent. The geological examination report on the problem indicates clearly that there will be no structural damage to Rainbow Bridge by the reservoir waters beneath it. The Committee sees no purpose in undertaking an additional expenditure in the vicinity of \$20,000,000 in order to build the complicated structures necessary to provide the protection contemplated. (House Report 1634, 86th Cong., 2nd sess., p. 81)

*Glen Canyon Unit, Arizona.*—The committee recommends a program of \$23,535,000 for the continuation of construction of the Glen Canyon Unit. The sum recommended is a reduction of \$3,500,000 in the budget program, and the same amount as allowed by the House. The recommendation of the committee is in accord with the House action of disallowing all funds requested for the initiation of construction of facilities to protect the Rainbow Bridge National Monument in Utah.

In taking this action the committee has considered the findings of the Geological Survey that the impoundment of water in the Glen Canyon Reservoir (Lake Powell) will not result in any structural damage to the Rainbow Bridge. (Senate Report 1768, 86th Cong., 2nd sess., p. 38)

If any further proof were needed of the intention of the Congress that closure is not to be delayed, it is to be found in the observations of the Senate Appropriations Committee in connection with the fiscal year 1963 appropriation bill. The Senate Committee called upon the National Park Service to construct visitor facilities at Rainbow Bridge National Monument "as rapidly as possible so that the facilities will be available when the level of Lake Powell will permit their use." (Senate Report 2178, 87th Cong., 2nd sess., p. 41)

For the foregoing reasons I must advise you that in my opinion deferment of closure pending the provision of protective works for Rainbow Bridge National Monument would be completely at variance with the present state of the enactments of Congress applicable to the Glen Canyon Unit.

FRANK J. BARRY,  
*Solicitor.*

#### INFORMATION BEFORE CONGRESS RELATIVE TO GLEN CANYON CONSTRUCTION AND FILLING SCHEDULE AND RAINBOW BRIDGE PROTECTIVE WORKS

The Congress, in acting upon Glen Canyon appropriations, has been continuously advised as to the progress of construction, the construction schedule, the plans for closure, and the schedule for initiation of power generation.

Section 6 of the Colorado River Storage Project Act requires the Secretary on January 1 of each year to make an annual report to the Congress for the previous fiscal year, beginning with fiscal year 1957, upon the status of the revenues from and the cost of constructing, operating, and maintaining the Colorado River Storage Project and the participating projects. The Act requires that the Secretary's report be prepared to reflect accurately the Federal investment allocated at that time to power, to irrigation, and to other purposes, the progress of return and repayment thereon, and the estimated rate of progress year-by-year in accomplishing full repayment.

As a part of the first annual report of the Secretary submitted on December 30, 1957, there was included a statement of the assumptions upon which the anticipation of power revenues and payout were premised. In that statement, storage was assumed to have been initiated at Glen Canyon Dam in calendar year 1962, with initial power-generation beginning in June of 1964. Sen. Doc. 77, 85th Cong., 2d sess., p. 10. (Due to the strike that completely shut down construction work on Glen Canyon Dam from July 6, 1959, to January 4, 1960, the original schedule of closure could not be met.)

Each of the annual reports that has been filed specifically sets out the progress of construction during the preceding year. In presenting the Secretary's third annual report (covering fiscal year 1959) to the Senate on January 26, 1960, the Chairman of the Senate Committee on Interior and Insular Affairs made certain observations which were printed with the 1959 report in Sen. Doc. 79, 86th Cong., 2d sess. Chairman Anderson, in his remarks, urged the Secretary of the Interior "to keep close tabs on the Glen Canyon construction and related schedules to insure completion of the installation as planned." Sen. Doc. 79, 86th Cong., 2d sess., vii. In this connection, Senator Anderson dwelt upon the importance of early initiation of power generation. He called the specific attention of the Senate to the President's budget request for fiscal year 1961, including the request of \$3,500,000 to initiate the works to protect Rainbow Bridge National Monument. *Ibid*, vii.

The fourth annual report (Sen. Doc. 10, 87th Cong., 1st sess.) as ordered printed by the Senate, included extensive statements analyzing certain proposals that had been made by private utilities to construct some of the transmission lines required to integrate the storage project powerplants and to deliver the power generated at the projects to market. The analysis compared the cost of power on the basis of an all-Federal transmission grid on the basis of the utilities' proposal. This analysis was based upon a comparison of costs accruing during the operating period of the projects, which in turn was based upon

March 18, 1963

initiation of power generation on schedule. The analysis covered the 84-year, overall payout period of the project, beginning with initial power marketing in 1964.

The construction and filling schedule called for initiation of construction of protective works for Rainbow Bridge in fiscal year 1961 and an appropriation request of \$3,500,000 was included in the budget for that year. In presenting the 1961 appropriation requests the Appropriation Committees of each House were specifically advised of the construction schedule and the plan for closure. The Commissioner of Reclamation testified before the House Appropriations Committee that the protective work needed to be started in fiscal year 1961 "so as to have it completed by the time we start filling because if we get a good year Glen Canyon could fill up to the level where it would back water into the monument in one year." House Hearings, Public Works Appropriations for 1961, Part 2, p. 518. The testimony before the House Committee for fiscal year 1961 dealt extensively with the estimated cost of the protective works, the report of the Geological Survey regarding the effect of water storage upon Rainbow Bridge, and with the provisions of the Colorado River Storage Project Act relative to protection of the monument and the statement of Congressional intent that no dam or reservoir constructed under the Act should be within any national park or monument. See House Hearings, Fiscal Year 1961, pp. 513-520.

The Senate Hearings reveal that the Commissioner of Reclamation testified that "Glen Canyon power will start coming in on the line—the first unit—in June 1964. We expect to start the initial storage in the spring of calendar year 1963 and we would actually, late in the fall, start to store the winter flows to the extent we could that winter and be ready for the spring runoff in the spring of 1963. And if we get normal water years, we will get power on the line the following season." Public Work Appropriations, 1961, Senate Hearings on H.R. 12326, p. 606.

The budget for fiscal year 1962 included a request of \$10,000,000 to finance the protective works. Again the Congress was fully advised not only as to the nature of the protective work problem and the provisions of the Colorado River Storage Project Act but also with respect to the construction and filling schedule. Commissioner Dorn testified before the House Committee that "if the protective features are to be done they must be done immediately or we will be running into the problem of deliberately holding back the filling of Glen Canyon and the loss of operating revenues from putting water through the power plant unless we can get this work under way at once. We have a very short construction period left because Glen

Canyon will be completed to the point that we will start storing water in January of 1963." House Hearings, Public Works Appropriations for 1962, Part 3, p. 498. The Commissioner's testimony before the Senate Committee was to the same effect. Public Works Appropriations for 1962, Senate Hearings on H.R. 9076, p. 566. Again there was extensive consideration before the Committee of the Rainbow Bridge protection issue.

The schedule was again brought specifically to the attention of the Congress in connection with the fiscal year 1963 appropriation requests. The project justification included at page 487 of the House Hearings on Public Works Appropriations for 1963, Part 3, stated that filling of the Glen Canyon Reservoir would start in the fiscal year. The Commissioner of Reclamation also so testified. See House Hearings, Fiscal Year 1963, page 558.

Likewise, in the Senate hearings for fiscal year 1963, the filling schedule was brought to the attention of the Committee by a project justification statement identical to that given to the House Committee. Senate Hearings on H.R. 12900, Public Works Appropriations, 1963, p. 505. The Commissioner of Reclamation also specifically testified that storage would start in calendar year 1963. Senate Hearings 1963, p. 522.

The appropriation hearings for years 1961 through 1963 also reveal that presentations supporting the appropriation of funds for protective works were made by representatives of various conservation groups. See House Hearings, FY 1961, Part 5, pp. 1448-1449; Senate Hearings, FY 1962, pp. 614-628; House Hearings, FY 1963, pp. 739-752.

### CLAIM OF MICHAEL J. DOLAN, JR.

T-1176

*Decided June 3, 1963*

#### **Torts: Motor Vehicles**

Skidding on an icy street or road does not, as a matter of law, establish that the driver of the skidding motor vehicle was guilty of a negligent or wrongful act or omission in the operation of the vehicle. However, the skidding may be caused or accompanied by negligence upon which liability may be predicated.

#### **Torts: Motor Vehicles**

If either party can avoid an accident by the exercise of proper care, the accident cannot be said to be unavoidable. The issue of unavoidable accident arises only when the evidence shows that the accident happened from an unknown or unforeseen cause or in an unexplainable manner, which circumstances rebut any alleged negligence.

June 3, 1963

## ADMINISTRATIVE DETERMINATION

Mr. Michael J. Dolan, Jr., 3063 North Main Street, Fall River, Mass., has filed a claim in the amount of \$392.20<sup>1</sup> for personal injury and for damage to his automobile. This claim arises out of an accident involving Mr. Dolan's automobile and a Government-owned vehicle operated at the time of the accident by an employee of the Geological Survey. The claim will be considered under the Federal Tort Claims Act.<sup>2</sup>

The accident occurred on Monday, December 3, 1962, at 6:10 a.m., on the Fall River Expressway, Route 24, one mile north of Route 140, Taunton, Bristol County, Massachusetts. At this location, the Fall River Expressway is a straight and level divided highway with three lanes for northbound traffic and three lanes for southbound traffic. It was dawn and fog was present in patches. There were icy patches on the road.

The claimant was northbound on Route 24 driving at approximately 50 miles per hour, when the automobile in front of him slowed down. Apparently, the first automobile had slowed because another vehicle was overturned on the strip dividing northbound and southbound traffic.<sup>3</sup> The claimant's automobile slid on the ice on the road onto the dividing strip and came to rest facing west immediately off the northbound portion of the highway. While sliding, the right rear door and fender of the claimant's automobile struck the rear of the preceding vehicle.

When Mr. Dolan's automobile came to rest, he got out of the vehicle. The Federal automobile which was also northbound on Route 24 at approximately 50 miles per hour slid on the icy road when the driver applied the brakes after observing the previous accidents. The front

<sup>1</sup> Standard Form 95, Claim for Damage or Injury, submitted by the claimant, lists: "Property Damage \$195"; "Personal Injury \$47"; "Total \$242." However, a list of damages accompanying the form lists:

"\$195.00 Lowest repair bill to car.  
 15.00 Towing charge from scene of accident.  
 20.00 Morton Hospital, Taunton, Mass.  
 20.00 Dr. Witmer, Fall River, Mass.  
 7.00 Prescription from Dr. Witmer.  
 135.20 Loss of wages from Plymouth Rubber, Canton, Mass., due to the accident;

\$392.20 Total Amt. Claimed."

It is obvious that when Mr. Dolan filled out the form, he felt that the caption "Property Damage" covered only the repair cost for his automobile (\$195), and that the caption, "Personal Injury" covered only actual medical expenses (hospital, \$20; doctor, \$20; prescription, \$7; total, \$47). Properly filled out, the form would read "Property Damage-\$210.00" (automobile repair plus towing); "Personal Injury \$182.20" (medical expenses plus loss of wages); Total \$392.20."

<sup>2</sup> 28 U.S.C., 1958 ed., sec. 2671 *et seq.*

<sup>3</sup> Statement of Witness Michael D. M. Westgate.

of the Federal automobile pinned the claimant against the left side of his car near the rear.

The Tort Claims Officer of the Geological Survey states:<sup>4</sup>

Mr. Dolan was able to walk after the accident but complained that his legs hurt. He was taken by the State Police to town for medical treatment (presumably the Morton Hospital, Taunton, Mass.).

The claimant may recover from the Government only for so much of his damages as were caused by a negligent or wrongful act or omission of the Government driver. Any damages that were the result of the claimant's own negligence, or any damages that were the result of an unavoidable accident cannot be recovered from the Government.

Blashfield states:<sup>5</sup>

\* \* \* if either party can avoid an accident by the exercise of proper care it cannot be said to be unavoidable. \* \* \*

In other words the issue of unavoidable accident arises only under evidence showing the accident happened from an unknown or unforeseen cause or in an unexplainable manner, which circumstances rebut defendant's alleged negligence; \* \* \*

Whether the damage to the *right* side of Mr. Dolan's vehicle was the result of anyone's negligence or was the result of an unavoidable accident need not be decided here. That damage was in no manner caused by any act or omission of the Government driver since it occurred before the Government vehicle became involved in the incident. Hence, I deny that part of the claim which pertains to damage to the right side of claimant's vehicle.

The damage to the *left* side of Mr. Dolan's vehicle and Mr. Dolan's personal injuries were caused when the Government automobile struck the claimant and his automobile. Therefore, it will be necessary to decide whether or not this collision was the result of some act or omission on the part of the Government driver for which the Government is liable.

In dealing with an accident in which an automobile slid on an icy road, the Supreme Judicial Court of Massachusetts stated:<sup>6</sup>

The defendant relies on the statement contained in a number of our decisions that "the mere skidding of a motor vehicle, unexplained, is not evidence of negligence." *Sherwood v. Radovsky*, 317 Mass. 307, 308, 57 N.E. 2d 912, 913. But it is equally well settled that skidding may be caused or accompanied by negligence upon which liability may be predicated. *Levin v. Twin Tanners, Inc.*, 318 Mass. 13, 15, 60 N.E. 2d 6; *McKeague v. Henry Jenkins Transportation Co. Inc.*, 323 Mass. 404, 405, 82 N.E. 2d 8. \* \* \* The icy condition of the road made

<sup>4</sup> Memorandum of January 8, 1963, to Assistant Solicitor, Branch of Claims and Contract Appeals, Department of the Interior.

<sup>5</sup> 1 Blashfield, *Automobile Law and Practice*, Part 2, sec. 635 at 486-87 (1948).

<sup>6</sup> *Costello v. Hansen*, 327 Mass. 254, 97 N.E. 2d 738 (1951). Cf. *Kurt A. Rahfs*, T-1194 (April 26, 1963) (Shenandoah National Park, Virginia); *Fred Woodland*, 60 I.D. 252, 254 (1948) (U.S. Highway 66, Navajo, Arizona).

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all driving dangerous. The speed of twenty miles an hour, while moderate under normal conditions, coupled with the inability to control the automobile, could be found indicative of negligence.\* \* \*

The quoted case and those cited within it are clear that while the mere unexplained skidding of a motor vehicle is not evidence of negligence, nevertheless, the skidding may be caused or accompanied by negligence. In order to decide whether or not negligence is present, the skidding must be considered together with all surrounding circumstances.

These circumstances in the case under consideration include:

1. It was dawn, 6:10 a.m., on December 3, 1962.
2. Patches of fog were present.
3. Patches of ice were present.<sup>7</sup>
4. The road was a six-lane, three for northbound and three for southbound traffic, divided highway.
5. The Government vehicle was traveling approximately 50 miles per hour (the speed limit was 60 miles per hour).
6. The Government driver observed the dangerous situation from a distance of 500 feet away.<sup>8</sup>

Driving a motor vehicle at the rate of 50 miles per hour on a road where patches of fog and ice are present is evidence of negligence.<sup>9</sup> This coupled with the Government driver's inability to control the vehicle and avoid the accident even though he saw the danger 500 feet away was negligence on the part of the Government driver.<sup>10</sup> This negligence was the proximate cause of the claimant's personal injury and of the damage to the left side of the claimant's automobile.

Identical or similar statements could be made concerning the claim-

<sup>7</sup> Exactly how much ice was present does not appear in the record. The investigator on Standard Form 91A, Investigation Report of Motor Vehicle Accident, on the check list under "Road Condition" has checked "icy" and added the phrase "icy patches." Under "Describe What Happened" the investigator writes, "Highway was free from ice except in part where multiple accidents occurred." On Standard Form 91, Operator's Report of Motor-Vehicle Accident, the Government driver notes under "Condition of Roadway" that the road was "icy." On Standard Form 95, Claim for Damage or Injury, the claimant states, "I applied the brakes and slid on the icy road." On Standard Form 94, Statement of Witness, Michael Westgate states, "A group of cars traveling north tried to stop on slick ice." In any event it appears that there was enough ice present to be reasonably noticeable. Blashfield (*supra* note 5, sec. 749 at 682-83) says, "Accidents occur more frequently during the months when there is much rain and ice on the roads. In winter, motorists should watch carefully for patches of ice on the highway. On days when the sun has melted the ice on the roads, motorists should be particularly careful when entering shaded areas, as in valleys and in the shadows of buildings. The air is often cold enough to keep the ice frozen where the sun does not reach it, and an automobile may pass suddenly from a nearly dry road to an icy portion, and be thrown into a skid."

<sup>8</sup> Standard Form 91A, Investigation Report of Motor Vehicle Accident.

<sup>9</sup> In the *Costello* case (*supra* note 6), the court said that 20 miles per hour under the existing conditions could be negligence. In *McKeague v. Henry Jenkins Transportation Co.*, 323 Mass. 404, 82 N.E. 2d 8 (1948), the court indicated that negligence could be present even though the vehicle involved was "proceeding at an estimated speed of about fifteen miles per hour."

<sup>10</sup> *Cf.* cases cited in *supra* note 6.

ant's operation of his automobile, and the collision in which the right side of his automobile was damaged. However, the claimant's negligence, if any, in causing that accident, did not contribute to his injuries and damages suffered in the accident involving the Government vehicle. The first accident was entirely over, the claimant's automobile was off of the traveled portion of the road, and the claimant was out of his car and walking around it when the second accident occurred. Therefore, since the claimant's negligence, if any, did not contribute to his personal injuries or to the damage to the left side of his automobile, that "negligence, is without legal consequence,"<sup>11</sup> in considering these items.

The claimant has submitted two itemized estimates of the damage to his automobile. From these estimates it appears that the reasonable cost of repairing the damage to the left side of Mr. Dolan's automobile will be \$132. A towing bill of \$15 has also been submitted. Since the vehicle was involved in two accidents, only one-half (\$7.50) of that will be allowed. Therefore, the total allowable property damage is \$139.50.

Mr. Dolan has submitted the following bills in connection with his personal injury: Morton Hospital, \$20; Dr. Witmer, \$20; prescription, \$7. The claimant alleges that he suffered loss of wages in the amount of \$135.20. However, no verification of loss of wages has been submitted. Therefore, the allowable claimed damages resulting from the personal injury total \$47.

Accordingly, I determine that the accident was due to the negligence of the Government driver, and allow the claim of Mr. Michael J. Dolan, Jr. in the amount of \$186.50 (\$139.50, property damage; \$47, personal injury).

EDWARD WEINBERG,  
*Deputy Solicitor.*

UNITED STATES

v.

CHARLES H. HENRIKSON and OLIVER M. HENRIKSON

A-28763

*Decided June 4, 1963*

**Mining Claims: Patent**

Patent to a mining claim cannot be withheld where it is shown that the claim is still being worked and the sand and gravel therefrom are still being removed and disposed of at a profit in the current market upon the conjecture that very little sand and gravel still remain on the claim.

<sup>11</sup> *Stamas v. Fanning*, 185 N.E. 2d 751 (Mass., 1962).



June 4, 1963

### **Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery**

Where there is no showing that there are within the limits of a mining claim deposits of sand and gravel in sufficient quantities to induce a prudent man to expend his labor and means with a reasonable prospect of developing a valuable operation, there has been no discovery within the meaning of the mining laws.

### **Surface Resources Act: Applicability**

The Surface Resources Act is applicable to mining claims located for sand and gravel prior to July 23, 1955, but not perfected by discovery prior thereto.

### **Mining Claims: Placer Claims**

A 10-acre placer claim consisting of a string of four contiguous 2½-acre tracts straddling three regular 10-acre subdivisions is not thereby invalid as not being in conformity with the public land surveys.

### **Mining Claims: Mineral Lands**

Where a 10-acre placer claim includes land situated within three regular 10-acre subdivisions and a discovery has been made on the land in one 10-acre subdivision, it is not necessary to show that the portions of the claim in the other two 10-acre subdivisions are mineral in character in order to sustain the validity of the entire claim.

#### **APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

The Forest Service, Department of Agriculture, has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated December 2, 1960, affirming a decision by a hearing examiner declaring two mining claims in sec. 28, T. 16 N., R. 16 E., M. D. M., California, within the Tahoe National Forest, to be valid claims.

The first claim, the Squaw Valley Gravel placer mining claim, covering ten acres, was located by Quenton L. Brewer on August 12, 1949, and sold to Charles H. and Oliver M. Henrikson by quitclaim deed dated October 23, 1953. The second claim, the Squaw Creek placer mining claim, covering 20 adjoining acres, was located by the Henriksons on March 6, 1953.

Application for a mineral patent covering the two claims was made on August 29, 1957, and, by decision dated July 17, 1958, portions of the Squaw Creek claim were declared null and void because those portions (parts of Forest lots 46, 48, 50 and 52) were in private ownership and not subject to the mining laws of the United States (30 U.S.C., 1958 ed., sec. 21 *et seq.*). Thereafter, the claimants amended their application for patent to eliminate the lands covered by the Squaw Creek location in private ownership.

On January 27, 1959, the Forest Service recommended the initiation of a contest against both claims on the ground, among others, that minerals have not been found within the limits of each claim in suffi-

cient quantity to constitute a valid discovery. The contest was brought and a hearing had on the validity of the claims. The hearing examiner found that a discovery has been made on both claims.

The Forest Service contends that the Squaw Valley claim has been mined out so that any discovery which may have been made thereon has been lost, and therefore the claimants are not entitled to a patent covering this claim. As to the Squaw Creek claim, the contention is made that there was no discovery of sand and gravel on this claim prior to July 23, 1955, when deposits of common varieties of sand and gravel were declared not to be valuable mineral deposits within the meaning of the mining laws so as to give validity to mining claims thereafter located for such common varieties (30 U.S.C., 1958 ed., sec. 611).

The record made at the hearing has been carefully reviewed and while the evidence presented fully supports the finding of the hearing examiner that a discovery was made prior to July 23, 1955, on the Squaw Valley claim, the evidence does not, in our opinion, support the finding that a discovery was made on the Squaw Creek claim prior to that date.

Before discussing the Squaw Creek claim, we shall consider the Forest Service contention that the Squaw Valley claim has been mined out.

The evidence shows that at the time of the hearing, in July 1959, almost two years after the patent application was filed, the claim was still being worked and while the estimates given by the witnesses for the contestant and for the contestees differ widely as to the amount of sand and gravel still remaining on the claim, all admit that there is still some sand and gravel on the claims. The contestees testified that this sand and gravel is being extracted and sold at a profit in the present market and the Forest Service has not refuted this.

The situation here is not the same as that dealt with in *United States v. Lem A. and Elizabeth D. Houston*, 66 I. D. 161 (1959), upon which the Forest Service relies. In the *Houston* case, there was no evidence of recent mining activities. The claims had been mined out long before the patent application was made. There it was 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.

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Here, at the time the patent application was made and at the time of the hearing, a paying mine had been developed on the claim and the products of the claim were still being extracted, removed, and sold at a profit to meet the current demand for sand and gravel.

In the circumstances, the conjecture that there is very little sand and gravel remaining on the claim cannot defeat the issuance of a mineral patent.

The hearing examiner apparently based his finding of discovery on the Squaw Creek claim partly on the fact that the claims are contiguous and partly on the fact that some sand and gravel has been sold from the Squaw Creek claim. He stated:

\* \* \* Since these claims are contiguous claims, it is not required that pits be operated on both claims simultaneously or in competition with each other as argued. It is only necessary that it be demonstrated that the materials from each of the claims exist and that they may be sold at a profit. This was demonstrated by the testimony of witnesses that they have removed and sold from the Squaw Creek Placer Claim at least 20 cubic yards of sand and gravel in conjunction with their operation of the Squaw Valley Placer Claim and that an additional amount of top soil has been removed and sold from the Squaw Creek Placer Claim. Thus marketability had been established prior to July 23, 1955.

However, a discovery on one claim does not inure to the benefit of an adjoining claim. Valuable mineral deposits must be found within the limits of each claim (30 U.S.C., 1958 ed., secs. 23, 35). Thus, unless it is shown that there was a discovery on the Squaw Creek claim prior to July 23, 1955, the claim is without validity.

More is required to validate a claim for sand and gravel than merely to see or uncover the sand and gravel on the public domain and file a claim thereon. Before such a claim has any validity it must be shown that the sand and gravel are of a quality acceptable for the type of work being done in the market area, that the extent of the deposit is such that it would be profitable to extract it, and that there is a present demand for the sand and gravel. *United States v. Everett Foster et al.*, 65 I.D. 1, 5 (1958).

There is nothing in the present record to suggest that before July 23, 1955, any attempt had been made to determine the extent of the sand and gravel on the claim.

All that the record shows is that the Henriksons worked the Squaw Valley claim under Brewer for some time and then purchased that claim. One of the claimants testified: "And then we took an adjacent claim there because there was gravel over there, too, and rather than be limited, we figured we had better have another 20 acres there \* \* \*." (Tr. 331.) The claimants built a road into the Squaw Creek claim and made a canal running from the Squaw Valley to the Squaw

Creek for the purpose of draining water from the washing plant then located on the Squaw Valley claim. Both the road and the canal entailed the removal of trees from the Squaw Creek claim (Tr. 335). These improvements were apparently made in 1953, shortly after the claim was located (Tr. 357, 359). The claimants themselves admitted that most of the test holes on the Squaw Creek were "dug recently" (Tr. 358, 364) and that they were dug out of curiosity to see what kind of gravel was down there (Tr. 343); that some of these holes were dug in 1956 and 1957 on behalf of the Olympic Committee (Tr. 299) and that the material taken from these test holes dug for the Committee was good (Tr. 394) and that 6,550 cubic yards of overburden were removed from the claim by stripping. The record is ambiguous as to when that stripping took place. One of the claimants testified that "there are areas that we have excavated on the Squaw Creek Placer area for the development work that I have not mentioned, and that has been overgrown with grass, as shown by the photographs, bushes and the like, which cannot be readily observed at this date, but was done long ago, so we have done improvements on both claims, fully being aware of the requirements, although they are contiguous claims \* \* \*" (Tr. 403).

There was read into the record a part of a deposition made by Oliver M. Henrikson in connection with private litigation (Contestant's Exhibit N), in which Henrikson testified that they had removed gravel from the claim in 1956 and 1957. When asked whether gravel was removed in 1955, Henrikson's reply was "I assume some gravel was removed, yes. We had [to] maintain—[our annual assessment work]." (Tr. 435, 436.) Henrikson also testified that they had sold gravel from the claim but he had no idea of how many cubic yards had been sold since they acquired the claim (Tr. 436).

Charles Henrikson testified that he did not know when the excavations on Squaw Creek were commenced. "We had been digging away at that with a loader for a year or so before to see what we have down there." (Tr. 358.)

Referring to an area within the Squaw Creek claim from which certain material had been removed, Henrikson testified: "We take off the soil, you know, maybe eighteen inches of soil there, and till, and in order to do certain improvement work, you had to take out the material, so we just at random brought our loaders in there and took out several loads and put it through the screening plant and took it off the Squaw Creek Placer." (Tr. 358.) Later, Henrikson testified that gravel (approximately 20 loads) had been taken from the claim "over a number of years" (Tr. 361).

Nowhere in the record is there any indication that, prior to July 23, 1955, the claimants had done anything to determine whether the sand

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and gravel which they found on the claim, apparently by casual observation, existed in such quantities that its removal would be worthwhile. That its quality may have been similar to that found on the Squaw Valley claim is not enough if there was not shown, by July 23, 1955, to be present on the claim a sufficient quantity to persuade an ordinarily prudent man to expend his labor and means, with a reasonable prospect of developing a valuable sand and gravel operation. The fact that an additional requirement is made with respect to claims located for sand and gravel and other minerals of wide-spread occurrence, i.e., that there must be present marketability (*Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959)) does not relieve the claimants from making such a showing. Marketability alone will not suffice (*United States v. Quenton L. Brewer et al.*, A-27908 (December 29, 1959); Solicitor's opinion, M-36295 (August 1, 1955)).

The appellees' argument that the act of July 23, 1955, is not applicable to this claim since the act applies only to claims thereafter located is not sound. The Department has recently held that the act is applicable to lands included in mining claims located prior to that date but not perfected by discovery prior thereto. *United States v. Kenneth F. and George A. Carlile*, 67 I.D. 417 (1960).

Therefore, as the mining claimants did not show that the Squaw Creek claim was validated by discovery prior to July 23, 1955, the claim must be declared null and void and the patent application covering this claim must be rejected.

Two remaining contentions of the Forest Service require consideration. One is that the claims as located do not conform to the public land surveys in that they are long and narrow, wholly unrelated to the usual square subdivisions. The second is that if a discovery is found to exist anywhere on either claim, the legal subdivisions, outside of the subdivision on which there has been discovery, cannot be included in the patent unless they are shown to be mineral in character.

As we have found that there has been no discovery on the Squaw Creek claim, the contentions of the Forest Service will be considered only as they relate to the Squaw Valley claim.

The location notice covering the Squaw Valley claim identifies the ten acres included in the claim as the  $NW\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$ , the  $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$ , and the  $NE\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$  of sec. 28, T. 16 N., R. 16 E., M.D.B. & M., California. Thus the claim is 1,320 feet long and 330 feet in width. It covers portions of two quarter-quarter sections of sec. 28 and embraces portions of three 10-acre subdivisions of the  $SE\frac{1}{4}$  of the section.

The mining laws provide that:

Claims usually called "placers," \* \* \* shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. (Rev. Stats. sec. 2329; 30 U.S.C., 1958 ed., sec. 35.)

\* \* \* Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May, 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; \* \* \*. (Rev. Stats. sec. 2331; 30 U.S.C., 1958 ed., sec. 35.)

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; \* \* \*. (Rev. Stats. sec. 2330; 30 U.S.C., 1958 ed., sec. 36.)

The pertinent regulations provide that under the authority of the provision last quoted the 10-acre tracts subdivided out of the 40-acre legal subdivisions should be considered and dealt with as legal subdivisions and that an applicant having a placer claim which conforms to one or more of such 10-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat. 43 CFR 185.26.

The regulations also require that placer claims

\* \* \* shall conform as near as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands. 43 CFR 185.28(a).

\* \* \* \* \*

Where a placer location by one or two persons can be entirely included within a square 40-acre tract, by three or four persons within two square 40-acre tracts placed end to end, by five or six persons within three square 40-acre tracts, and by seven or eight persons within four square 40-acre tracts, such locations will be regarded as within the requirements, where strict conformity is impracticable. 43 CFR 185.28(c).

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case, and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the Government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. (Snow Flake Fraction Placer, 37 L.D. 250 (1908.) 43 CFR 185.28(d).)

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The Departmental decision cited in the regulation, rendered on November 14, 1908, reviewed at some length the past practices of the Department. It found that, relying on early decisions of the Department (*William Rablin*, 2 L.D. 764 (1884), and *Pearsall and Freeman*, 6 L.D. 227 (1887)), placer miners had located claims of every conceivable form and that placer claims of all shapes and forms had been presented and approved for patent, with little or no attention being given to the conformity provision of the statute. In reviewing the disallowance of patent in the case of *Miller Placer Claim*, 30 L.D. 225 (1900), wherein the claim covered two large tracts of land over three miles apart connected by a narrow strip of land over three miles long, apparently from 30 to 50 feet wide, it said:

\* \* \* The Department disallowed the claim because it not only failed to approximately conform to the United States system of public land surveys and the rectangular subdivisions thereof but appeared to be totally at variance with such system, holding that the law affords no warrant for cutting the public lands into lengthy strips of such narrow width and such great length, whether the claim be located on surveyed or unsurveyed lands. (37 L. D. 253.)

The Department found, however, after noting other decisions on the subject, that it had observed a more rigid interpretation of the letter of the mining law than was warranted by a just regard for the mining conditions and customs and the interests in harmony therewith which must have been within the legislative contemplation.

After reviewing the amendment to the mining law made in 1872 (*Rev. Stats. 2331, supra*), the Department said:

\* \* \* It not only waives further survey and plat when locations upon surveyed lands conform to legal subdivisions but impliedly contemplates cases of non-conformity. The act also by necessary implication recognizes locations upon unsurveyed lands. Then follows the broad provision that "All placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such survey;" clearly meaning that these limitations shall apply whether the locations be upon surveyed or unsurveyed land. (P. 256.)

The Department concluded:

Each case presented must be considered and decided on its own facts. Conformity is required if practicable. In the interest of wise administration and under the power which we think Congress has vested in this Department in the phrase "shall conform as near as practicable," taken from section 2331, *supra*, and in order to keep claims in compact form and not split the public domain into narrow, long and irregular strips, and to provide for a less harsh rule than that which has been followed recently, and to cover cases where strict conformity is impracticable, it is the view of this Department that a claim hereafter located by one or two persons which can be entirely included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts placed end to end, and

a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts, should be approved. In stating this rule it is necessary to say that we do not intend that the forties which are made the unit of measure should necessarily have north-and-south and east-and-west boundary lines. Thus, no inordinately long and narrow claim could be patented, and no locator would be compelled to include non-placer ground unless he so desired, as was permitted in the case of Hogan and Idaho Placer Mining Claims, *supra*. (Pp. 258-59.)

While the claim here under consideration does not conform to the usual 10-acre legal subdivision, we do not believe that it comes within the scope of such a claim as was considered in the *Miller* case or that the allowance thereof would cut the public domain into long, narrow, or grossly irregular or fantastic shape. The claimants show that the land on the north of the claim is patented and that the claim is bounded east and west by mountains. They assert that the claim was located to cover the terminal moraine in which the sand and gravel is found. And, it is to be noted, the Squaw Valley claim can be encompassed within a square 40-acre tract.

We do not agree with the other contention of the Forest Service as it relates to Squaw Valley. This contention, as indicated earlier, is that since the claim straddles three regular 10-acre subdivisions ( $NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$ ,  $NE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$ , and  $NW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$ ) the portion of the claim in each of the regular 10-acre subdivisions must be shown to be mineral in character, although the entire claim comprises only 10 acres.

We do not believe that the departmental decision cited by the Forest Service supports its position. In that case, *American Smelting and Refining Company*, 39 L. D. 299 (1910), the Department was concerned with an application for patent covering nine claims, eight of which embraced 160 acres each and the other over 155 acres. Of the total acreage applied for, 1425.194 acres, a report of a special agent indicated that over one-third, or 517.6 acres, consisting of various amounts in seven of the claims, were not mineral lands. On the basis of that report the Land Office directed proceedings against those lands, specifically described by 10-acre tracts in each of the claims, on the ground that those tracts were not mineral in character. The company resisted the proceeding, urging that the order directing the hearing was unwarranted. The Department quoted with approval from an earlier decision (*Ferrell et al. v. Hoge et al.*, on review, 29 L. D. 12, 15 (1899)):

Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location



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of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is covered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of non-mineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these mineral claimants were sustained.

In answer to another contention by the company that 20-acre tracts should be the unit of investigation and elimination, the Department said:

\* \* \* The statute, mining regulations, and decisions clearly contemplate that a placer location may be made of a 10-acre tract in square form. If such a tract, whether in a location by itself or included with other such tracts in a maximum location, is proven to be nonplacer ground, such tract can not pass to entry and patent under the placer application. (39 L. D. 299, 301.)

The Department then reviewed the mining regulations and decisions and held:

In accordance with the foregoing it has been the practice of the land department to order hearings upon protest charging the non-mineral character of lands embraced in applications for placer patents and to investigate and determine the actual character of such lands, when called in question, and to eliminate the adjudged non-mineral land from the placer claim by rejecting the placer application or cancelling the entry *pro tanto*. (39 L. D. 299, 304.)

In the case of the Squaw Valley claim, the Forest Service challenged the mineral character of the claim, which embraces only 10 acres in all. The charge was not sustained. A discovery was shown to exist within the confines of the 10-acre tract and we believe that is sufficient to validate the entire claim. The situation is not at all analogous to the *American Smelting* case, *supra*, which dealt with association claims 16 times the size of the Squaw Valley claim and which ordered a hearing to test the character of the lands in question. As noted above, a hearing was had in this case and the charge that this 10-acre tract is nonmineral in character was not proved.

In the circumstances of this case, we believe that no violence to the mining laws would be done by permitting the Squaw Valley claim to go to patent.

The Forest Service requested an opportunity to present oral argument in support of its appeal covering the two claims. However, as the decision in this case turns upon the evidence adduced at the hearing and upon the proper application of the mining laws to the facts and as the Forest Service has fully set forth its analysis of the evi-

dence and the law no useful purpose would be served by hearing oral argument. Accordingly, its request is denied.

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, insofar as his decision affirmed the holding of the hearing examiner that the Squaw Valley Gravel placer mining claim is a valid claim, entitled to patent, is affirmed and his decision, insofar as it upheld the hearing examiner in declaring the Squaw Creek placer mining claim to be a valid claim, is reversed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

### APPEAL OF RICHEY CONSTRUCTION COMPANY

IBCA-187

*Decided June 18, 1963*

Rules of Practice: Appeals: Generally—Rules of Practice: Evidence—Rules of Practice: Hearings

Where the Board of Contract Appeals finds, upon the basis of newly discovered evidence presented at a rehearing, that its prior decision was based largely on testimony that has been discredited, the prior decision will be vacated and the appeal will be remanded to the contracting officer for appropriate action.

#### BOARD OF CONTRACT APPEALS

By letter dated November 15, 1958, the contracting officer terminated the contractor's right to proceed under the above-entitled contract. The contractor appealed timely. A hearing in that appeal was held on December 7, 8 and 9, 1959, at Phoenix, Arizona. On April 8, 1960, the Board affirmed the decision of the contracting officer (IBCA-187).<sup>1</sup> Upon appellant's request for reconsideration, a rehearing was granted by order of the Board dated August 9, 1962. The rehearing was held in Phoenix, Arizona, on November 26, 1962.

At the rehearing, the evidence adduced, including testimony of Mr. Knighton, an authorized representative of the contracting officer, showed that Mr. Knighton had received favors in the purchase of an automobile from an affiliate of the Northeast Engineering Company, which was awarded the successor contract for the completion of the work under appellant's terminated contract. That company also furnished him with a gasoline credit card. Some significant excerpts from Mr. Knighton's testimony follow:

A. The price on the ticket the companies put out on the window was twenty-eight hundred dollars and something, and the price that they gave me was twenty-three hundred and some odd dollars—\$2,304.10, I think it was.

<sup>1</sup> 67 I.D. 118, 60-1 BCA par. 2554; 2 Govt. Contr. 277.

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Q. In other words, there was a \$500.00 discount on this automobile someplace?

A. If you want to call it a discount, yes.<sup>2</sup>

Concerning the credit card for purchase of gasoline, furnished by Northwest Engineering Company, Mr. Knighton testified<sup>3</sup> that he accepted the card from Mr. Baker, the company's superintendent, on the insistence of the latter as a matter of friendship, but never used the card and never charged any gasoline to the company.

The automobile transaction took place in December of 1958,<sup>4</sup> while the credit card was issued in August or September of 1960.<sup>5</sup>

None of the information as to these matters was available to the Board (or to the appellant) at the time of the Board's decision of April 8, 1960.

The Board takes official notice that departmental disciplinary proceedings were instituted against Mr. Knighton and that he was suspended from pay and duty status for a total of fifteen days as a result of the car purchase and gasoline credit card incidents.

The Board's decision of April 8, 1960, rested largely on the testimony given by Mr. Knighton at the hearing of December 7, 8 and 9, 1959, and on records maintained by him. In that decision, Knighton was described as being one of the two principal witnesses for the Government, and as being "the highway construction engineer who, as authorized representative of the contracting officer, supervised the contract work."<sup>6</sup> The "operational limitation" which was a crucial issue before the Board "was imposed by Knighton."<sup>7</sup> "Knighton himself admitted that during the whole of his long career as a road construction engineer he had never imposed any limitation on the operations of a road construction contractor."<sup>8</sup> The Board had recognized that "the evidence is particularly conflicting with reference to the effect of the operational limitation on the appellant's grading operations,"<sup>9</sup> but decided the issue in favor of the Government since it considered Knighton's testimony completely creditable.<sup>10</sup> There are numerous other instances in the Board's decision which indicate the reliance of the Board on Knighton's testimony.<sup>11</sup>

Knighton's testimony is now seriously discredited in the light of the circumstances suggesting partiality and impropriety as described above.

The Indian Affairs Manual for several years prior to the dates of the incidents involved in the disciplinary proceedings contained explicit instructions to employees prohibiting the acceptance of gratuities or favors.<sup>12</sup> These regulations of the Bureau of Indian Affairs governing conduct of employees are consonant with the policies and regulations of the Department of Interior on the subject.<sup>13</sup>

<sup>2</sup> Tr. 113.

<sup>3</sup> Tr. 93, 94.

<sup>4</sup> Tr. 109.

<sup>5</sup> Tr. 120.

<sup>6</sup> 67 I.D. 121.

<sup>7</sup> 67 I.D. 122.

<sup>8</sup> 67 I.D. 124.

<sup>9</sup> 67 I.D. 123.

<sup>10</sup> 67 I.D. 127.

<sup>11</sup> e.g. 67 I.D. 127, 131.

Footnotes<sup>12</sup> and <sup>13</sup> on page 224.

The applicability of conflict-of-interest provisions such as these is not limited to situations where actual corruption can be proved. As said by the Supreme Court of the United States in *United States v. Mississippi Valley Generating Company*:<sup>14</sup>

\* \* \* The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. \* \* \*

While this passage has to do with the construction of a statutory prohibition, its rationale is equally applicable to the construction of the administrative prohibition here involved.

Since one of the primary bases of the Board's decision of April 8, 1960 has been seriously weakened, the decision cannot stand. That decision is hereby vacated.

#### Conclusion

The appeal is remanded to the contracting officer for appropriate action consonant with the views expressed in this opinion.<sup>15</sup>

THOMAS M. DURSTON, *Member.*

WE CONCUR:

PAUL H. GANTT, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

<sup>12</sup> Volume IV, Part IV, Chapter 9, Conduct of Employees, Section 902.01 (Effective November 7, 1951) reads as follows:

"01. *Manner of Performance.* Each employee should perform all duties for the Bureau in a manner that will:

"K. Maintain all Federal dealings above reproach, free from any indiscretions, gratuities or favors that would cast doubt or suspicion upon himself or the administration of the Bureau and refrain from using his official position unethically to advance his personal interests or those of friends."

<sup>13</sup> Department of the Interior Supplement to the Federal Personnel Manual, Chapter ID-C2, Conduct of Employees (March 5, 1951) contains verbatim, except for use of the word "Department" in lieu of "Bureau," the same language as that set forth in note 12, *supra*. See also, memorandum dated May 10, 1956, from the Administrative Assistant Secretary, subject: Department Policy as to gift acceptance and bestowal.

<sup>14</sup> 364 U.S. 520, 549-50 (1960).

<sup>15</sup> There are several courses of action available to the contracting officer. Among these are: (a) he may issue another findings of fact and decision in which the question of whether the contract was rightly terminated for default is reexamined and reevaluated in the light of the partiality and impropriety suggested by the favors which the Board has found, were received by Mr. Knighton; (b) he may convert the termination for default into a termination for convenience and negotiate a settlement agreement consonant with the guide lines laid down in *Foster Wheeler Corporation*, IBCA-61 (January 26, 1960), 67 I.D. 22, 26-27, 60-1 BCA par. 2481, 2 Gbvt. Contr. 97.

## PAUL GORDON

## AMERADA PETROLEUM CORPORATION

A-29332

*Decided May 2, 1963\****Oil and Gas Leases: Extensions—Withdrawals and Reservations: Generally**

Although a departmental regulation precludes the acceptance of oil and gas offers to lease lands within wildlife refuges and by departmental order certain lands within existing oil and gas leases are made a part of a refuge, applications for the five-year extension of such leases should not be rejected on the ground that such lands have been withdrawn, when none of the actions taken by the Department with respect to the lands purports to be a withdrawal of such lands from the operation of the Mineral Leasing Acts.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Paul Gordon and Amerada Petroleum Corporation have each appealed to the Secretary of the Interior from a decision by the Acting Chief, Division of Appeals, dated August 31, 1961, affirming separate land office decisions which rejected in part Gordon's application (BLM-A 035488-A (Mont.)) and Amerada's application (BLM-A 035488-B (Mont.)) for a five-year extension of the leases then held by each. The reason for the partial rejection was that certain lands in the leases had been withdrawn as a wildlife refuge and thus the leases were not entitled to extension as to such lands pursuant to regulation 43 CFR 192.120(d).<sup>1</sup>

The base lease, BLM-A 035488, was issued effective June 1, 1956. Subsequently, by partial assignments the lease was segregated into the leases involved in this appeal. The lands designated as being within the wildlife refuge were formerly under the jurisdiction of the Department of Agriculture but were transferred to this Department by Executive Order No. 10787, effective November 6, 1958 (23 F.R. 8717). Thereafter, by Interior Departmental Order 2843 (published November 25, 1959, 24 F.R. 9488), jurisdiction over the lands here involved was transferred to the Bureau of Sport Fisheries and Wildlife for purposes of administering the lands under appropriate

\* Not in chronological order.

<sup>1</sup> That regulation is based upon the provisions regarding the single five-year extension in section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). These provisions are applicable to these leases, although the lands are acquired lands, since the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., sec. 352) authorizes the leasing of such lands upon the same conditions as contained in the leasing provisions of the Mineral Leasing Act.

laws as refuges for migratory birds and other wildlife. The order stated that the lands will be administered as an addition to the Lake Mason National Wildlife Refuge.

The Acting Chief concluded that the lands designated as an addition to this refuge are considered as effectively withdrawn within the meaning of regulation 43 CFR 192.120(d). That regulation provides that where upon the expiration of the initial five-year lease term the leased lands or any part thereof have been withdrawn from leasing the lease will not be extended as to such lands, except that a withdrawal shall not affect the right to an extension if drilling operations were being diligently prosecuted on the expiration date of the lease, or "if notice of the withdrawal has not been sent by registered mail to each lessee to be affected thereby, at least 90 days prior to the termination date of the lease."

The Acting Chief also indicated that the notices required by this regulation were sent to the lessees 16 months before the leases were to terminate, and that such notices were adequate notices of the withdrawal even though they erroneously indicated, in relation to the provision above regarding the conducting of drilling operations, that drilling operations had to be commenced before November 17, 1959.

Both appellants contend that the error in the notice made it defective and that thus the leases are entitled to extension for that reason. They have also made other contentions relating to the authority of the Secretary to withdraw these lands from leasing so as to preclude their right to an extension, and also as to whether the Secretary did, in fact, so withdraw the lands.

There is, as the appellants have contended, a statutory and contractual right to an extension under the conditions and terms of the statute, regulations, and lease. See Solicitor's opinion, 62 I.D. 177 (1955), but compare *Seaboard Oil Co.*, 64 I.D. 405 (1957). The conditions which would preclude the extension relied on by the Bureau were the cited withdrawal, the giving of the notice, and the lack of drilling operations at the termination of the lease. It is unnecessary to resolve many of the appellants' contentions as it appears that the determinative issue here is whether the Secretary did, by Departmental Order 2843 and also by regulation 43 CFR 192.9 cited by the Bureau or any other action, effectually make a withdrawal of the lands within the meaning of the regulation referred to by the Bureau and section 17 of the Mineral Leasing Act, *supra*, fn. 1.

The effect of Departmental Order 2843 was to add the lands involved here to the wildlife refuge by transferring jurisdiction to the Bureau of Sport Fisheries and Wildlife. However, there was nothing in the

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language of the order purporting to withdraw the lands from oil and gas leasing. Therefore, the adding of the lands to the refuge by that order did not, of itself, constitute a removal of the lands from the operation of the Mineral Leasing Acts where there was no such exclusionary language in the order. See *James K. Tallman et al.*, 68 I.D. 256 (1961).

With respect to oil and gas leasing on wildlife refuges the Department has issued regulation 43 CFR 192.9 which states as the leasing policy and procedure of the Department that no offers for oil and gas leases will be accepted and no leases covering lands within the refuges will be issued except in certain circumstances not relevant here. The Bureau relied on this regulation for its action in rejecting the applications for extension. Although the regulation did set forth a policy regarding the acceptance of lease offers, there is no language regarding extensions of existing oil and gas leases. A discussion of the regulation is set forth in a decision, *Richard K. Todd et al.*, 68 I.D. 291 (1961). In that decision the Department indicated that the Secretary was not purporting to withdraw lands from oil and gas leasing or exercising any authority to withdraw lands but that in exercise of the Secretary's discretionary authority to issue leases the regulation established a departmental policy to reject oil and gas lease offers for lands within the refuges. Thus the regulation cannot be considered as a withdrawal nor can the action of the land office in sending the notices be considered as a withdrawal of the lands since it was not in accordance with the established procedures for making a withdrawal. See *Richard K. Todd, supra*.

Thus there was no reason for refusing to extend the leases and it was error not to do so. This determination does not preclude the Bureau from requiring of the lessees any stipulations which may be necessary for the protection of the refuge.

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 appealed from is reversed and the cases are remanded to the Bureau of Land Management for further appropriate action consistent with this decision.

ERNEST F. HOM,  
Assistant Solicitor.

## HOPE NATURAL GAS COMPANY

A-29371

*Decided June 25, 1963***Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Description of Land**

An oil and gas lease offer for unsurveyed, acquired land which fails to include a metes and bounds description of the land sought for leasing but describes the land by tract numbers is not defective for failure to include a metes and bounds description, with the courses and distances between successive angle points on the boundary, unless the deed under which the land was acquired fails to include such a description.

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Description of Land**

An oil and gas lease for unsurveyed acquired land is not defective because it is not accompanied by a map or plat showing the location of the land applied for within the administrative unit or project of which it is a part, but the offeror may be required to submit a satisfactory showing of such a map or plat.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Hope Natural Gas Company has appealed to the Secretary of the Interior from a decision dated January 10, 1962, by the Division of Appeals, Bureau of Land Management. The appeal arises from the following facts:

Fifteen tracts of land within the Monongahela National Forest in Tucker and Randolph counties in West Virginia were previously leased for oil and gas purposes. When the previous leases terminated by operation of law on March 31, 1961, the land office, pursuant to departmental regulation 43 CFR 192.43, posted a notice announcing the availability of the tracts for oil and gas leasing. The Company filed seven different offers for the tracts (BLM-A 057005 through 057011). Eighteen other persons filed fifty-three different offers for these same tracts and, because the offers were filed during the simultaneous filing period, a drawing was held as a result of which priorities were established for eight different groups of offers. The Company's offer 057011 was awarded first priority for the eighth group and those of other offerors, for the other groups.

The Company filed a protest alleging that all of the offers, except its own, were deficient. It grouped the protested offers in three categories: (1) those that designated the land by tract number only and did not contain any deed or recording information and were not accompanied by maps; (2) those that designated the land by tract number only but contained information concerning the deed by which the United States had acquired it and the recording of the deed but



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were not accompanied by any maps; and (3) those that designated the land by tract numbers only but contained deed and recording information and were accompanied by maps showing the location of the tracts in the different areas of the national forest. The Company contended that all these offers did not satisfy the requirements of the applicable departmental regulation, 43 CFR 200.5(a), which provides that—

Each offer \* \* \* must contain \* \* \* a complete and accurate description of the lands for which a lease or permit is desired. \* \* \* If not so surveyed [under the rectangular system of public land surveys] and the tract is not within the area of the public land survey,<sup>1</sup> \* \* \* it must be described in a manner consistent with the description in the deed under which it was acquired, amplified where the deed description does not supply them, to include the courses and distances between the successive angle points on the boundary of the tract, and adequately shown on a plat or map to permit its location within the administrative unit or project of which it is a part. In all cases 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 land, (ii) the names of the persons who conveyed the lands to the United States, (iii) the date of such conveyance, and the place, liber and page number of its official recordation.

The Company contends that all the protested offers have a common defect in that none "described" the land applied for but merely "designated" it by reference to the tract number or numbers given the land when it was acquired by the United States. The Company contends that some of the protested offers have a second fatal defect in that they were not accompanied by maps or plats showing the location of the land applied for within the administrative unit or project of which it is a part. Both requirements, the Company asserts, are plainly spelled out in the regulation.

The land office rejected the first ground of protest but sustained the second ground, holding that the offers submitted, which were not accompanied by the required maps or plats, were defective. The Division of Appeals rejected the protest as to both grounds.

Essentially the same contentions made by the Company here have recently been considered in the case of *Merwin E. Liss et al.*, BLM-A-045569, etc. They were rejected by the Director of the Bureau of Land Management in a decision dated May 31, 1963, approved by Assistant Secretary Carver on June 7, 1963, 70 I.D. 231. The Department held

<sup>1</sup> "Lands within the area of the public land surveys are those north and west of the Ohio and Mississippi Rivers (except Texas) and in the States of Mississippi, Alabama, Florida, and Alaska."

in that decision that a description of land by its tract number is sufficient and that the land need not be described in an offer by metes and bounds, giving courses and distances between successive angle points on the boundary, if such courses and distances are given in the deed under which the land was acquired by the United States. The Department also held that the regulation does not plainly require an offeror to accompany his offer with a map or plat showing the location of the land in the administrative project or unit in which the land is situated.

The Department held that an offeror who did not give a metes and bounds description in his offer could be required to furnish proof that such a description was contained in the deed or deeds of acquisition and that his offer would be defective if the deeds did not contain such a description. Offerors Liss and Wasserman in that case were required to furnish such proof. Likewise, the holders of the protested offers here should be and will be required to furnish such proof in order to establish the validity of their offers as to this requirement.

So far as furnishing a map or plat is concerned, in the *Liss* case *supra*, it was found sufficient that the offers of Liss and Wasserman contained a reference to the official status map on file with the Forest Service. In fact they had furnished a copy of the official status map with one of their offers. I believe that, as with the requirement for a metes and bounds description, an offeror who does not furnish a map or plat with his offer may properly be required to prove that the land for which he has applied is adequately shown on a plat or map so as to permit its location within the administrative unit or project of which it is a part. The simplest way to do this, of course, would be to furnish a copy of such map or plat, but it may be possible to make a satisfactory showing in some other manner.

Accordingly, upon the return of this case to the Division of Field Services land office, each of the offerors whose offer has been protested should be afforded a reasonable period of time to furnish such showing as is necessary to qualify his offer insofar as the two requirements discussed in this decision are concerned.<sup>2</sup>

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 appealed from is affirmed as

<sup>2</sup>The offers which were not drawn first and were rejected for that reason, subject to reinstatement in the event a prior offer should not prove to be qualified, will not be reinstated if a prior offer is accepted. It may not be necessary to prove the validity of such offers unless and until they are reinstated. However, it is not intended in this decision to spell out or prescribe the exact procedure that should be followed as to each case. This decision holds merely that the offers protested were not necessarily defective at the time when they were filed for the reasons asserted by the Company.

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modified and the case is returned for further appropriate action in accordance with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

May 31, 1963

Merwin E. Liss  
Jacob N. Wasserman  
New York State Natural Gas Corporation

New York State Natural Gas Corporation has appealed from a decision dated December 19, 1962, of the Chief, Minerals Adjudication Section, Division of Field Services Land Office, dismissing its protest against certain noncompetitive acquired lands fractional interest oil and gas lease offers of Merwin E. Liss (BLM-A 045569 filed November 15, 1957, and BLM-A 045920 and 045921 filed January 7, 1958) and of Jacob N. Wasserman (BLM-A 047587 and 047588 filed September 4, 1958), which predate and conflict with lease offers of appellant (BLM-A 065609 through 056614 filed September 10, 1962).

The issue presented on appeal is whether or not the descriptions of lands contained in the lease offers protested against meet the requirements of 43 CFR 200.5(a), as amended on May 22, 1959 (Cir. 2017, 24 Fed. Reg. 4141).<sup>1</sup>

Although it is contended by appellant that the descriptions contained in appellees' lease offers were defective both prior to and following the amendatory change in 43 CFR 200.5(a) on May 22, 1959, we find it unnecessary to rule upon the earlier status of these descriptions for the reason that their sufficiency must be determined in accordance with the regulatory provisions in force at the time the lease offers were first considered otherwise valid (see Footnote 1, *supra*), notwithstanding the fact that the appellees had not been apprised of the amendatory change and had not been given an opportunity to comply with the new regulation.<sup>2</sup>

<sup>1</sup> In its protest appellant contended that appellees' lease offers were defective in two other respects and that these defects were not finally cured by appellees until October 10, 1960. By that date, appellant stated, the regulation governing land descriptions in lease offers had been amended by Circular 2017 (on May 22, 1959) to require more information than had been previously required, with the result that appellees' land descriptions were rendered defective, if they were not already defective under the provisions of the regulation in effect at the time the lease offers were originally filed. The land office decision sustained appellant's protest concerning the existence of the two other defects and the date as of which these defects could be considered cured. This holding stands unchallenged by appellees who, in fact, appear to concur in it. Since upon examination of the facts and the applicable law we think that portion of the decision to be correct, further discussion thereof is considered unnecessary.

<sup>2</sup> The land office decision misconceived the law in this respect. See *Genia Ben Ezra*, 67 I.D. 400 (November 16, 1960).

Under the cited amended regulation, the two requirements for the land description, where the lands are not surveyed under the rectangular system of public land surveys, are as follows:

(1) It must be described in a manner consistent with the description in the deed under which it was acquired, amplified where the deed description does not supply them, to include the courses and distances between the successive angle points on the boundary of the tract, and

(2) It must be adequately shown on a plat or map to permit its location within the administrative unit or project of which it is a part.

The record reveals the lease offers in question to contain descriptions wherein reference is made to the various entire tracts applied for by the official tract number together with the acreage comprising each tract, with further reference to "the official status map [upon which these tracts are shown] for LU project PA-4, Site 3, Bedford County, Pennsylvania, on file with the Forest Service, Department of Agriculture, Washington, D.C." One of the Liss offers, BLM-A 045569, contained a copy of the official status map.

In connection with the first requirement enumerated above, the question is whether a reference to the official tract number meets that provision of the regulation. The Department has indicated in several cases involving 43 CFR 200.5 (a) as in effect prior to the 1959 amendment, that a description of the whole of a tract by reference to its number is sufficient. *Celia R. Kammerman et al.*, 66 I.D. 255 (1959); *Merwin E. Liss*, A-27924; A-27940 (August 31, 1959); *Merwin E. Liss*, A-28142 (January 19, 1960). The particular provision, at that time, required that the lands must be described in a manner consistent with the description in the deed. The additional language shown in (1) above was added by the 1959 amendment. We believe that under the current language an offeror could reasonably interpret the provision to require the inclusion in the offer of "the courses and distances between the successive angle points on the boundary of the tract" only where the deed did not contain them. If the inclusion of such courses and distances in the deed can be established, we believe that the offeror may be considered to have met the requirement as worded currently. Although the Department no doubt intended to secure more information in the offers than submitted here, it is our opinion that the said offers cannot be held to be defective under the current language of the first requirement unless the offeror fails to establish that the deeds of acquisition contained courses and distances between the successive angle points on the exterior boundary of the tracts.

Accordingly, offerors Liss and Wasserman must be required to submit proof that the deeds of acquisition actually contain the said courses and distances, and, if the deeds do not contain such informa-

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tion, their offers should be held defective. This, at least, is required under the current language of the regulation.

The second requirement quoted above is that the lands be adequately shown on a plat or map to permit its location within the administrative unit or project of which it is a part. It does not require specifically that the offeror supply such a map with his offer, but rather that the lands be adequately shown on a plat or map. The Liss and Wasserman land descriptions contained a reference to the official status map on file with the Forest Service. We believe that an offeror could reasonably interpret this provision as requiring no more than was supplied in this case.

It has been contended that under this provision an offer must contain a copy of such a map. However, it is our opinion that the language of this provision is not so clear that a description in an offer should be held defective for failure to include such a map in the description of lands for which a lease is desired. Cf. *Madison Oils, Inc., et al.*, 62 I.D. 478 (1955).

Therefore, it must be held that the offers of Liss and Wasserman enjoy a preference right over the offers of the New York State Natural Gas Corporation, and the offerors are entitled to leases of the lands in question, if they can show the deeds of acquisition of the lands actually contain courses and distances between the successive angle points on the exterior boundaries of the tracts. The offerors, Liss and Wasserman, are allowed 15 days from notice hereof within which to submit such additional showing to the Division of Field Services Land Office, failing in which their offers will be finally rejected without further notice.

The land office decision is so modified.

It is to be noted, in the event the Liss and Wasserman offers are finally rejected, that Tracts 76, 1832 and 1833 of the lands here concerned are situated within the limits of the known geologic structure of the Five Forks gas field, as of June 21, 1962, said status having been reported by memoranda of the Director, Geological Survey, dated October 3, 1962, and April 15, 1963.<sup>3</sup> Therefore, in the event of final rejection of the Liss and Wasserman lease offers for these lands,

<sup>3</sup> The report dated October 3, 1962, of the Director of the Geological Survey relates to Tracts 76 and 1833 and his report of April 15, 1963, relates to Tract 1832. The latter report corrected an error which appears of record (report dated October 1, 1962) whereby Tract 1832 was erroneously reported as not having been situated within the known geologic structure of a producing oil and gas field. The corrected report places this tract within an undefined structure as of June 21, 1962. See *The Superior Oil Company*, A-28897 (September 12, 1962).

the lands would be subject only to competitive lease bidding under authority of 30 U.S.C., 1958 ed., sec. 226(b), from June 21, 1962.

KARL S. LANDSTROM,  
*Director.*

APPROVED *June 7, 1963*

JOHN A. CARVER, JR.  
*Assistant Secretary.*

### STATE OF CALIFORNIA

A-29009

*Decided June 26, 1963*

#### State Exchanges: Equal Values—Eminent Domain

Where land offered by a State in exchange for public land, pursuant to section 8 of the Taylor Grazing Act, as amended, has been used by the Department of the Navy for several years under leaseholds acquired through condemnation proceedings and the Navy's usage has depressed the value of the State's land, the value of the land for the purpose of determining whether the offered and selected lands are of equal value is to be the amount that would have to be paid for the land by the United States in proceedings brought to condemn the fee.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of California has appealed to the Secretary of the Interior from a decision dated May 8, 1961, of the Appeals Officer, Bureau of Land Management, which affirmed the rejection by the Los Angeles land office of three applications to exchange State-owned land for public domain pursuant to the provisions of section 8 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g).

The State's applications were filed on March 23, May 3, and December 21, 1955, respectively. In its applications, as amended, the State offered a total of 17,108.74 acres of State-owned land in exchange for 11,768.48 acres of public domain. In 1952 the Department of the Navy had created the Twentynine Palms Artillery and Anti-Aircraft Weapons Training Area known as the Marine Center. Within the boundaries of the training center there are about 29,000 acres of State land, 17,000 of which have been offered by the State in the exchange applications under consideration. Because the State lands are surveyed school sections, that is, sections 16 and 36 in each township, the offered lands are scattered throughout the area covered by the Training Center. The Department of the Navy, in 1952, acquired a leasehold interest in the State lands through condemnation proceedings and renewed it each year until June 30, 1958. The Navy then instituted a condemnation action to obtain title to the 17,000 acres against the State under which it has taken possession of but not title to the land.

June 26, 1963

The statute authorizing State exchanges provides:

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: \* \* \*. 43 U.S.C., 1958 ed., sec. 315g(c).

The pertinent regulation in turn reads:

An application for exchange may be made on the basis of equal area or equal value. However, with respect to all exchange applications filed after June 20, 1946 the Secretary of the Interior will consider and determine the value of the offered and selected land and will not approve an exchange unless the values of the offered and selected land are approximately equal. In determining such values, consideration will be given to such matters as the actual appraised value of the lands, the benefits of consolidation or blocking out of land holdings by the State and the Federal Government as a result of the proposed exchange, the size of the areas involved, the value of the surface or other resources, including such reservations of minerals or easements as may be made by the State or the United States, and any other considerations which may have appropriate bearing on the value of the lands involved. 43 CFR 147.2(b).

In accordance with the usual practice, the land office appraised both the offered and selected lands and concluded that the value of the selected lands was much greater than the value of the offered lands, \$691,465 to \$99,396. The State made its own appraisals of the lands involved and concluded that the selected lands and offered lands are substantially equal in value. When the differences between the State and land office appraisals could not be reconciled, the land office rejected the applications. From that decision, the State appealed first to the Director and, upon its affirmance, to the Secretary.

The discrepancy in the valuation of the offered lands is a result of different bases upon which the values were computed. The land office, basing its appraisal upon the circumstances existing at the time of the appraisal, held that the highest and best use of the offered lands are their present use for military training purposes as a bombing and gunnery range and valued them accordingly. The State, on the other hand, insists that the offered lands should be valued at their present market value based upon the highest and best use of the lands as though the training center had not been established. It bases its valuation upon the prices received for sales of comparable lands for small tract development.

For the purposes of this appeal it may be assumed that the present market value of the offered lands is less than it would be if the lands were not used as part of the military training center and that the value of the lands prior to the time the Navy took possession was more than it is now. It may also be accepted that in eminent domain proceedings a landowner is to be compensated on the basis of the value of the property as of the time the United States takes possession, undiminished by any use previously made by the United States of the property which depreciated its value prior to the taking. See *United States v. Virginia Electric and Power Company*, 365 U.S. 624, 636. (1961). Finally, it is not disputed that, if the Bureau of Land Management appraisals are proper, the offered and selected lands are not of equal value and the exchanges cannot be approved.

The question then is whether the Secretary, in equating the value of offered and selected lands, is to appraise them on the basis of the facts existing as of the time the exchange application is filed or whether he is to use as a basis for the value of the offered lands a value determined by what the United States would have to pay for the lands in a condemnation action following a usage of the lands by the United States which depreciated the value of the lands.

Whether the offered lands are acquired by exchange or by condemnation, title to the lands is to be held in the name of the United States, not the Department of the Interior or the Department of the Navy. Thus, the United States is the party in interest, even though the responsibility of paying for the land in kind (through exchange) or in money (through condemnation) is that of separate agencies of the United States. If the situation is thus viewed from the position of the United States as an entity, the fragmentation of its obligations becomes an exercise in the semantics of government accounting rather than a determination of equal value within the meaning of the statute and regulation. The equal value which they command is equal value to the United States, not equal value to this Department.

Accordingly, it is concluded that in ascertaining the value equivalency of the lands selected and offered, the value of the latter is to be determined on the basis of the compensation that the United States would have to pay for condemning the land for the Navy.

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 Appeals Officer is reversed and the case is remanded for further proceedings consistent herewith.

EDWARD WEINBERG,  
*Deputy Solicitor.*



**AUTHORITY TO CONSTRUCT PACIFIC NORTHWEST-PACIFIC  
SOUTHWEST TRANSMISSION LINE**

**Bureau of Reclamation: Construction—Bonneville Power Administration**

The Secretary of the Interior has authority to construct transmission lines which would be used to transmit to markets outside the Pacific Northwest power generated in the United States Columbia River Power System of the Pacific Northwest.

**Bonneville Power Administration**

The Secretary of the Interior is under no statutory geographic limitation of authority to construct such transmission lines other than the limitation in the Bonneville Project Act that transmission must be within economic transmission distance.

M-36656

*June 26, 1963*

**To: THE SECRETARY OF THE INTERIOR.**

**SUBJECT: AUTHORITY TO CONSTRUCT PACIFIC NORTHWEST-PACIFIC  
SOUTHWEST TRANSMISSION LINE**

A question has arisen concerning the authority of the Secretary of the Interior to construct a transmission line between the Pacific Northwest and the Pacific Southwest either through the Central Valley of California to San Francisco or through Nevada to Los Angeles. For the reasons hereafter expressed it is my opinion that the Secretary possesses ample present authority for the construction of such transmission facilities.

The Bonneville Project Act provides:

In order to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups, the administrator is authorized and directed to provide, construct, operate, maintain, and improve such electric transmission lines and substations, and facilities and structures appurtenant thereto, as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and, for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal projects and publicly owned power systems now or hereafter constructed \* \* \* (Sec. 2 (b) ; 16 U.S.C. 832a (b) ).

Subject to the provisions of this Act \* \* \* the administrator shall negotiate and enter into contracts for the sale at wholesale of electric energy, either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons and for the disposition of electric energy to Federal agencies. (Sec. 5(a) ; 16 U.S.C. 832d(a) ).

The administrator is authorized to enter into contracts with public or private power systems for the mutual exchange of unused excess power upon suitable exchange terms for the purpose of economical operation or of providing emergency or break-down relief. (Sec. 5(b) ; 16 U.S.C. 832(b) ).

The administrator may make such expenditures \* \* \* for such other facilities and services as he may find necessary for the proper administration of this Act. (Sec. 9 (b) ; 16 U.S.C. 832h (b) ).

Subject only to provisions of this Act, the administrator is authorized to enter into such contracts, agreements, and arrangements, \* \* \* and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary. (Sec. 2 (f) ; 16 U.S.C. 832a (f) ).

The foregoing statutory provisions authorize, both expressly and by obvious implication, the construction of a transmission line between the Pacific Northwest and the Pacific Southwest via either route. There are no statutory geographical limitations on the exercise of this authority, the only limitation being that of economic transmission distance. It is precisely for that reason that legislation defining the primary marketing area of the Bonneville Power Administration has been introduced in and considered by both the last and the current Congresses. See, for example, S. 3153, 87th Cong., and S. 1007, H.R. 994, H.R. 1160, H.R. 4071, and H.R. 4485, 88th Cong.

Other statutes under which the Secretary markets power from projects in both the Pacific Northwest and the Pacific Southwest, including but not limited to Section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s) and section 9 (c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h (c) ), provide additional and alternative authority for the construction of the lines. The Flood Control Act provision expressly authorizes the construction of transmission lines for marketing power generated at projects. The Reclamation Project Act provision impliedly authorizes such construction as a necessary requirement for marketing power. Cf. *Arizona v. California*, 31 L.W. 4571 (June 3, 1963).<sup>1</sup>

Statutes relating to particular projects provide further authority. For example, the Rivers and Harbors Act of 1937 (50 Stat. 844) reauthorizing the Central Valley Project, with particular reference to transmission lines, is authority for the construction of an interconnecting line between the Pacific Northwest and the San Francisco Bay area via California's Central Valley, if at some time in the future the transmission should be necessary to the project. At the present time the project output is already under contract. Similarly the Act of 1935 (49 Stat. 1028) reauthorizing Parker Dam on the Colorado River provides additional authority for the construction of an intertie between the Pacific Northwest and the Los Angeles region via the Nevada route, if such transmission should become necessary to that

<sup>1</sup> "The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it."

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project. That same Act of 1935 also reauthorizes Grand Coulee Dam on the Columbia River. The proposed transmission lines by either route are therefore also authorized under that Act as "incidental works necessary" to that project.

It should also be noted that section 14 of the Reclamation Project Act of 1939 (43 U.S.C. 389) authorizes the Secretary to enter into contracts for exchange of power if in his judgment such exchange is "necessary and in the interests of the United States and the project." It follows *a fortiori* that the Secretary would be authorized to construct the transmission facilities necessary to effect such an exchange.

While the Bonneville Project Act speaks in terms of authorizations to the Administrator, it also provides that all functions vested in the Administrator may be exercised by the Secretary of the Interior (sec. 2(a); 16 U.S.C. 832a(a)). In addition, Reorganization Plan No. 3 of 1950 (15 F.R. 3174) transferred the functions of the Administrator to the Secretary. It further authorized the Secretary to permit any agency in the Department of the Interior to carry them out. For example, he could designate either the Bonneville Power Administration or the Bureau of Reclamation as the agency to construct, operate and maintain the entire line, or he could divide the function by having the Bonneville Power Administration construct, operate and maintain that portion of the line north of the Oregon-California border and the Bureau of Reclamation that portion south of the California border.

It has been suggested that statements made by the Appropriation Committees in their reports on bills appropriating funds for the Department of the Interior for fiscal years 1951 and 1952 are conclusive on the lack of authorization for the construction of a Pacific Northwest-Pacific Southwest intertie.<sup>2</sup> This argument reflects a misunderstanding of the appropriation process in Congress and also constitutes loose use of the term "authorize" in connection with that process. Normally the Congress enacts a law authorizing the United States to undertake an activity and the making of appropriations for the purpose of providing funds to carry out that activity. Bills which ultimately become such laws are considered by the appropriate legislative committees in the two houses of Congress. In the case of most power projects these legislative committees are the Public

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<sup>2</sup> Statement by Robert H. Gerdes, President, Pacific Gas and Electric Company on June 12, 1963, to the Senate Appropriations Subcommittee on Public Works referred to the 1951 House Committee report on a proposed Federal line between BPA and the Central Valley Project. The report contained the following language: *The CVP-BPA inter-connection is not to be considered as authorized and no expenditure of funds should be made in fiscal 1952 from any appropriation available to the Bureau for reconnaissance, preliminary survey, design, construction, or any other work in connection with this proposed line.* (H. Rep. No. 339, 82d Cong., 1st Sess., p. 11.) [Italics supplied.]

Works Committees or the Interior and Insular Affairs Committees. After the authorization act becomes law the agency entrusted with its execution requests the Congress for an appropriation of funds. The appropriation request is considered by the Appropriation Committees of the two houses of Congress. The Appropriation Committees have no legislative jurisdiction, and if they attempt to approve a bill which contains either an appropriation for an activity which the Congress has not previously authorized or an amendment of a substantive law as distinguished from an appropriation to carry out that law, the appropriation bill is subject to a point of order for the reason that it contains substantive legislation.<sup>3</sup>

The Appropriation Committees do have the right to select from all the legislatively authorized activities and projects those for which they recommend that appropriations be made for the fiscal year under consideration. Accordingly they do approve the projects and activities for which funds will be appropriated and in that sense "authorize" the agency to undertake such projects and activities with the funds appropriated in the particular bill. But that approval is limited to one of *selecting*, from all of the legislatively authorized activities, those for which appropriations are recommended. It does not extend either to authorizing new projects or activities or to repealing existing authorizations for projects or activities. It is axiomatic that a committee of one house of Congress, or even the passage of a bill by one house, cannot amend or repeal a duly enacted law of the United States.

There was, therefore, no question concerning the existence of legislative authorization. The House Appropriations Committee did not say it was denying funds because the Congress had not authorized the making of an appropriation for an interconnecting line. It merely stated it was not approving a request for an appropriation for such a line and that no funds were to be expended for that purpose. In the quotation in footnote 8 the House Appropriation Committee obviously

<sup>3</sup> House Rule XXI, sec. 2, provides: No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendments thereto changing existing law be in order, except such as being germane to the subject matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill \* \* \* (H. Doc. No. 610, 87th Cong., 2d Sess., p. 441.)

Senate Rule XVI, sec. 2, provides: The Committee on Appropriations shall not report an appropriation bill containing amendments proposing new or general legislation or any restriction on the expenditure of the funds appropriated which proposes a limit not authorized by law if such restriction is to take effect or cease to be effective upon the happening of a contingency, and if an appropriation bill is reported to the Senate containing amendments proposing new or general legislation or any such restriction, a point of order may be made against the bill, and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations. (S. Doc. No. 1, 88th Cong., 1st Sess., p. 17.)

was using the term "authorized" in the sense of approval of funds by the Appropriation Committee. The true nature of its action is found in its statement that no expenditure of funds should be made for any work in connection with the proposed line.

Similarly, the Senate Appropriation Committee made clear that disapproval of the appropriation request was all that was involved. It "*disapproved* the remainder of the supplemental estimate totaling \$3,900,000 which was requested for the purpose of accelerating the proposed California intertie." (S. Rep. No. 499, 82d Cong., 1st Sess., p. 9.) The same was true of its comments with respect to administrative adjustments by the Bonneville Power Administration.<sup>4</sup>

The existence of legislative authorization for an interregional line is clear from the basic power-marketing statutes referred to at the outset of this opinion.

The Senate Committee on Interior and Insular Affairs has expressly recognized such authority in its reports on bills to define a primary marketing area for the Bonneville Power Administration.

\* \* \* Provision would be made for the transmission of non-Federal power over any interconnecting lines between the Pacific Northwest and other regions which may be constructed by the United States. The bill contains no authorization for the construction of Federal lines for those regions. Existing statutes provided [sic] such authority. (S. Rep. No. 1748, 87th Cong., 2d Sess., pp. 2-3; S. Rep. No. 122, 88th Cong., 1st Sess., p. 2.)

The Congress appropriated for the fiscal year 1963, \$300,000 for preliminary engineering, reconnaissance surveys, economic analysis and negotiations with public and private utilities interested in a coordinated plan for power interchange between the two regions. (See H. Rep. No. 2223, 87th Cong., 2d Sess., p. 57; S. Rep. No. 2178, 87th Cong., 2d Sess., p. 41.) That action is an express recognition of the existence of legislative authorization for the line.

We, therefore, conclude that there is vested in the Secretary of the Interior ample statutory authority to proceed with the construction of transmission facilities by either the Nevada route or the Sacramento Valley route in the event Congress appropriates the necessary funds.

FRANK J. BARRY,  
*Solicitor.*

<sup>4</sup> "It is understood that this authority for administrative adjustment in the use of funds will not permit undertaking construction of new major facilities not previously *approved* by the Congress. It will permit, within the limits of funds appropriated upon approval by the Bureau of the Budget, expansion of existing major facilities, construction of new minor facilities and expansion of existing minor facilities, all only as required by urgent conditions which could not have been foreseen in time for normal presentation to the Congress." (S. Rep. No. 499, 82d Cong., 1st Sess., p. 10.) [Italics supplied.]

**APPEALS OF MONTGOMERY-MACRI COMPANY AND WESTERN LINE  
CONSTRUCTION COMPANY, INC.**

**IBCA-59 and IBCA-72** *Decided June 28, 1963*

**Contracts: Interpretation—Contracts: Specifications**

A site examination provision in a construction contract may have the effect of incorporating by reference into that contract those portions of the specifications of a contract with another contractor that have to do with work the performance of which is a necessary antecedent for performance of work required by the construction contract, if the condition to be created or removed by the antecedent work is a condition that falls within the scope of the site examination provision, and if the stage of completion of the antecedent work during the bidding period is not such as admits of its qualities upon completion being forecast through visual inspection alone (Claim A-1).

**Contracts: Acts of Government—Contracts: Breach—Contracts: Changed  
Conditions—Contracts: Notices**

A claim for additional compensation on account of hindrances for which the Government is responsible that arise after the making of the contract, and so do not amount to changed conditions, that serve principally to increase the volume of working time needed for achievement of the result prescribed by the contract, rather than to defer the calendar date by which such result can reasonably be achieved, and that are overcome in a manner voluntarily chosen by the contractor, rather than in a manner required by Government personnel, is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the standard form of Government construction contract (Claim A-1).

**Contracts: Interpretation—Contracts: Contracting Officer—Contracts:  
Specifications**

Under a contract for the clearing of the right-of-way for a transmission line which (1) prescribes specific standards to govern the clearing, (2) authorizes the contracting officer to issue special instructions for areas presenting special problems, and (3) states general objectives to be achieved or safeguarded through the clearing, the contracting officer may permit deviations from the specific standards by virtue of his authority to issue special instructions, provided such deviations are in keeping with the general objectives stated in the contract (Claims A-1 and A-2).

**Contracts: Additional Compensation—Contracts: Bids: Generally—Con-  
tracts: Damages: Generally**

The additional compensation to be paid as damages for breach of contract or as an equitable adjustment under a contract may properly be measured by the difference between the costs that would have been incurred by the contractor if the job had not been affected by the compensable event in suit, and the costs that were necessarily and reasonably incurred by the contractor in performing the job under the circumstances under which it actually had to be performed as a result of such compensable event. The "total cost" method whereby the sum to be paid is measured

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merely by the difference between the amount bid by the contractor, without regard to its reasonableness, and the cost actually incurred in performing the job, without regard to what caused them, is unacceptable in ordinary circumstances (Claims A-1 and A-2).

#### **Contracts: Contractor—Contracts: Unforeseeable Causes**

Under the standard form of Government construction contract, the risk of loss on account of increases in the cost of the job that are not the product of any compensable act or omission of the Government, but that are caused merely by the encountering of bad construction weather, whether normal for the season of the year involved or sufficiently abnormal to constitute an excusable cause of delay, rests upon the contractor (Claims A-3 and G-2).

#### **Contracts: Interpretation—Contracts: Performance**

A provision in a contract for the stringing of aluminum conductor on a transmission line to be energized at a very high voltage which states that the contractor, if he elects against stringing the line under tension, may use lagging "to prevent the conductor from being dragged over the ground or other obstructions where there is possibility of damage to the conductor" means that enough lagging must be used to forestall any reasonable possibility of damage to the conductor through contact with the ground, and requires the use of sufficient lagging to keep the conductor entirely clear of the ground where, but only where, the terrain is so fraught with hazards that avoidance of all contact between it and the conductor is needed, as a practical matter, to forestall any reasonable possibility of damage to the latter (Claim B-1).

#### **Contracts: Acts of Government—Contracts: Breach—Contracts: Changes and Extras—Contracts: Performance**

A contractor who undertakes to string a transmission line with a new variety of conductor furnished by the Government is entitled to additional compensation on account of work stoppages ordered by the Government in order to facilitate inspection of the conductor for fabricator-caused defects, repairs ordered by the Government for the correction of such defects, removal of obstacles to acceptable performance interposed by such defects, and other measures necessitated by their presence or suspected presence. The contractor, however, is not entitled to additional compensation for expenses incurred in devising and using reasonable stringing procedures needed because of novel qualities of the conductor, rather than because of defects in its fabrication, or for losses incurred in unsuccessful attempts to follow the procedures customarily applied in the past to the most nearly comparable varieties of conductor, since by engaging to string a new variety of conductor the contractor assumed the responsibility to ascertain whether the prevailing methods of stringing would work well with the new product and, if not, to find and adopt methods that would (Claims B-2, B-3, C-1 through C-4, and D-1 through D-4).

**Contracts: Appeals—Contracts: Delays of Government—Contracts: Interpretation**

A Government-furnished property clause which states that the Government will make "every reasonable effort" to deliver materials "so as to avoid any delay in the progress of the contractor's work as outlined in his construction program," but that if the contractor is delayed "because of failure of the Government to make such deliveries" the only form of adjustment allowable will be a time extension, is to be construed as making the contractor's right to monetary compensation for a delay in delivery turn upon whether the Government made every reasonable effort to deliver materials by the time when they would be needed, and is also to be construed as making the construction program submitted by the contractor the criterion, in general, for determining the time when materials would be needed. If a failure to make timely delivery is proved, the burden of offering some reasonable explanation for the delay rests on the Government, and, if it offers no such explanation, the contractor is entitled to a finding that every reasonable effort was not made (Claims C-5 and E-2).

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

The duration of a time extension for an excusable cause of delay is governed by the extent to which the excusable cause either increases the amount of time required for performance of the contract work as a whole, or defers the date by which the last of that work will be reasonably capable of completion. Depending upon the way in which the excusable cause affects the contractor's operations, the time extension may be either longer, as in some cases where the job is projected into bad weather, or shorter, as in some cases where part of the job is unaffected, than the period during which the excusable cause was operative. Among other considerations, regard must be had for the possibility that the impact of the cause of delay might have been avoided or shortened by the contractor (Claims under headings E and F, and Claim G-1).

**Contracts: Delays of Contractor—Contracts: Delays of Government**

In the absence of countervailing considerations, the time extension allowable for an excusable cause whose primary effect upon the job is to increase the volume of the work remaining to be done, rather than to defer the time when the doing of that work will become practicable, may appropriately be measured by dividing the average daily work capacity of the contractor into the volume of work added to the job by the excusable cause. In the absence of countervailing considerations, the time extension allowable for an excusable cause that puts off the date by which the job could otherwise have been brought to an end with reasonable efforts, for a time roughly equivalent to the duration of the period while extra work is being performed, or while work is being prevented by the Government, or while some other excusable cause is operative, may appropriately be measured by the duration of such period (Claims E-3, F-3 and F-7).

**Contracts: Additional Compensation—Contracts: Damages: Generally**

The expense of measures undertaken for the purpose of performing extra work resulting from a change ordered by the Government, or of overcoming



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hindrances resulting from a breach of contract by the Government, is allowable to the extent to which the expense was actually and reasonably incurred, and, hence, if such measures were actually and reasonably undertaken during the winter, the cost incurred in performing them at that time of the year would be allowable. When the measures so undertaken form an integral component of a series of operations that is pushed, wholly or partially, into the winter as a necessary consequence of the incorporation of such measures within the series, the compensation due the contractor also includes the amount by which the cost of the subsequent operations in the series was increased through their projection into an unfavorable season (Claim G-2).

#### **Contracts: Acts of Government—Contracts: Changes and Extras**

A contractor is entitled to reimbursement for expense actually and reasonably incurred in complying with a direction of the Government to perform work in advance of the date when performance is due. It follows that a contractor who has encountered an excusable cause of delay, who has requested an extension of time on account of such cause, who has been denied an appropriate extension, who has been instructed to complete the work within a lesser time than would have been available if an appropriate extension had been granted, and who complies with that instruction, is entitled to reimbursement for expenditures, such as the cost of working under adverse weather conditions, that could have been saved if an appropriate extension had been granted. Where, however, the Government directs that the work be accelerated, but the contractor in fact does not accelerate its performance, no additional compensation is allowable (Claim G-2).

#### **Contracts: Breach—Contracts: Delays of Government**

In the absence of express warranties or covenants by the Government, a construction contractor is not entitled to additional compensation for a delay caused by the failure of another contractor to perform, within the time set by his contract, work that is a necessary antecedent for availability of the construction site, unless the delay was due in some way to fault on the part of the Government. The awarding of a construction contract, or the issuance of notice to proceed thereunder, in circumstances where the Government knows that the antecedent work will not be finished by the time when the construction site will be needed, in the ordinary and economical course of contract performance, may be sufficient basis for a finding that the delay was due to fault of the Government (Claim G-2).

#### **BOARD OF CONTRACT APPEALS**

The appellants in this case (hereinafter referred to as Montgomery-Macri-Western) are joint ventures who have filed timely notices of appeal from decisions of the contracting officer under contract No. 14-03-001-10980 with the Bonneville Power Administration (hereinafter referred to as Bonneville).

The contract in question, dated June 10, 1954, provided for the construction of Schedules II and III of the Chief Joseph-Snohomish 345 KV Transmission Line in the State of Washington. It was on Standard Form 23 (Revised March 1953) and incorporated the Gen-

eral Provisions of Standard Form 23A (March 1953) for construction contracts. The effective date of the notice to proceed was June 16, 1954, and the completion date set for both schedules was September 9, 1955.

Schedules II and III of the Chief Joseph-Snohomish transmission line began in the eastern foothills of the Cascade Mountains, traversed a succession of ridges and canyons westward to the summit of the range at Stevens Pass, passed through the densely forested country on the Pacific slope of the range, and ended in the flatter country near Puget Sound. The combined length of the two schedules was 65.6 miles. The combined number of towers was 315. Going from east to west, Schedule II began at tower 443 and ended at tower 605, while Schedule III began at tower 606 and ended at tower 757. The transmission line attained its highest elevation, approximately 5,000 feet, at tower 598 on top of a ridge above Stevens Pass. The line was a double-circuit one, that is, six parallel wires of electrical conductor were to be strung in the spans between the towers, except that from tower 583 to tower 606 the line was a single circuit one, that is, three parallel wires of electrical conductor were to be strung in each span.

A distinctive feature of the Chief Joseph-Snohomish transmission line was the extremely high voltage at which it was intended to be energized. Another was the use of a new variety of large-size conductor, known by the trade name of "Chukar," designed specifically for the transmitting of heavy loads of current at 345,000 volts. Under the terms of the contract, the "Chukar" conductor was to be furnished by Bonneville and was to be strung by Montgomery-Macri-Western.

Claims based on alleged defects in the "Chukar" conductor or in fittings furnished by Bonneville for use with it form part of the subject matter of the instant appeals, IBCA-59 and IBCA-72. Claims based on like grounds were also asserted by other contractors in other appeals, IBCA-77 and IBCA-80. At the request of the appellants in all four of these cases, the Board held a consolidated hearing for the purpose of taking testimony common to all four appeals, followed by separate hearings on the individual appeals. The Board has since rendered a decision on IBCA-77 in which the general aspects of the "Chukar" conductor problem and the general characteristics of the procedures used in stringing such conductor are explained.<sup>1</sup> The Board has also rendered a decision on IBCA-80.<sup>2</sup> Hence, the discussion in the present opinion will be confined to those matters that are

<sup>1</sup> *Bay Construction, Inc., and Don L. Conney, Inc.*, IBCA-77 (November 30, 1960), 61-1 BCA par. 2876, 3 Gov. Contr. par. 63 (e).

<sup>2</sup> *W. L. Ridge Construction Company*, IBCA-80 (November 30, 1960), 61-1 BCA par. 2868, 3 Gov. Contr. par. 63 (e).

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outside the scope of the consolidated hearing, such as claims based on alleged inadequacy of clearing, and to those aspects of the matters presented at that hearing which are peculiar to IBCA-59 and IBCA-72.

Montgomery-Macri-Western presented to Bonneville from time to time, both during and after the performance of the contract work, a number of claims for time extensions and for additional compensation. The contracting officer made certain allowances of time and money, but rejected the bulk of the claims. The value of the additional allowances now sought totals \$505,200.36.<sup>3</sup> In this opinion an attempt has been made to arrange the claims in an order that will simplify as much as possible their consideration.

The Board's study and evaluation of the issues presented has been materially facilitated by the excellent post-hearing briefs submitted by counsel for each of the parties.

### *A. Clearing and Access Claims*

#### *Claim A-1*

#### *Tower Sites and Assembly Areas*

This claim is for the sum of \$196,176.25, of which \$4,534 was allowed by the contracting officer, leaving \$191,642.25 as the amount now in dispute.<sup>4</sup> The claim arises out of alleged inadequate clearing of the tower sites and assembly areas on Schedule III. As here used, the term "tower site" refers to an area, usually 75 feet square, within which the footings for the tower legs were to be placed, and the term "assembly area" refers to an immediately adjoining area, equivalent in size to the difference between a 120-foot square and a 75-foot square, where steel for the tower legs and bodies might be

<sup>3</sup> The claims here involved were the subject of five separate decisions by the contracting officer, as follows: (1) Two complementary letters dated September 23, 1955, relating to time extensions on Schedule II, from which appeal was taken by notice dated October 20, 1955; (2) Letter dated February 29, 1956, relating to time extensions on Schedule III, from which appeal was taken by notice dated March 23, 1956; (3) Finding of facts dated February 29, 1956, relating to alleged inadequate clearing, from which appeal was taken by the same notice; (4) Supplement to finding of facts, dated April 16, 1956, also relating to alleged inadequate clearing, from which appeal was taken by notice dated April 24, 1956; and (5) Finding of facts, dated September 28, 1956, relating to alleged faulty conductor, from which appeal was taken by notice dated October 9, 1956. In addition, by letter dated January 28, 1957, Bonneville transmitted to Montgomery-Macri-Western certain voucher computations, from which appeal was taken by notice dated February 28, 1957. This final exchange, however, does not serve to enlarge the scope of the issues, since no contention is made that the voucher computations amounted to an appealable decision, and since the notice of appeal was filed merely as a precaution lest such a contention be advanced.

<sup>4</sup> This claim was allowed to the extent indicated in the text, and was otherwise disallowed; in the finding of facts dated February 29, 1956, which, in addition to being signed by the contracting officer, was approved by the Bonneville Power Administrator.

assembled, equipment set, and other construction procedures undertaken. The typical assembly area was in the form of a border 22½ feet wide surrounding the tower site on all four sides, but, sometimes, attempts to wrest working space from an unfavorable terrain resulted in assembly areas that were concentrated on one side of a tower or were otherwise irregular in shape.

Clearing of the right-of-way for the transmission line was itself a task of major proportions. Virtually all of the land traversed by Schedules II and III was forested. Precipitation at the summit and on the western slope of the Cascades is heavy and the forest in these areas is notable for the great size of its trees, the closeness of their spacing, the thickness of the underbrush, and the quantities of wind-falls and other forest debris on the ground. Going eastward from the summit, precipitation decreases at a fairly rapid rate, with the result that the forest on the eastern slope tends to be a good deal more open than that on the western side of the range. Considerable portions of the right-of-way were within the boundaries of National Forests.

The contract contained no provisions relating to the clearing of the right-of-way, it being contemplated by both parties that this work would be performed under other contracts. At the time when the invitation for bids was issued, on April 15, 1954, contracts for the clearing of the whole of Schedules II and III had already been let by Bonneville and operations thereunder were in full swing. Clearing of Schedule II and of a small portion of Schedule III (that which included towers 606, 607 and 608) was provided for in a contract with Paul C. Helmick Company. Clearing of the portion of Schedule III between towers 609 and 693, both inclusive, was provided for in a contract with Washington Utilities Construction Company. Clearing of the remainder of Schedule III, that between towers 694 and 757, both inclusive, was provided for in a contract with F. H. Jarnagin.

Appellants contend that while Schedule II was cleared to acceptable standards, Schedule III was not. They allege that the clearing of the tower sites and assembly areas on Schedule III was far inferior to what they had a right to expect. They further allege that the costs of excavating and placing the footings for the towers, and of assembling and erecting the steel framework of the towers were vastly increased by reason of this lack of adequate clearing.

Whether the clearing on Schedule III was adequate or inadequate depends, of course, upon the standards by which it is measured. As a practical matter, counsel for both parties appear to agree that the proper standards are the clearing specifications set out in the three clearing contracts, although they are poles apart in their interpretation and application of those specifications. Appellants were not

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aware of the content of the clearing specifications until months after the construction contract had been awarded to them, but, nevertheless, rely heavily upon such portions of those specifications as tend to support their claims.

The view taken by counsel for Montgomery-Macri-Western is that the clearing contracts are third party beneficiary contracts, and that appellants as the beneficiaries of those contracts are entitled to recover compensation from the Government for any failure to comply with the clearing specifications. There are, however, three valid objections to acceptance of this point of view. The first is that the clearing of the right-of-way was a performance which the clearing contractors were to render to, and for the benefit of, the Government as owner of the right-of-way, and that appellants were, therefore, merely incidental beneficiaries of the clearing contracts and, as such, were not entitled to enforce them.<sup>5</sup> The second is that the promise to clear the right-of-way in accordance with the clearing specifications was a promise made by the clearing contractors, and that, if there were a failure to comply with the clearing specifications, the party who would be obligated to compensate a third party beneficiary for such failure would be the clearing contractor who broke its promise to clear the right-of-way in accordance with such specifications, and not the Government who promised to pay for, but not to do, the clearing.<sup>6</sup> A third objection is that appellants' rights, if any there be, to enforce the clearing contracts against either the clearing contractors or the Government would necessarily be subject to all the provisions of those contracts, including provisions reserving to the Government such privileges as that of directing how the general provisions of the clearing specifications should be applied to specific situations, that of establishing special clearing requirements for areas having special clearing problems, and that of changing the clearing specifications themselves.<sup>7</sup>

The view taken by Department Counsel is that, in the absence of specific provisions on clearing in the contract with Montgomery-Macri-Western, the applicable standard of clearing is to be found in local usage with respect to the construction of high-voltage transmission lines, and that the specifications set out in the clearing contracts are reasonably representative of such usage. The test of local usage is a valid one,<sup>8</sup> but in the present case there is little to show that a standard of clearing for high-voltage transmission lines has been

<sup>5</sup> *Restatement, Contracts*, secs. 133, 147.

<sup>6</sup> *Restatement, Contracts*, secs. 135, 136.

<sup>7</sup> *Restatement, Contracts*, sec. 140.

<sup>8</sup> *Restatement, Contracts*, secs. 230, 245-48.

established by such usage, except in particulars too limited to provide overall guidance.

We believe that acceptance of the specifications set out in the clearing contracts as the governing standard is called for by the site examination section<sup>9</sup> of the construction contract with Montgomery-Macri-Western. That section contains the following provision:

Bidders are required to read and carefully examine the maps, drawings, and specifications and any and all forms governing the work. They shall make a complete examination of the site so that all contracting hazards may be evaluated. Road conditions for access to the sites shall be appraised and every condition relative to the work shall be considered. Failure to do so shall not relieve the contractor from any provisions of the contract.

The forest that covered most of the right-of-way for Schedules II and III would, if not removed, constitute a major hazard to transmission line construction, and, therefore, the extent to which it had been, or was going to be, removed must be regarded as one of the conditions which the site examination section required bidders to consider and evaluate. During the period between April 15, 1954, the date of the invitation for bids, and May 25, 1954, the date when the bids were opened, the clearing work was still in progress. By visual inspection during this period a bidder could see what had been done, but he could not tell how much more was going to be done. Stated more precisely, a bidder could see that, while some segments of the right-of-way had not yet been touched at all, most of it had been cleared to varying degrees of refinement, but he could not tell merely by looking at the scene whether, and if so to what extent, more work was planned to be done at any particular location where the clearing may have failed to measure up to the bidder's concept of a suitable degree of refinement. The most obvious source of accurate information as to what additional steps, if any, the clearing contractors were going to have to take in order to obtain final acceptance of their work by Bonneville was, assuredly, the clearing specifications themselves. Appellants were experienced contractors, who had handled a number of transmission line jobs for Bonneville, and, while they were unaware of the content of the clearing specifications, they must have been aware that the clearing was being performed pursuant to contracts which defined in some manner the scope and quality of the work to be done. The site examination section, when applied to these facts, clearly contemplated that appellants would acquaint themselves with the content of the clearing specifications, a matter with which the Government was necessarily already acquainted. In such circumstances that section may legitimately be regarded, in our opinion, as having the effect

<sup>9</sup> Section 2-106 of the specifications.

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of incorporating the clearing specifications, by reference, into the construction contract with appellants.

The clearing specifications of the contracts with Paul C. Helmick Company and Washington Utilities Construction Company are identical, whereas the clearing specifications of the F. H. Jarnagin contract differ from them in some particulars. Both parties have tended to treat the differences as inconsequential. Those provisions of the Helmick and Washington Utilities contracts which appear to bear directly upon issues here controverted are included in the following excerpts:

*General Contractual Provisions*

*Work To Be Done.* The work consists of furnishing all plant, superintendence, labor, and material, and performing all work required to clear the right-of-way, remove danger trees and obstructions, build access roads, road structures and gates; and dispose of all cleared material in accordance with these specifications or as may be directed by the contracting officer.

*Intent Of Plans and Specifications.* It is the intent of these specifications to prescribe the complete work of clearing the right-of-way and disposal of cleared material in full compliance with plans, specifications, and directions of the contracting officer, so that when this contract is complete the right-of-way will be ready for erection of structures and stringing of conductors for the transmission line.

\* \* \* \* \*

*Clearing And Disposal of Cleared Materials*

*Objective.* The objective in these specifications is to:

1. Clear central strips which will be utilized for access during construction and maintenance, which will permit the conductor to be laid on the ground and then raised into position without injury or catching on forest debris, and which will provide adequate electrical clearance after energization of the transmission line;

2. Clear the sides of the right-of-way outside the central strip to the widths specified of all material which is greater than ten feet in height;

\* \* \* \* \*

4. Dispose of cleared material.

*Definition Of Terms.* The interpretation of technical terms in these specifications shall be governed by the following definitions:

1. *Brush*—includes trees smaller than six inches in diameter at a height of 4½ feet above the ground, shrubs, bushes and vines.

2. *Center lines*—The center lines of the transmission line towers to be constructed. \* \* \*

3. *Central Strips*—70 feet in width, centered on the center lines defined in 2 above.

\* \* \* \* \*

5. *Down Log*—a log, rotted or sound, existing on the right-of-way prior to the entry of the contractor.

\* \* \* \* \*

8. *Waste Material*—includes buildings, building debris, down logs, windfalls, tops, limbs, brush, uprooted stumps, unmerchantable logs and all other debris.

\* \* \* \* \*

*General. A. \* \* \**

D. Any trees, snags, stumps and other material required to be cut by these specifications shall be cut as close to the ground as practicable. On lands located east of the Cascade divide, stump heights shall in no case be more than 16 inches on the side adjacent to the highest ground, while on lands located west of the Cascade divide they shall not exceed 24 inches unless these limits are clearly impracticable.

\* \* \* \* \*

*Central Strips. A. Within the central strips:*

1. All standing trees shall be felled;
2. All stumps and snags higher than eight feet shall be cut;
3. All brush except sagebrush shall be cut;<sup>10</sup>
4. All waste material existing on the ground and all waste material created by the contractor shall be burned with the exception of individual down logs over eight inches in diameter which have not been disturbed by the contractor and which will not make the central strips impassable to construction vehicles.

B. At the tower sites:

1. An area equivalent to a 120-foot square shall be cleared in the same manner as for the central strips except that all down logs shall be burned. \* \* \* These areas will be designated by the contracting officer. \* \* \*

2. An area equivalent to a 75-foot square centered on the tower site shall be grubbed. This area shall be cleared of all stumps, brush and other debris. The location of these areas and the position of their sides will be designated by the contracting officer. The contractor shall exercise caution to avoid undue disturbance of the ground surface which would necessitate revision of tower foundation design. \* \* \*

\* \* \* \* \*

*Special Areas. A. Removal or trimming of trees, shrubs, structures or other obstructions from orchards, parks, or other special areas designated by the contracting officer, shall be done in accordance with specific instructions from the contracting officer.*

\* \* \* \* \*

### *U.S. Forest Service Requirements*

*General. A. These requirements are taken from the Special Use Permit granted the Bonneville Power Administration by the United States Forest Service. The contractor shall conduct his operations in strict accordance with the requirements stated in this section.*

\* \* \* \* \*

*Soil Erosion. All phases of the clearing and line construction operations, including the construction of truck and tractor roads, shall be so conducted as to minimize as far as practical the damage to the soil and to prevent gulying and the creation of other conditions conducive to soil erosion. Damage which, in the judgment of the contracting officer, is excessive and unnecessary shall be repaired.*

<sup>10</sup> The contract with F. H. Jarnagin omits the words "except sagebrush." This, however, is not a significant variation since the evidence indicates that sagebrush does not grow in the country traversed by Schedule III.



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by the contractor in a satisfactory manner. Tractors shall not be used to fell or bunch trees, brush, and slash for burning if their use for these purposes causes excessive damage. Generally on slopes of over 35 percent tractors do cause excessive damage. On slopes under 35 percent, no trees over 12 inches in diameter shall be pushed or pulled over. \* \* \*

In addition to these general provisions, there is a pertinent special provision reading as follows:

Portions of the right-of-way between approximate Stations 5280-00 and 5390-00 are on a steep side hill directly above the tracks of the Great Northern railroad in an area subject to heavy snow fall. On these portions of the right-of-way, in order to reduce the danger of snow slides reaching the tracks, the contractor shall cut all old growth timber and all snags requiring cutting on the right-of-way and in the danger tree area to a stump height of six feet on the side adjacent to the highest ground.

The stations mentioned in this provision are located at or near tower 619 and tower 632, respectively.

The principal substantive difference between the quoted provisions and those of the Jarnagin contract is that most of the content of the sections entitled "Work to be Done," "Intent of Plans and Specifications," and "Objective" does not appear in the latter contract.

Before attempting to evaluate the merits of the instant claim in the light of the foregoing standards, it is necessary to consider the question of notice. The contracting officer found that Montgomery-Macri-Western gave the first oral notice of alleged inadequate clearing of the tower sites and assembly areas late in June of 1955, and gave the first written notice thereof in a letter dated July 11, 1955. He further found that the Government had been prejudiced by the failure to give earlier notice, and ruled that because of such failure no equitable adjustment would be allowed for tower sites or assembly areas at which construction operations had been performed before July 1, 1955. Accordingly, in computing the amount of \$4,534 allowed on the instant claim, the contracting officer gave consideration only to those tower sites and assembly areas where work was done by appellants on or after that date.

These rulings were premised on the theory that inadequacy of clearing under the circumstances here involved would fall within the application of Clause 4, "Changed Conditions," of the contract, and, therefore would necessitate compliance by appellants with the requirement in such clause that the "Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing" of the changed conditions supposedly encountered.

The Board is unable to agree with this theory. Clause 4 permits equitable adjustments to be made with respect to two categories of

changed conditions, namely: "(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 language used naturally leads to an interpretation that both categories are limited to physical conditions in existence when the contract is made, and that neither comprehends physical conditions which come into being only after the contract has been formed.<sup>11</sup>

During the period available for site investigation, that is, between April 15 and May 25, 1954, Montgomery-Macri-Western made a site examination in the course of which appellants' representatives observed to some extent what had been done, and was being done, in clearing the right-of-way. For the present purposes it is immaterial whether the site examination was a reasonably thorough one, since the governing provision, already quoted, expressly puts the risk of loss from an insufficient examination upon the contractor, and thereby charges him with constructive knowledge of whatever a reasonably thorough examination would have disclosed.<sup>12</sup> Here an examination would have revealed many particulars in which the clearing did not then come up to the standards prescribed by the clearing contracts. Such deficiencies, however, could not be accounted changed conditions within the meaning of Clause 4 because they were neither latent, as required for conditions of the first category, nor unknown, as required for the second category. Moreover, it would be a reasonable expectation that many, at least, of these deficiencies, would be cured by the clearing contractors, either voluntarily or at the behest of the inspectors, before the clearing was finally accepted by Bonneville. Even if they were not, a failure of some of the clearing to still come up to the applicable specifications when the work was finally accepted could not give rise to changed conditions within the meaning of Clause 4, since the physical condition involved in such a failure would be the state of the clearing at the time of the final acceptance, and this condition would be one that arose after the making of the contract with Montgomery-Macri-

<sup>11</sup> *Arundel Corporation v. United States*, 96 Ct. Cl. 77, 115-18 (1942) (first category); *Osberg Construction Company*, IBCA-139 (October 16, 1959), 66 I.D. 354, 358-59, 59-2 BCA par. 2367, 1 Gov. Contr. par. 703 (both categories); *Flora Construction Company*, IBCA-101 (September 4, 1959), 66 I.D. 315, 324, 59-2 BCA par. 2312, 1 Gov. Contr. pars. 647-50 (second category); *Morrison-Knudsen Company*, CA-170 (October 20, 1952) (both categories); *Koeneke & Latimer*, ASBCA No. 3163 (June 14, 1957), 57-1 BCA par. 1313 (second category).

<sup>12</sup> *Cf. Trimbunt Dredging Company v. United States*, 80 Ct. Cl. 559, 574-75 (1935); *Carson Construction Company*, IBCA-21 *et al.* (November 22, 1955); 62 I.D. 422, 428-29, 6 CCF par. 61,736; *E. O. Korsmo Construction Company*, W.D. BCA No. 1080 (January 31, 1946), 4 CCF par. 60,050.

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Western. That contract was awarded on June 10, 1954, a date which preceded by several months both substantial completion and final acceptance of the work under each of the three clearing contracts. As the instant claim is one that could not fall within the purview of Clause 4, the notice provision of that clause is inapplicable.

Notice requirements also appear in Clause 3, "Changes," and Clause 5, "Termination for Default-Damages for Delay-Time Extensions," and these have been added to or enlarged by judicial construction. Thus, it has been held that if a contractor who is directed to do work which is neither called for by the drawings and specifications nor provided for in a change order fails to protest against the direction, such work may be considered as voluntarily done and, therefore, as not amounting to a constructive change for which relief may be allowed under Clause 3.<sup>13</sup> Also, it has been held that if a contractor whose work is set back through a delay caused by a breach of contract by the Government fails to give notice of the cause of delay, in accordance with Clause 5, he loses not only his right to a time extension under that clause, but also his right to monetary compensation for the delay in the form of damages for breach of contract.<sup>14</sup>

The facts out of which the instant claim emerges fail to bring it within any of these express or implied requirements as to notice. The alleged inadequate clearing was represented, in the main, by stumps or roots left in place in areas supposed to be grubbed, stumps or snags exceeding applicable limits of height, growing saplings and other brush, uprooted stumps, and fallen or felled logs lying on the ground. The additional costs alleged to have been incurred by reason of the presence of these obstructions chiefly consisted of (1) expenses incurred for labor and equipment utilized in removing such of the obstructions as the crews engaged in building road spurs to the towers and in performing other parts of appellants' preparatory work could readily remove, and (2) expenses incurred for labor and equipment utilized in constructing the transmission line itself, to the extent that the need for working in ways which would avoid or overcome the obstructions increased the volume of man hours and equipment hours needed for the various line construction operations. There is no evidence to suggest that appellants were directed, required, or instructed by Government personnel to remove the obstructions or to pursue any

<sup>13</sup> *Woodcraft Corporation v. United States*, 146 Ct. Cl. 101 (1959); *J. A. Ross & Company v. United States*, 126 Ct. Cl. 323, 328-30 (1933). But see *Jarvis Manufacturing Company, Inc.*, ASBCA No. 1723 (November 26, 1954), *aff'd on reconsideration* (March 7, 1955).

<sup>14</sup> *Plumley v. United States*, 226 U.S. 545, 548 (1913); *Langevin v. United States*, 100 Ct. Cl. 15, 32-35 (1943); *United States v. Cunningham*, 125 F. 2d 28, 30-31 (D.C. Cir. 1941).

other given course of action with respect to them. What happened simply was that appellants, being confronted with hindrances which made the discharge of their contractual obligation to build the transmission line more expensive than would have been necessary if the hindrances had not been there, took those steps that were chosen by them, in the exercise of their own judgment, as seeming to offer the most economical way for discharging that obligation in the face of such hindrances.

These circumstances present none of the indicia of a change—either actual or constructive. On the contrary, they are typical of a claim for breach of contract.<sup>15</sup> Nor does the recovery sought consist, to any significant degree, of compensation for damages caused by delay. Fundamentally, the recovery sought is compensation for an increase in the volume of working time needed in order to achieve the result prescribed by the contract, rather than compensation for deferment of the calendar date by which such result could reasonably be achieved.

In the last analysis, the claim here at issue is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the contract.

While the foregoing conclusion is necessarily dispositive of the question of notice in connection with the instant claim, the appeals also bring before us a claim for a time extension on account of inadequate clearing. As this further claim is one to which the notice requirement of Clause 5 does apply, it is appropriate that findings now be made as to when notice was first given, whether it could have been given earlier, and whether the Government was prejudiced by lack of notice.

Appellants vigorously contend that notice of alleged inadequate clearing was repeatedly given at dates long prior to those found by the contracting officer. However, the only specific evidence of such earlier notice that has been adduced consists of a letter of complaint sent to Bonneville's central office under date of October 11, 1954, coupled with testimony to the effect that the same complaint was orally communicated, at a somewhat earlier date, to Bonneville's Area Construction Superintendent for the area where Schedule III was situated. The difficulty with this evidence is that the letter says nothing about inadequate clearing. Its gravamen is that "as of this date, October 11, there has been practically no clearing done from tower No. 710 to tower No. 719, inclusive, and it is not ready for our construction crews, mean-

<sup>15</sup> *Seal and Company*, IBCA-181 (March 28, 1961), 68 I.D. 94, 61-1 BCA par. 2988, 3 Gov. Contr. par. 298(j); *Utah Construction Company*, IBCA-133 and 140 (June 10, 1960), 67 I.D. 248, 60-1 BCA par. 2649, 2 Gov. Contr. par. 397; *Flora Construction Company*, *supra* note 11; *York Tabulating Service, Inc.*, IBCA-126 (March 7, 1958), 65 I.D. 120, 58-1 BCA par. 1635; *A. S. Horner Construction Company*, IBCA-75 (December 20, 1956), 63 I.D. 401, 56-2 BCA par. 1115.

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ing that we have had to reorganize our job and by-pass this area completely." The terms of the letter, whether read by themselves or in the light of the surrounding circumstances as shown by the record, merely express a complaint that the clearing of the right-of-way from tower 710 to tower 719 had not yet been performed. Whether it would be adequate could not be known with certainty until the work had been finished. Moreover, if the letter could be read as a notice of inadequate clearing, the notice so given would cover, in any event, only the ten towers therein mentioned. These comments are equally true of the oral complaint to the Area Construction Superintendent. The Board finds, as did the contracting officer, that notice of the alleged inadequate clearing was first given orally late in June of 1955, and was first given in writing by a letter dated July 11, 1955.

The contention of appellants that it would have been impractical to give notice earlier because during the fall of 1954 they expected that the defects in the clearing would ultimately be remedied, and because during the ensuing winter and spring snow obscured the status of the clearing, is likewise without merit. During the fall of 1954 appellants actually performed construction work at more than two-thirds of the tower locations where it is now claimed that the clearing was deficient. By the end of October 1954, the portion of the transmission line running from tower 725 to tower 757 had all its towers in place. Of these 33 towers, 27 are included in the present claim. By the same date the foundation excavations, at least, had been started for 75 more towers, of which 61 are included in the present claim. Certainly, appellants could not have expected that more clearing work would be done at locations, such as these, which not only had been staked for construction by Bonneville, but at which construction had been actually begun and, in some instances, carried forward to the point where tower erection was complete. And, obviously, appellants were not prevented by the subsequent snow from knowing how well or ill these 100-odd locations had been cleared when appellants entered on them.

Prejudice to the Government from want of earlier notice is a more difficult question. The Department Counsel point to two ways in which such prejudice could conceivably assert itself if an attempt were made to determine the amount of time or money allowable as an equitable adjustment for tower sites or assembly areas worked on prior to the giving of notice, the first being inability to distinguish between debris left by the clearing contractors and debris brought onto the site or area by appellants, the second being inability to ascertain just how much, or how little, actual trouble and difficulty the alleged inadequate clearing caused appellants.

The applicability of the first of these arguments would necessarily be limited to debris as such, that is, logs, uprooted stumps, and other movable material. Rooted stumps, growing brush and other material still attached to the ground could hardly be a consequence of appellants' operations. Moreover, following the giving of notice, Bonneville caused an on-the-site investigation to be made of the clearing along the whole of the right-of-way for Schedule III. The inspectors who made this investigation included in their findings a number of notations identifying particular items or piles of debris as having been pushed into particular locations by appellants. From these notations it would seem that the inspectors were, as a practical matter, usually able to identify the source of debris even at tracts on which work had already been done by appellants. Finally, a tower-by-tower examination of the clearing data submitted by the parties reveals that locations where placement of footings and erection of steel had been completed at the time when this data was collected exhibit a cleaner appearance, and are the subject of fewer criticisms from appellants, than are locations which had not yet been worked at that time. In this particular, Montgomery-Macri-Western would seem to have done more injury to their own interests than to those of the Government by their delay in bringing to light the instant claim.

The second of the arguments advanced by the Department Counsel would have a great deal of force if Bonneville had, after receiving notice of the instant claim, made an effort to keep track of the costs being incurred by appellants as a result of the obstructions alleged to constitute inadequate clearing, at the previously unworked tower sites or assembly areas. But, as far as the record shows, Bonneville did not station inspectors at these sites or areas with instructions to take notes upon the amount of any extra labor or equipment time caused by such obstructions, nor attempt in some other manner to make an analysis of the expense being incurred for the purpose of determining what part of it was attributable to such obstructions. Instead, the reasonable cost of removing these hindrances, determined on the basis of a comparison with other jobs involving similar work, was used as the foundation for the equitable adjustment allowed. This procedure would have been just as sound for locations that had been worked on previously as for those that had not.

Clauses 3, 4 and 5 all contain provisions permitting the contracting officer to allow claims that are asserted before the final settlement of the contract, even though timely notices have not been filed, if he determines that the facts justify a waiver of this failure. Such a determination, like other determinations made by a contracting officer,

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may be reviewed by this Board upon appeal.<sup>16</sup> In the making and review of such a determination, the principal factor to be considered is whether or not the untimeliness of the notice has prejudiced the Government.<sup>17</sup> The facts outlined above indicate that here the Government has not been prejudiced. Hence, even if the facts were such as to bring the instant claim within the application of one or the other of these three clauses, the Board would hold that its consideration is not barred by lack of timely notice.

This brings us to the question of the extent to which the clearing actually conformed to the applicable standards, as set out in the clearing specifications. The parties view these specifications in totally different lights. Counsel for Montgomery-Marci-Western regard them as a set of virtually immutable and universal rules, pursuant to which, for example, "all" stumps, roots and brush must be grubbed out of the tower sites, "all" logs, brush and debris must be removed from the assembly areas, and "all" logs felled by the clearing contractors must be removed from every portion of the central strips of the right-of-way. The Department Counsel, on the other hand, view the clearing standards as conferring on the Government a broad discretion to require at any particular locality on the right-of-way either the maximum degree of clearing contended for by counsel for appellants or a "minimum" degree of clearing that would reflect such considerations as, for example, the need for leaving in place rooted stumps the grubbing of which would destroy survey markers or would create soil erosion hazards.

In general, the interpretation placed upon the clearing specifications by the Department Counsel appears to be a sound one. It is directly supported by the provision in the "Work to be Done" section that the clearing is to be performed "in accordance with these specifications or as may be directed by the contracting officer," and the provision in the "Special Areas" section that the contracting officer may designate special areas where clearing shall be done "in accordance with specific instructions from the contracting officer." It is inferentially supported by other portions of the clearing specifications, such as the provision in the tower sites paragraph of the "Central Strips" section that the contractor "shall exercise caution to avoid undue disturbance of the ground surface which would necessitate revision of tower foundation design," the provision in the "Soil Erosion" section

<sup>16</sup> *Monarch Lumber Company*, IBCA-217 (May 18, 1960), 67 I.D. 198, 200-03, 60-2 BCA par. 2674, 2 Gov. Contr. par. 290.

<sup>17</sup> *Monarch Lumber Company*, supra note 16; *Flora Construction Company*, supra note 11; see *McWaters and Bartlett*, IBCA-56 (October 31, 1956), 56-2 BCA par. 1140.

that clearing within national forests shall be "so conducted as to minimize as far as practical the damage to the soil and to prevent gullying and the creation of other conditions conducive to soil erosion," and the provision that in the snow slide area along the Great Northern Railroad stumps shall be cut high "in order to reduce the danger of snow slides reaching the tracks." That the tower sites and assembly areas were not necessarily to be stripped entirely clean is indicated by the presence in the construction contract of provisions to the effect that appellants' unit prices for footings were to cover such "incidental" work as "removing from the site and burning of all disturbed roots, stumps and brush."<sup>18</sup>

A good example of a "minimum" application of the clearing specifications is afforded by tower 699. Here, the clearing contractor was specifically directed not to grub the tower site, but to cut the stumps as nearly flush with the ground as possible. The reason for this was that the site contained certain huge stumps, removal of which would have so impaired the bearing value of the soil as to necessitate finding another location for the tower. In the circumstances this was an appropriate application of the clearing specifications, and whatever increased expense appellants may have sustained by reason of the presence of the stumps was "damnum absque injuria."

There is, however, another side to the coin. The clearing specifications clearly evince an intent that facilitation of the subsequent line construction operations is to have a prominent place among the considerations governing their application. Thus, the section entitled "Intent of Plans and Specifications" states that the clearing is to be "in full compliance with plans, specifications, and directions of the contracting officer, so that when this contract is complete the right-of-way will be ready for erection of structures and stringing of conductors for the transmission line." Similarly, the section entitled "Objective" lists as an objective of the specifications the clearing of central strips "which will be utilized for access during construction and maintenance," and "which will permit the conductor to be laid on the ground and then raised into position without injury or catching on forest debris." While the clauses just quoted do not appear in the Jarnagin contract, this omission is counterbalanced by the fact that the clause "or as may be directed by the contracting officer" likewise does not appear in that contract. From the whole tenor of each contract, it is reasonable to infer that a "minimum" application of the clearing specifications was contemplated only in situations where such

<sup>18</sup> Paragraphs 7-107-A and 7-107-H of the specifications.



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application would not have an adverse effect upon the subsequent line construction operations or where, as in the tower 699 situation, such application would be a reasonable means of avoiding obstacles or objections to the building of the transmission line or of minimizing hazards or injuries caused thereby.<sup>19</sup>

The Board also agrees with counsel for appellants that the tower sites paragraph of the "Central Strips" section extends to the removal of imbedded roots, even though roots are not expressly mentioned therein, since the paragraph calls for "grubbing" of the tower sites. There appears to be an established usage among persons concerned with the clearing of rights-of-way through the forests of western Washington that "grubbing" is to be regarded as comprehending the removal of imbedded roots.<sup>20</sup> The recognition by the Board of this meaning of "grubbing" is, of course, subject to our previous recognition of the authority of the contracting officer to permit "minimum" clearing in appropriate circumstances, as outlined above.

The record contains data with respect to the adequacy of the clearing at each individual tower site and assembly area on Schedule III. It contains a set of charts, one for each tower, on which are marked the position, size and quantities of the various stumps, logs and other obstructions, as determined by an investigation made by employees of Montgomery-Macri-Western during late July and early August of 1955. It also contains a set of charts, covering all of the towers except the last 40 at the westerly end of the schedule, on which are marked the position, size and quantities of the various stumps, logs and other obstructions, as determined by an investigation made by Bonneville inspectors at a later date in August, 1955. The inspectors' findings, to which reference has already been made, are sometimes in substantial agreement with those of appellants' employees, and sometimes widely divergent. There is also a set of photographs showing the condition of the clearing at each tower on the schedule made by Bonneville employees in August, 1955.

In addition to this systematically compiled and arranged data, the record contains numerous other photographs of, or documents pertaining to, particular tower sites or assembly areas, and a great deal of oral testimony by witnesses for each party as to the status of the clearing at particular locations, or as to the practical significance of the conditions revealed by the charts, documents, and photographs.

<sup>19</sup> Cf. *First-Citizens Bank & Trust Company v. United States*, 110 Ct. Cl. 280, 293-297, 312-14 (1948).

<sup>20</sup> See *Cervien v. Erickson Construction Company*, 94 Wash. 500, 162 Pac. 567 (1917).

The contracting officer made his allowance of \$4,534 with respect to the instant claim after three of the top construction engineers in Bonneville's central office had personally examined the adequacy of the clearing at various locations on Schedule III. He also had available the sets of charts prepared, respectively, by appellants and by Bonneville, and the set of photographs made by the latter. Because of the lack of timely notice, he limited eligibility for an equitable adjustment to tower sites on which footings had not been excavated prior to July 1, 1955, and to assembly areas on which steel had not been assembled prior to that date. Out of the 18 tower sites which met this test, the contracting officer determined that 13, or about 72 percent, had not been cleared in the manner which ordinarily would have been anticipated.<sup>21</sup> Out of the 48 assembly areas which met this test, he determined that 30, or about 62 percent, had not been cleared in the manner which ordinarily would have been anticipated.<sup>22</sup> That the contracting officer, with ample documentation at hand, and with consideration limited to locations where work was begun only after notice, found an equitable adjustment to be due for these high percentages of the locations considered is a persuasive indication that the clearing on Schedule III was frequently below the level which, in the opinion of Bonneville, a line construction contractor would ordinarily anticipate.

The data mentioned above, as well as the contracting officer's findings, show convincingly that there were deficiencies in the clearing of the right-of-way of a nature that would necessarily add to the expense of constructing the transmission line. The evidence is sufficient to overcome any inference of lack of harm that otherwise might have been drawn from the failure of appellants to protest to Bonneville against the inadequacy of the clearing until most of its alleged ill effects had been sustained, or from the paucity of the comments about the clearing that appear in the contemporaneous records kept by appellants' field employees.<sup>23</sup>

Appellants contend that out of the 152 towers on Schedule III there was inadequate clearing at 126. The Board has carefully examined the evidence as to the status of the clearing of the tower sites and assembly areas at all of these 126 locations. We find that at 73 tower sites, in addition to the 13 for which allowance was made

<sup>21</sup> These 13 tower sites were those at towers 606, 607, 608, 609, 610, 614, 618, 619, 620, 622, 623, 624 and 630.

<sup>22</sup> These 30 assembly areas were those at towers 606, 607, 610, 611, 618, 619, 621, 622, 623, 629, 630, 632, 633, 634, 635, 664, 669, 670, 674, 704, 706, 707, 708, 709, 710, 711, 712, 713, 714 and 715.

<sup>23</sup> For the rule with respect to such inferences see Claim 1-A in IBCA-77, *supra* note 1.

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by the contracting officer, the clearing did not measure up to the standard set by the clearing specifications, as herein construed.<sup>24</sup> We find that at 32 assembly areas, in addition to the 30 for which allowance was made by the contracting officer, the clearing did not measure up to the standard set by the clearing specifications, as herein construed.<sup>25</sup> There are, of course, some situations where the clearing was on the borderline between adequacy and inadequacy, and these we have attempted to allocate equitably between the parties. And in making our determinations we have perforce applied the rule that appellants have the burden of proving both the validity and the quantum of their claims.

There remains the question of what amount is due appellants with respect to the inadequately cleared locations.

Montgomery-Macri-Western have presented a tower-by-tower tabulation of the costs they assert were actually incurred for excavation, placement, and backfilling of the footings, and for assembly and erection of the steel framework, at each of the 126 towers for which they seek additional compensation. The actual costs so tabulated aggregate \$513,520.10. Appellants have also presented a tower-by-tower tabulation of the costs they assert were duly estimated, in making up their bid, for the footing and steel work at each of these 126 towers. The estimated costs so tabulated aggregate \$342,932.06. By taking the difference between these two figures, that is, \$170,588.04, and by adding to it \$25,588.21 (15 percent of \$170,588.04) as an allowance for overhead and profit, appellants obtain a total of \$196,176.25. This is the amount they assert to be due.

The foregoing method of computation is not ordinarily considered to provide an acceptable basis for determining the amount of the additional compensation to be paid as damages for breach of contract or as an equitable adjustment under a contract.<sup>26</sup> A method of computation frequently used in such a case as this is to measure the amount due

<sup>24</sup> These 73 tower sites are those at towers 611, 628, 629, 631, 632, 633, 640, 645, 648, 649, 653, 654, 655, 656, 661, 662, 664, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 678, 679, 680, 682, 683, 685, 696, 697, 700, 701, 702, 703, 704, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 719, 720, 723, 724, 727, 730, 731, 733, 734, 735, 737, 739, 740, 742, 743, 745, 747, 748, 749, 751 and 756.

<sup>25</sup> These 32 assembly areas are those at towers 620, 624, 647, 648, 649, 651, 653, 659, 668, 671, 673, 676, 683, 690, 692, 693, 695, 699, 701, 702, 703, 716, 717, 720, 729, 731, 732, 734, 741, 742, 747 and 748.

<sup>26</sup> *F. H. McGraw and Company v. United States*, 131 Ct. Cl. 501, 510-12 (1955); *Henly Construction Company*, IBCA-249 (December 7, 1961), 68 I.D. 348, 361-62, 61-2, BCA par. 3240, 4 Gov. Contr. par. 49(b), *aff'd on reconsideration* (April 27, 1962), 69 I.D. 43, 45, 1962 BCA par. 3341, 4 Gov. Contr. par. 49(c); *Holly Corporation*, ASBCA No. 3626 (June 30, 1960), 60-2 BCA par. 2635, *aff'd on reconsideration* (January 18, 1962), 1962 BCA par. 3272; *Roy L. Bair & Company*, Eng. C&A Nos. 914 and 927 (September 7, 1956).

by the difference between the costs that would have been incurred by the contractor if the job specified in the contract had not been interfered with, changed, or otherwise affected by the compensable event in suit—sometimes called the “as specified” costs—and the costs that were necessarily and reasonably incurred by the contractor in performing the job under the circumstances under which it actually had to be performed as a result of such compensable event—sometimes called the “as performed” costs.<sup>27</sup> While the two methods have a deceptive similarity of appearance, the estimated costs developed by appellants are in reality less inclusive than the “as specified” costs defined above, and the actual costs so developed are in reality more inclusive than the “as performed” costs thus defined. The method used by appellants might aptly be called the “total loss” method, since it tends to provide recoupment not only for losses sustained as a result of acts or omissions of the Government, but also for all other losses sustained in connection with the contract work. However, it is most frequently known as the “total cost” method of computation.

The first basic fallacy of the “total cost” method is that it overlooks the necessity for proof that the costs used in making up the claimant’s bid were soundly and properly estimated. More than one contractor has been known to make inadvertently a bid that was far below the reasonably foreseeable costs of doing the job. More than one contractor has been known to unbalance deliberately his bid by overpricing some items and underpricing others. The amount that would have had to be spent in performing the job had there been no breach, change, or other occasion for an award of additional compensation is not to be measured merely by the claimant’s bid, but, rather, is the amount that a prudent contractor would have estimated reasonably as being the cost of performance.<sup>28</sup>

A second basic fallacy of the “total cost” method is that it overlooks the necessity for proof linking the actual costs with their alleged cause. Some, or perhaps all, of the increase in expense may have been incurred because of happenings, such as equipment breakdowns, inefficiency of labor, bad weather, or acts of third parties, that, in the circumstances of the particular case, have no relationship to the breach of contract,

<sup>27</sup> See *S. N. Nielsen Company v. United States*, 141 Ct. Cl. 793 (1958); *General Contracting Corporation v. United States*, 96 Ct. Cl. 255, 276-77 (1942); *Henly Construction Company*, *supra* note 26; *G. M. Co. Manufacturing Inc.*, ASBCA No. 2883 (November 7, 1957), 57-2 BCA par. 1505.

<sup>28</sup> *S. N. Nielsen Company v. United States*, *supra* note 27; *MacDougald Construction Company v. United States*, 122 Ct. Cl. 210, 260-62 (1952); *Great Lakes Dredge and Dock Company v. United States*, 119 Ct. Cl. 504, 558-60 (1951), *cert. denied* 342 U.S. 953 (1952); *General Contracting Corporation v. United States*, *supra* note 27; *Levering & Garrigues Company v. United States*, 73 Ct. Cl. 566, 575 (1932).

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change, changed condition, or other compensable event on which the claim is founded. Even when such a relationship does exist, some of the items of expense may have been improvidently or unnecessarily incurred. Only those actual costs that were caused by a compensable event and that are reasonable in nature and amount may be allowed.<sup>29</sup>

The decision in *Oliver-Finnie Company v. United States*, 279 F. 2d 498, 505-06 (Ct. Cl. 1960), does not abandon either of these substantive "as specified" and "as performed" requisites for an award of additional compensation. It stands at most for the proposition that the "total cost" method may be followed in a case where the contracting officer has made no finding as to amount and where there is no proof that the bid was too low or that the actual costs claimed are too high. In the instant case there is a pertinent finding by the contracting officer. Nor does *Farnsworth & Chambers Company*, ASBCA No. 5988 (August 16, 1960), 60-2 BCA par. 2733, abandon these substantive requisites. It stands merely for the proposition that the "total cost" method may be followed if the contracting officer has utilized it, since before doing so he presumably satisfied himself that the bid was not too low and that the actual costs claimed are not too high. In the instant case the contracting officer expressly refused to utilize that method. Thus, neither decision is applicable here, and, if it were, would do no more than shift the incidence of the burden of proof, by placing upon the Government the burden of disproving appellants' figures, in lieu of requiring appellants to prove the correctness of those figures. The limited scope of each decision is indicated by the fact that *Oliver-Finnie* characterizes the "total cost" method as being "by no means satisfactory," while *Farnsworth & Chambers* says of that method:

Ordinarily, we do not accept this basis for computing the amount of an equitable adjustment. This is for two reasons: (1) it presupposes that the contract price is a reasonable price which may or may not be true, and (2) it presupposes that all of the increase in cost is traceable to the change or other contract action for which an equitable adjustment is being sought. This, likewise, may or may not be true. \* \* \*

In the instant case appellants have offered no satisfactory proof that the cost increases reflected in their actual cost figure of \$513,520.10 include only cost increases attributable to inadequate clearing of tower sites and assembly areas, and exclude any cost increases that were not caused by the Government.

<sup>29</sup> *MacDougald Construction Company v. United States*, supra note 28; *Great Lakes Dredge and Dock Company v. United States*, supra note 28; *Henly Construction Company*, supra note 26.

Appellants' managing partner testified, it is true, that the \$513,520.10 did not include costs attributable to those errors of appellants that he was "absolutely familiar with" at the time when the actual costs were computed. However, he was not regularly present at the job site until the winter of 1955-56, depended on his subordinates for information as to what went on there, and plainly had only limited familiarity with the extent to which errors were committed. His statement is not corroborated by work sheets or other records showing how much or how little was deducted for contractor errors in computing the actual costs. In any event it falls a good deal short of an assertion that deductions had been made for all errors of appellants and for all other increased costs not caused, directly or indirectly, by the Government.

Appellants' own documents indicate, moreover, that the \$513,520.10 contains substantial amounts of increased costs for which appellants were responsible. These documents, as put in evidence, include the daily slips that were prepared by appellants' foremen to account for the time of the men and equipment assigned to their respective crews, and that were later used in computing the job costs. A number of the slips contain notations explaining the reasons why a higher degree of productivity was not being attained, or explaining other problems that were bothering the foremen. Also in evidence is a diary covering nearly the entire period of contract performance kept by one of the general foremen. There are in the slips and the diary a bare handful of references to inadequate clearing. By way of comparison, there are a legion of references to equipment breakdowns. A reading of the entries strongly suggests that far more labor and equipment hours were unexpectedly lost because of equipment breakdowns than because of inadequate clearing, and other evidence points to a like conclusion. From the whole record it is readily apparent that appellants' actual cost figure greatly overstates the increased costs attributable to inadequate clearing.<sup>30</sup>

Appellants have also offered no satisfactory proof that their estimated cost figure of \$342,932.06 is based upon a reasonable evaluation of all the cost factors affecting the job that were known, or should have been foreseen, during the bidding period.

The evidence as to how the \$342,932.06 was derived is very confused. Sometimes appellants' witnesses seem to say that this figure is based upon the work sheets used in computing their bid, but these sheets were not put in evidence and, as will be seen, the facts are inconsistent with such an ancestry. The estimated cost of the foot-

<sup>30</sup> Cf. *John A. Johnson Contracting Corporation v. United States*, 132 Ct. Cl. 645, 654 (1955).

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ing and steel work for the 152 towers on Schedule III is put by appellants at \$410,635.26, the difference between this sum and \$342,932.06 being the estimated cost for the 26 towers not included in the present claim. But the amount actually bid by appellants for the footing and steel items of Schedule III totaled \$677,100.10, or approximately 65 percent more than the \$410,635.26 which appellants now give as their estimated costs for the same work. The bidding occurred at a time when competition for Bonneville transmission line construction jobs was keen, and it is inconceivable that a bid which contained so great a margin for profit as that inherent in this 65 percent differential would have turned out to be the lowest on the job here involved. It is true that appellants' estimated cost figure, like their actual cost figure, does not include any allowance for materials or for overhead. However, the materials furnished by appellants in the course of performing the footing and steel work were small in amount, and probably increased the estimated costs by a good deal less than 10 percent. Appellants' concept of a reasonable allowance for overhead is suggested by the fact that they are now seeking a single allowance of 15 percent to cover both overhead and profit. Thus, it seems clear that appellants' bid must have been based upon estimated costs (before allowances for materials, overhead and profit) considerably higher than the figure of \$342,932.06 used in computing the instant claim. If not, then appellants greatly underestimated the foreseeable costs of the job.

On the other hand, there is some testimony to the effect that this figure represents an estimate, compiled after the job had been completed, of what the work would have cost if there had been no defects in the clearing. The evidence is, however, so uncertain that it fails to reveal whether the estimate resulting from this supposed after-the-fact review of what the job should have cost was higher or lower than the original bid estimate. Assuming that such a review was made, there is an utter lack of any supporting data from which its sufficiency and impartiality might be judged.

Appellants' presentation, moreover, contains a compilation of the actual costs and the estimated costs at 22 towers on Schedule III which appellants regard as having been properly cleared and which, therefore, are not included in the present claim.<sup>31</sup> According to this compilation, the actual costs were \$63,407.19 and the estimated costs

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<sup>31</sup> The four remaining towers are excluded because they were the subject of alleged cost increases which appellants attribute to changes, subsurface conditions, or other circumstances unrelated to clearing.

were \$58,672.26, thereby resulting in an excess of actual costs over estimated costs of \$4,734.93, or approximately 8 percent. The compilation, however, appears to omit certain items of expense, such as backfill, from the actual costs. If all the omitted items were taken into account, at the same ratio as that used in appellants' computations for like items at the other towers, the excess of actual costs over estimated costs would be \$12,705.21, or approximately 22 percent. It is thus apparent that appellants' estimated costs are unrealistically low, not merely for the towers included in the claim, but even for the towers as to which no complaint of improper clearing is made.

We do not disagree with the testimony in which appellants' witnesses described at least a dozen different construction operations, the cost of each of which could have been increased by inadequacy of clearing. But appellants kept no records from which it would be feasible to determine, even by a rough approximation, how many instances there were in which any one of these operations had actually been hampered by inadequacy of clearing. And the isolated instances which its witnesses were able to recall obviously could account for no more than a small fraction of the amount claimed.

Counsel for Montgomery-Macri-Western urge that we should not insist upon too high a standard of proof of costs because the necessity for proving costs was brought about by the Government, citing *Douglas Aircraft Company, Inc. v. United States*, 95 Ct. Cl. 140 (1941.) That case does not appear to be in point. It involved a situation where the avoiding of a contract, at the instance of the Government, made it necessary for the contractor to seek compensation on a *quantum meruit* basis for the work previously performed under the contract. Hence, the contractor was obliged to prove the costs of work for which, while performance was being made, it had no occasion to keep cost records, since, if the contract had not been avoided, the work would have been paid for at the contract price. The present claim, on the other hand, is for compensation over and above the contract price on account of hindrances that prevented performance of the contract work in the most economical way. Such a claim, whether viewed as being for a breach of contract or for an equitable adjustment under the contract, is a claim as to which proof of costs has been traditionally required, both by courts and boards of contract appeals. At the time when the hindrances in question were encountered, appellants had every reason to anticipate that the amount of the costs generated by such hindrances would ultimately need to be proved if compensation were to be obtained for them. Nor did the action of Bonneville in failing to have the right-of-way more adequately cleared



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place appellants under any disadvantage in keeping cost records, or in otherwise assembling proof of the added expense occasioned by such failure. Therefore, there is no justification for relaxing the standard of proof.

Since Montgomery-Macri-Western have submitted no adequate proof of the amount due them, we turn to the Government's figures. The contracting officer's allowance of \$4,534 was computed on the basis of the prices paid by Bonneville for clearing work on other transmission lines. For the tower sites the basic price used was \$118 per site. This price was increased by 100 percent because of the more difficult terrain on the Chief Joseph-Snohomish line, and because of an intervening increase in costs. The resulting \$236 was then decreased by 50 percent on the ground that at least half of the work at each of the inadequately cleared tower sites had been correctly done by the clearing contractors, thereby leaving \$118 per site as the final figure. For the assembly areas the basic price used was \$1,500 per acre. This price was the average sum paid for clearing a right-of-way running alongside that of the Chief Joseph-Snohomish line, and hence, did not need to be adjusted for difference in terrain. Because the intervening increase in costs appeared to be fully offset by a rise in the market value of the cut timber (which clearing contractors are customarily accorded the right to salvage and sell) no adjustment was made for such increase. Since disposal of waste material was considered to be the only significant portion of the clearing work left undone at the inadequately cleared assembly areas, and since Bonneville in making payment for clearing work had long recognized the disposal of waste material as representing approximately 30 percent of the costs involved in a clearing job, a like percentage was applied to the \$1,500 figure, thereby establishing \$450 per acre as the price for waste material disposal. After considering other factors deemed pertinent, including the increment in costs resulting from the necessity for moving appellants' crews from area to area and the reduction in costs resulting from the fact that only some of the waste material had to be disposed of by appellants, the \$450 figure was increased to \$500 per acre. There being one-fifth of an acre in each assembly area, the final figure was \$100 per assembly area. Thus the amount allowed was, for the tower sites 13 times \$118, or \$1,534, and for the assembly areas 30 times \$100, or \$3,000, a total of \$4,534.

As the foregoing summary indicates, a considerable measure of judgment is reflected in the Bonneville computation. The evidence does not provide data on which we could independently review the

soundness of that judgment, but it does indicate that the conclusions reached were based on practical experience in the field of clearing costs and were arrived at objectively. In the last analysis the unperuasiveness of appellants' evidence leaves us only the choice of relying upon the Bonneville computation or of making no allowance at all. We think that computation has enough support in the record to justify the former alternative.<sup>32</sup>

The additional compensation due appellants for the 86 inadequately cleared tower sites, accordingly, is found to be \$10,148 ( $86 \times \$118$ ) and the additional compensation due appellants for the 62 inadequately cleared assembly areas, accordingly, is found to be \$6,200 ( $62 \times \$100$ ).

The Board determines, therefore, that Claim A-1 is allowable in the sum of \$16,348, of which \$4,534 was allowed by the contracting officer, leaving \$11,814 as the remainder due appellants.

### *Claim A-2*

#### *Central Strips*

This claim is for the sum of \$202,992.80, none of which was allowed by the contracting officer.<sup>33</sup> The claim arises out of alleged inadequate clearing of the central strips of the right-of-way for Schedule III. These strips constituted, in effect, a ribbon of specially-cleared land, 70 feet wide, that extended from tower to tower directly underneath the space where the conductor was to hang.

The incidents of the claim for the central strips largely parallel those of the claim for the tower sites and assembly areas. The standards governing the clearing of the central strips are included in the excerpts from the clearing specifications that are quoted in our discussion of Claim A-1. Appellants' allegations are to the effect that the central strips in many of the spans on Schedule III contained brush, felled logs, uprooted stumps, and other obstructions improperly left by the clearing contractors, and that the presence of this undesired material impeded the free passage of men and equipment, increased the hazard of snagging or abrading the wire while it was being pulled

<sup>32</sup> See *Henly Construction Company*, *supra* note 26; *Caribbean Construction Corporation*, IBCA-90 (Supp.) (September 22, 1959), 66 I.D. 334, 59-2 BCA par. 2322, 1 Gov. Contr. par. 666; *Holly Corporation*, *supra* note 26.

<sup>33</sup> This claim was denied in the finding of facts dated February 29, 1956, and the denial was reaffirmed by the contracting officer in the supplement to such finding dated April 16, 1956.

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out, and, in general, added greatly to the cost of stringing the conductor. The contracting officer, on the other hand, found that in the clearing of the central strips there was no material deviation from the applicable specifications.

With respect to the issue of notice, the pertinent facts are essentially the same as those stated in the discussion of Claim A-1. Hence, the Board holds that the instant claim is not barred by reason of any failure to give notice.

With respect to the adequacy of the clearing, the general observations as to the proper application of the specifications made in the course of our discussion of Claim A-1 are equally relevant to the central strips. The two sets of charts mentioned in that discussion include notations as to the adequacy of the clearing on the central strips which cover, in the case of the Montgomery-Macri-Western charts, all of the spans on Schedule III, and, in the case of the Bonneville charts, nearly all of those spans except the 40 most westerly ones. There is also much oral testimony and photographic evidence bearing upon the clearing of the central strips.

Application of the clearing specifications to the evidence has required the resolution of certain recurring problems that deserve specific mention. In the main, these stem from the provision in the "Central Strips" section that:

All waste material existing on the ground and all waste material created by the contractor shall be burned with the exception of individual down logs over eight inches in diameter which have not been disturbed by the contractor and which will not make the central strips impassable to construction vehicles.

This provision, when read in the light of the "Definition of Terms" section, called for the removal of logs exceeding eight inches in diameter that were present on the central strips when the right-of-way was first entered by the clearing contractor if such logs either (1) were disturbed by him, or (2) would make impassable to construction vehicles a locality which otherwise would have been passable to such vehicles. On the other hand, it called for the removal of logs exceeding eight inches in diameter that were felled by the clearing contractor irrespective of whether such logs affected the passability of the central strips, and called for the removal of all other waste material irrespective of who had created it or how it might affect passability.

The Board, however, cannot read into the word "individual," as used in this provision, a requirement that the clearing contractor

must remove logs present at the time of his entry merely because they happened to be lying in piles or jumbles, or to be crisscrossed, or to be touching one another in some other way. Nor can the Board read into the clearing specifications a general requirement that any material which would prevent the passage of construction vehicles or would create a hazard of injury to the conductor must be removed from the central strips, even though the material belongs to a class, such as pre-existing stumps or snags less than 8 feet high, as to which there is no specific requirement for removal in the clearing specifications. Conversely, the impassability of a particular area would not, by itself, justify leaving in that area logs felled by the clearing contractor or waste material other than logs, if such logs or waste material would constitute a substantial hazard to subsequent line construction operations, as, for example, by snagging or fouling the conductor while it was being strung.

There appear to have been some instances where logs that should have been disposed of by the clearing contractors, but that were nevertheless left on the central strips, turned out to be useful for lagging purposes. These instances, however, were limited as well as fortuitous. The evidence shows that appellants had available a number of devices—sometimes called lagging jacks—designed to hold the conductor above the ground at places where injury might otherwise occur, that appellants regarded such devices as the preferable method of lagging the conductor, that logs on the central strips interfered with the placing of the lagging jacks, and that appellants used the latter to a substantially lesser extent than would have been the case had fewer logs been left on the central strips. The evidence also shows that the logs sometimes contained pitch or other substances capable of injuring the conductor, that they were scattered about in a random manner which often necessitated considerable rearrangement before they could be used as lagging, that they did not hold the conductor as high as lagging jacks would have done, and that the latter were on the whole a superior means of protecting the conductor against deleterious contacts. All things considered, the logs left on the central strips would seem to have been of little real advantage to appellants for lagging purposes, except possibly in a few hard-to-reach areas where lagging jacks would have had to be packed in by hand.

A portion of the right-of-way that presents special problems is the snow slide area along the Great Northern Railroad between tower 619 and tower 632. In some of the spans within this area quantities of logs felled by the clearing contractor were left on the central strips. This

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deviation from the general requirements of the "Central Strips" section is not justified by the specific provision (appearing at the end of the excerpts from the clearing specifications) for this snow slide area, since that provision merely prescribes a stump height of six feet in lieu of the two feet that would otherwise be required. The evidence offers no indication of the making of any systematic attempt to arrange the logs in formations that would tend to hold the soil in place, or to retain snow, or to forestall the possibility of the logs themselves rolling down the steep slopes. Even less is there any indication of an attempt to arrange the logs in formations that would tend to combine the objective of facilitating line construction operations with the objective of conserving soil and moisture. In general, these logs appear to have been more a hindrance to the stringing of the conductor than they were a protection against snow slides or soil erosion. The situation, therefore, is one in which the deviation from the requirements of the "Central Strips" section cannot be justified as a reasonable exercise of the authority reserved to the contracting officer in other provisions of the clearing specifications.

The situation just discussed should not be confused with the piles of logs found alongside the railroad tracks at certain places in the same area. At these places the Great Northern Railroad had caused logs to be arranged in piles for the planned purpose of protecting the movement of its trains against snow slides. These piles were mostly outside the central strips, and were composed of logs not felled by the clearing contractor. The only place where the log piles created by the railroad appear to have had any effect upon appellants' work is at the point where the transmission line crossed the railroad tracks in the span between towers 631 and 632. The retention intact of these purposefully created piles was a reasonable precaution, well within the authority of the contracting officer under the clearing specifications.

Another portion of the right-of-way that has proved to be especially controversial is the Index Ridge area, running from about tower 709 to tower 718. At the time when this area was cleared, there was no access road leading to towers 710, 711, 712, 713 and 714, and, therefore, no ready means through which fire-fighting apparatus could reach the vicinity of these towers in the event burning operations got out of control. Because of this special hazard, Bonneville directed the clearing contractor not to burn the logs felled by him, but, instead, to place them on the sides of the right-of-way outside the central strips. This was done. Subsequently, the contract between

Bonneville and Montgomery-Macri-Western was amended so as to provide for the construction by the latter of an access road to the five towers mentioned.<sup>34</sup> While constructing this road appellants pushed into the central strips a number of the logs that the clearing contractor had placed outside those strips, together with debris resulting from the road-building operation itself. Much of the terrain between the five towers mentioned would have been impassable to construction vehicles in its natural condition. In essence, the situation is one where there was a valid reason for not burning logs, where the central strips themselves were cleared of all logs that had been felled by the clearing contractor or that impeded impassability, and where the waste material subsequently found on the central strips was put there by appellants themselves. It necessarily follows that no additional compensation is allowable for any of the spans between towers 710, 711, 712, 713 and 714. The other parts of the Index Ridge area did not involve comparable problems, and had some spans with clearing deficiencies, such as, for example, the leaving of excessively high stumps.

The particular spans on Schedule III where there was allegedly inadequate clearing are not enumerated by appellants. The charts prepared from the data collected by their employees contain notations of inadequate clearing for approximately 64 of the 151 spans.

The Board finds, upon the basis of the whole record, that in 22 spans the clearing of the central strips did not measure up to the standard set by the clearing specifications, as herein construed.<sup>35</sup> In making this determination, we have followed the same principles concerning borderline situations and burden of proof as in the case of the tower sites and assembly areas.

With respect to the amount of the additional compensation due, appellants' evidence is even less persuasive than in the case of Claim A-1. It consists of little more than a statement of the total number of man hours and equipment hours alleged to be attributable to clearing deficiencies on the central strips, together with information as to the average hourly rate of pay and the hourly equipment charges. The testimony of appellants' managing partner indicates that this statement was compiled by estimating in percentage terms the extent to which the total costs of the job had been increased by inadequate clearing of the central strips. What the percentages were is nowhere

<sup>34</sup> This road also figures in Claims F-2 and F-5.

<sup>35</sup> These 22 spans are those which begin, respectively, at towers 619, 620, 621, 622, 623, 624, 625, 628, 630, 632, 663, 672, 700, 708, 709, 715, 716, 718, 740, 750, 754 and 756, and which end, respectively, at the next higher numbered tower.

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stated, and how they were calculated is nowhere explained. Thus the statement fails to possess even the appearance of certainty and substantiation. Furthermore, as pointed out in the discussion of Claim A-1, there is persuasive evidence that appellants probably would have sustained a substantial loss on the job in any event because of factors not chargeable to the Government, such as the numerous serious breakdowns of equipment. In the light of these facts it would be impossible to accept any computation based on the concept that appellants' bid prices were all soundly estimated, that its actual costs were all prudently incurred, and that any excess of the latter over the former should be borne by the Government.

In the absence of better evidence, the Board considers that the figure of \$500 per acre applied to the assembly areas by both the contracting officer and the Board is a fair measure of the additional compensation due for the central strips. There are, to be sure, some differences. For example, the clearing specifications required all logs to be removed from assembly areas, but permitted certain logs to be left on the central strips, thus presumably making the latter somewhat less expensive to clear to the prescribed standards. On the other hand, appellants frequently had to provide their own access road spurs into assembly areas, and in the course of so doing could sometimes effect economies by cleaning up these areas as a part of the road-building operation. In total effect the differences do not appear substantial enough to call for application to the central strips of some figure other than \$500 per acre.

The Board has not attempted here to take account of the fact that a large, but unspecified, portion of the \$202,992.80 included in the instant claim is for general cost increases attributed to the severe winter weather that prevailed while the final portions of the contract work were being performed, rather than for cost increases directly and solely traceable to inadequate clearing of the central strips on Schedule III. The extent to which the responsibility for the winter costs rests upon Montgomery-Macri-Western on the one hand, or upon Bonneville on the other, is a complex problem which can be soundly analyzed only in the light of the total impact upon the contract work of the various transactions involved in the present appeals. Hence, the question of winter work is being reserved for consideration in the last section of this opinion.

The central strips of the 22 spans where there was inadequate clearing have an aggregate length of 23,554.6 feet and an aggregate content

of approximately 37.85 acres.<sup>36</sup> At \$500 per acre, the additional compensation due appellants for inadequate clearing of the central strips amounts to \$18,925.

The Board determines, therefore, that Claim A-2 is allowable in the sum of \$18,925.

*Claim A-3*

*Access Road 28C*

This claim is for the sum of \$3,500, none of which was allowed by the contracting officer.<sup>37</sup> It is based upon the alleged unusable condition of an access road leading to towers 628, 629, and 630.

The contract permitted Montgomery-Macri-Western to utilize Bonneville access roads for trucking in materials and for other operations incident to the performance of the contract work, but left with them the responsibility of providing such additional roads or other access facilities as might be needed.<sup>38</sup> While most of the towers were near Bonneville access roads, in existence or under construction when the contract was awarded, there were some notable exceptions. One of these was a steep and rocky ridge where towers 628, 629 and 630 were to be built. Appellants, when estimating their bid, planned upon rigging overhead cables to tall trees or spars so as to be able to move equipment and materials to and from these sites through the air—a procedure known as “skylining” or “highlining.”

Bonneville, however, determined to have built into this area an access road, which came to be designated as Access Road 28C. Bids for its construction were solicited shortly after appellants had been awarded their contract for the line construction job. Appellants submitted a bid for the access road, but the successful bidder was Washington Utilities Construction Company, the clearing contractor for this portion of Schedule III. Appellants' bid included, pursuant to a request contained in the invitation, a quotation of the amount which they would be willing to have deducted from the contract price for the transmission line if the access road were built by others and made

<sup>36</sup> These figures are exclusive of those portions of the spans that fall within the tower sites and assembly areas, as measured by a 120-foot square at each tower, since compensation for any inadequate clearing within such squares or their equivalents is provided under Claim A-1.

<sup>37</sup> A time extension on account of the circumstances out of which this claim arises was denied by the contracting officer in his letter of February 29, 1956. That letter has been treated in the course of the appeal as also denying, by necessary implication, additional compensation on account of such circumstances. See *Cow and Haddock*, IBCA-155 (March 26, 1959), 66 I.D. 97, 105, 59-1 BCA par. 2111, 1 Gov. Contr. pars. 274, 276.

<sup>38</sup> Section 3-103 of the specifications.



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available for appellants' use, the amount so quoted being \$3,500. Following these events the contracting officer issued and appellants accepted Change Order "A," dated September 22, 1954. This order recited that:

The Government has entered into an agreement to have constructed an access road (Access Road 28C) to provide access to Towers 628, 629, and 630. This road will be made available for your use in performing your contract. In consideration for the privilege of using this road you have agreed to a reduction of \$3,500.00 in the contract amount which is considered reasonable and acceptable to the Government.

It then went on to provide that "in consideration of availability to the contractor of Access Road 28C" the contract price for the transmission line was decreased by \$3,500.

The road was constructed in the fall of 1954, but appellants did not seek to make any real use of it until the spring of 1955. Much of the road was in the form of a shelf cut into a steep and rocky hillside. The evidence concerning its condition when first used for haulage operations in 1955 is rather conflicting, but justifies a conclusion that while light vehicles designed for rough terrain, such as 4-wheel-drive jeeps, could ordinarily travel the road under their own power, the heavy trucks utilized for carrying such items as tower steel, even when having 6-wheel drives, could not make the grade unless assisted. To get them up usually involved moving a caterpillar tractor equipped with a powerful winch to the top of the ridge, anchoring the tractor in place, fastening the cable of the winch to the truck, and using the winch to haul the truck slowly up the grade. Appellants contend that for all practical purposes the road was so unusable as not to be "available" within the meaning of Change Order "A," and that the Government, therefore, is not entitled to the benefit of the reduction in the contract price provided for in that order.

To evaluate this contention it is necessary to consider just what sort of a road appellants were entitled to expect. Change Order "A" did not purport to describe the road, other than by implying that it would be such as had been bid upon by appellants as well as by the successful bidder. The invitation sent to each of them stated:

The road should be of ten foot minimum width, without ditches, with culverts as indicated on the drawing and built in accordance with the standard specifications enclosed.

The drawing mentioned contained a profile which showed that the road would be very steep with a grade, when finished, exceeding 20 percent for much of its length and going as high as 28 percent. It

also contained a plan which showed that the road was to be a winding one that would approach, but not actually reach, the assembly areas at each of the three towers. The specifications mentioned were Bon-ville's standard specifications for access road construction and improvement. As would be natural in a set of standard specifications, they contained a number of general provisions the application of which in particular situations was to be governed by the drawings, other contract documents, or the directions given from time to time by the contracting officer.

The weight of the evidence is to the effect that Access Road 28C, when constructed, was substantially as good a road as appellants could reasonably have anticipated from the terms of the invitation, drawing, and specifications for its construction. In general, it was too much to expect that the steep, narrow, winding, undrained and unpaved road described in the invitation, drawing and specifications could be successfully climbed by heavily-laden trucks without some form of assistance. In specifics, the objections to the road are based upon misinterpretation of the contract or of the facts. Thus, appellants lay stress on the absence of drainage ditches, but the express statement "without ditches" in the invitation clearly made inapplicable the portions of the standard specifications relating to drainage ditches. Stress is also placed upon the lack of enough culverts, but all of the culverts called for by any of the contract documents were installed except two, and these were so situated that their omission had no adverse consequences. Other objections have to do with alleged failures to comply with specification requirements covering such matters as the placing of rock for slope protection, the removal of unstable material from the roadbed, the breaking off of projecting rocks, the shaping of the surface of the roadbed, and the removal of roots and other deleterious material from within the top four inches of the finished surface. The evidence shows, however, that these requirements either were met, or were inapplicable to the situation at hand, or were departed from in particulars which did not affect the usability of the road. The contention that the road stopped short of the assembly areas is answered by the fact that its location with relation to each tower was so plainly marked on the drawing that appellants, when estimating their price reduction quotation of \$3,500, could hardly have overlooked the necessity for constructing spurs into the assembly areas.

A further significant consideration is that an entire winter elapsed between the construction of the road and the beginning of haulage

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operations over it. The combination of steepness of grade, rocky ground, and lack of drainage ditches resulted in much of the road being a veritable gutter. Ample water to fill this gutter was provided by the heavy snowfalls characteristic of the surrounding region. It thus should have come as no surprise to appellants that some stretches of the roadway were found to be in need of substantial repairs when haulage operations began. Appellants performed some maintenance work, but not to the extent that would have been necessary in order to remedy all of the damage done by winter snowfalls and spring run-off.

Neither Change Order "A" nor any other contract provision purported to place upon Bonneville an obligation to maintain Access Road 28C. Quite the reverse, the contract with Montgomery-Macri-Western contained the following general requirement as to maintenance of Bonneville access roads:

The contractor shall maintain such roads used by him and upon completion of the job these roads are to be left in as good condition as on original entry.<sup>39</sup>

It is unnecessary to decide when the "original entry" occurred with respect to Access Road 28C, for, assuming that it did not occur until the beginning of haulage operations in 1955, the net effect would be merely to leave appellants in the position of owing the Government no duty to rectify prior damage to the road, and not to put the Government in a position of owing appellants a duty to rectify such damage. Hence, the case falls within the application of the general rule of contract law that a construction contractor must bear the risk of increases in the cost of the contract work caused by forces of nature, without the fault of the other party, unless there is, as here there is not, a provision in the contract shifting this risk to the Government.<sup>40</sup>

The Board concludes that the condition of Access Road 28C when it was made available to Montgomery-Macri-Western in the fall of 1954 does not afford a basis for recovery, since the road was constructed in substantial conformity with the invitation, drawings and specifications furnished appellants in advance of the negotiation of Change Order "A." The Board further concludes that the condition of Access Road 28C when it began to be used for haulage operations in the spring of

<sup>39</sup> Section 3-103 of the specifications.

<sup>40</sup> See *Day et al. v. United States*, 245 U.S. 159 (1917); *Warren Brothers Roads Company v. United States*, 123 Ct. Cl. 48, 76-79 (1952); *Eugene De Armas v. United States*, 108 Ct. Cl. 436, 466-68 (1947); *Arundel Corporation v. United States*, 103 Ct. Cl. 688, 708-12 (1945), *cert. denied*, 326 U.S. 752 (1945); *Inter-City Sand and Gravel Company & John Kovtynovich*, IBCA-128 (May 29, 1959), 66 I.D. 179, 199-200, 59-1 BCA par. 2215, 1 Gov. Contr. pars. 430-32.

1955 likewise does not afford a basis for recovery, since the risk of loss from deterioration of the road caused by forces of nature rested upon appellants.

Claim A-3, therefore, is denied.

### *B. General Conductor Claims*

The three claims that will be considered under this heading pertain solely to Schedule II.<sup>41</sup> The "Chukar" conductor furnished by Bonneville to Montgomery-Macri-Western for use on portions of that schedule was conductor which had been subjected to the inspectional and corrective procedures described in our decision on IBCA-77.<sup>42</sup> Dependent upon the particular procedure employed, such conductor was known either as "field reworked" or as "factory rewrapped." In contrast, the conductor furnished for use on the remainder of Schedule II and for all of Schedule III was from lots manufactured at a later date and by a somewhat different process than the conductor which had been subjected to these inspectional and corrective procedures. Appellants contend that the field reworked and factory rewrapped conductor contained fabricator-caused defects, and that in consequence thereof they were put to unanticipated expense for which they should be reimbursed by the Government. For the reasons and with the qualifications stated in our decision on IBCA-77, the Board is convinced that the field reworked and factory rewrapped conductor did contain a substantial number of fabricator-caused defects, but, as pointed out in that decision, it does not necessarily follow that the presence, or suspected presence, of these defects increased appellants' costs.

Each of the three claims here at issue deals with a general category of conductor stringing operations as to which additional expense is alleged to have been sustained by reason of fabricator-caused defects in the field reworked and factory rewrapped "Chukar" furnished for use on Schedule II. There is no problem with respect to notice since the contracting officer considered all of the conductor claims on their merits without invoking the notice requirements of the contract and, by so doing, waived any failure to give timely written notice as there prescribed. Nor is there any ground for applying the rule that failure to protest is a circumstance from which lack of harm may be inferred, since appellants made repeated oral and written protests to Bonneville

<sup>41</sup> These three claims were determined by the contracting officer in the finding of facts dated September 28, 1956, where they were designated, respectively, as Parts 1, 2, and 3 of Claim 6 for Schedule II.

<sup>42</sup> *Supra* note 1.

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against the additional expense to which, they said, they were being put by reason of having to use field reworked or factory rewrapped conductor.

*Claim B-1*

*Additional Lagging Cost*

This claim is for the sum of \$7,941.29, none of which was allowed by the contracting officer. Montgomery-Macri-Western used the lagging method, rather than the tension method, for stringing conductor. They contend that Bonneville, through its lagging inspectors, required that the pieces of lagging be spaced sufficiently close to insure that the conductor would not touch the ground in any circumstances, either while the wire was in motion or while it was at rest. The imposition of this alleged requirement is attributed by appellants, in the main, to a supposed proneness of the conductor to injury because of defects in its manufacture, although other possible reasons are also mentioned by them. This claim is for the additional expense allegedly incurred in supplying more and better lagging than was called for by the contract, as construed by appellants.

The claim thus put forward presents considerations of the same nature as were involved in Claim 5 of IBCA-77 and Claims 1-A and 4 of IBCA-80.<sup>43</sup> The governing contractual provision is identical.<sup>44</sup> We construe it as meaning that enough lagging must be used to forestall any reasonable possibility of damage to the conductor through contact with the ground, rather than as meaning that the conductor must be kept off the ground at all times irrespective of whether such contact would be injurious to the wire.

In relating this standard to the stringing of the transmission line across the Cascade Mountains that formed the subject of IBCA-80, we said:

Application of the standard in question necessarily called for the exercise of good judgment on the part of whoever was seeking to apply it. This, in turn, called for sound estimation of the potentialities for damage inherent in the nature of the terrain traversed by Schedule IV of the McNary-Ross line. The evidence discloses that there were many such potentialities. The country was rugged and mountainous, with quantities of rocks on, protruding through, or just beneath the surface. The natural ground cover of grass, forest debris, and other vegetal material tended at times to obscure the presence of rock outcroppings or scattered rocks. Relatively good stretches were few in number. We are convinced that,

<sup>43</sup> *Supra* note 2.

<sup>44</sup> Paragraph 10-110-G of the specifications.

in order to avoid reasonable possibility of damage, the conductor should have been kept entirely clear of the ground throughout most of the length of Schedule IV.

The numerous steep slopes added further to the lagging problem. Where the land dipped at right angles to the path of the conductor, the latter sometimes slipped sidewise off the lagging. Where the land dipped in the same direction that the conductor was moving, the lagging sometimes became dislodged and slipped downhill. The contractor's men and the inspectors cooperated with each other in keeping watch for occurrences of these kinds. It is evident that some of the stops for which claim is made were for the purpose of correcting just such accidental deficiencies as these.

These comments are as apt here as in IBCA-80. The evidence discloses that the terrain on Schedule II of the Chief Joseph-Snohomish line was even more fraught with hazards for the conductor than that on Schedule IV of the McNary-Ross line. It was rougher and had almost no relatively good stretches. The result is that the contractual requirement of enough lagging to forestall any reasonable possibility of damage to the conductor through contact with the ground was, as a practical matter, virtually equivalent to a requirement that the conductor be kept entirely clear of the ground.

It would appear, moreover, that the need for spacing lagging close enough to avoid any contact with the ground was recognized by appellants when bidding on the job. Representatives of Bonneville and of Montgomery-Macri-Western met, in accordance with custom, for an award conference on June 10, 1954. Appellants' managing partner is recorded as having said, when the discussion turned to the problem of avoiding damage to the wire, that: "We gave this enough attention that we have actually figured out in labor costs what it will cost to build a boardwalk from one end to the other, and it is quite expensive." To transmission line builders, a "boardwalk" means the closely-spaced lagging that is used where it is desired to avoid any contact with the ground.

Appellants also contend that they were not permitted to use for lagging purposes timber, whether cut or uncut, found on or near the right-of-way. The Government concedes that this was sometimes true, but only in instances where there was a valid reason for denying such permission, as, for example, where the timber contained resinous substances that might adhere to the conductor, or had imbedded in it stones that might scratch the conductor, or was outside the scope of any cutting or user privileges possessed by Bonneville. The evidence offered by appellants is inadequate to show that they were prevented from using the timber in question for lagging purposes in any instance

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where they desired so to do, where the timber was suitable for such purposes, and where Bonneville had a right to sanction its cutting or use.

The Board finds that the lagging required by the inspectors did not exceed the quantities necessary to forestall any reasonable possibility of damage to the conductor, that the procurement of the lagging from materials on or near the right-of-way which met such standard was not unduly restricted by the inspectors, and that the placement of the lagging did not cause stoppages of the stringing operations in excess of those which could properly have been required by the inspectors in order to apply such standard. Hence, there is no basis for the allowance of additional compensation on account of the lagging instructions given by the inspectors or on account of any work stoppages caused thereby.

Claim B-1, therefore, is denied.

*Claim B-2*

*Additional Stringing Cost*

This claim is for the sum of \$12,486.59, of which \$45.77 was allowed by the contracting officer, leaving \$12,440.82 as the sum now in dispute. The claim is for the amount by which fabricator-caused wire defects are alleged to have increased the cost of pulling out the conductor, of compressing sleeves and dead-end bodies, and of performing other stringing operations. The particulars in which such defects were considered by appellants' witnesses as having caused additional stringing expense are: (1) stops for inspection or repair, (2) making of repairs, (3) abnormal cutoffs, and (4) spiraling action of the wire.

The first two of these particulars are closely related. They present considerations of the same nature as were involved in Claim 1-A of IBCA-77 and Claim 1-A of IBCA-80. The evidence likewise follows the same pattern and prevents the same problems of evaluation.

The records kept by Bonneville's inspectors and by appellants' field employees contain a large number of entries reporting upon defects in the conductor, stoppages of the stringing operations, repairs to the conductor, and related matters. Many of the entries record incidents that involved no loss of productive time or performance of extra work by appellants, or that involved damage to the conductor which they themselves had caused. Some of the entries fail to include information upon significant questions, such as the source of the defect or damage,

whether the pulling out of the conductor was stopped for inspection thereof, how long the stoppage lasted, whether repairs were made, who made them, and whether the stringing operations were delayed by the repair work. Only infrequently is an incident described in a way that admits of its being positively identified as one where appellants lost productive time or performed extra work by reason of fabricator-caused defects in the conductor.

At the hearing three of the inspectors testified that they delayed the pulling out of the wire upon a few occasions, for short periods of time, because of fabricator-caused defects. Apart from these limited concessions, most of the oral testimony is highly conflicting.

The testimony of appellants' witnesses to the effect that fabricator-caused defects had a substantial impact upon stringing time is corroborated to a degree by Bonneville's stringing records. An analysis of these records reveals that the average stringing time per setup was more than 50 percent greater for setups of field reworked or factory rewrapped wire than for other wire setups on Schedule II. The average time per double circuit setup amounted to approximately 3.8 days for the former and to approximately 2.4 days for the latter.<sup>45</sup> This differential, it is true, cannot be attributed wholly to stops for inspection or repair of fabricator-caused defects in the field reworked or factory rewrapped wire. Some of it, for example, must be attributed to the problems attendant upon the initial organization of the Schedule II stringing operations in the spring of 1955, since virtually all of the setups used during the first months of stringing operations on Schedule II were composed of field reworked or factory rewrapped wire. Nevertheless, the spread of more than 50 percent is too great to be disregarded altogether, and tends to make up for the failure of appellants' and Bonneville's records to describe fully the time and duration of, reasons for, and other circumstances of all the individual stops.

There remains the problem of identifying the amount of time actually lost by reason of stops for fabricator-caused wire defects, or devoted to associated repair work. The sum of \$12,486.59 which appellants seek on account of all the stringing difficulties comprehended within the instant claim is based upon a computation that merely gives sum-total figures of man-hours and equipment-hours, together with the hourly rates applicable to each such total. There is no breakdown whereby it can be ascertained how these figures were derived. While appellants contend that the quantities stated in the computa-

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<sup>45</sup> In computing setups the Board has counted two single circuit setups as being equivalent to one double circuit setup.



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tion are fully substantiated by the daily time slips offered in evidence, this is not the case. The slips do not attempt to segregate time consumed or money spent by reason of fabricator-caused wire defects from time consumed or money spent for other purposes incident to the stringing of the conductor. It is impossible to tell from the slips which of the individual items of stringing expense there listed would have been saved if there had been no fabricator-caused defects. Such a computation as this is devoid of any real probative value.<sup>46</sup>

Tabulations made by the Government, allegedly on the basis of appellants' time slips, indicate that approximately 54,171 man-hours were consumed in stringing conductor on Schedule II, of which approximately 1,034 man-hours were consumed in sanding out nicks, scratches and abrasions. The contracting officer found that not to exceed 1 percent of the sanding was necessitated by fabricator-caused defects, and, accordingly, held that appellants were entitled to additional compensation in an amount measured by 10.34 man-hours. This figure he converted into a monetary allowance of \$45.77.

From the stringing records, as well as from the other evidence, the Board is convinced that the conductor repairs necessitated by fabricator-caused defects were not limited to sanding, and consumed substantially more than 1 percent of the time devoted to sanding and other repair procedures. In addition, the inspectors from time to time stopped the pulling out of the wire, or otherwise delayed the operations, in order to facilitate the examination of actual or suspected fabricator-caused defects, or in order to facilitate the repair of such defects. These stoppages and delays often resulted in idling a part or all of appellants' stringing personnel, because of the impracticality of shifting the men to or from other work on short notice.

A studied consideration of the evidence as a whole impels the Board to conclude that Montgomery-Macri-Western necessarily lost, by reason of fabricator-caused defects in the conductor, an amount of time equivalent to 20 minutes of work by 26 men for 78 days, or, altogether, a total of 676 man-hours. This amount includes not only time utilized by appellants' men in repairing such defects, but also time during which the men were idled while such defects were being inspected, marked or corrected. It includes not only sanding out nicks, scratches and abrasions, but also other types of repairs such as the cutting out or rolling out of baskets, the removal of foreign material trapped

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<sup>46</sup> *MacDougald Construction Company v. United States*, supra note 28; *Great Lakes Dredge and Dock Company v. United States*, supra note 28; *Levering & Garrigues Company v. United States*, supra note 28.

when popped strands tightened up under tension, and the readjustment of socks about excessively loose wire for the purpose of improving their grip.<sup>47</sup>

The figure of 20 minutes is the one best supported by the estimates of the witnesses as to the average daily amount of time lost. Its correctness is further corroborated by the fact that in IBCA-80, which involved a job where similar stringing procedures were used, we found that the time lost because of fabricator-caused wire defects was 20 minutes per day.

The figure of 26 men represents the customary size of the main stringing crew, which had to be fairly large in order to handle the double circuit work. Stops in the pulling out of the conductor usually idled this entire crew until the order to resume operations was given, although sometimes it was possible to utilize a part of the crew for such contractually required work as sanding out damage to the wire caused by appellants. The main stringing crew, upon occasion, also performed such tasks as lagging, sleeving, dead-ending and sagging, but, in general, appellants employed other, and smaller, crews for these tasks. The lagging, sleeving, dead-ending and sagging crews at times sanded out or otherwise repaired fabricator-caused damage to the wire, but the evidence is insufficient to establish that the volume of such work exceeded the volume of contractually-required work that could be performed by the main stringing crew during stops brought about by fabricator-caused damage.

The figure of 78 days represents the approximate number of working days that were consumed in stringing the portions of Schedule II where field reworked or factory rewrapped wire was used. Stringing of the other portions consumed about 48 working days. Both of these totals include days when the wire was not being pulled out, but when sleeving, dead-ending or sagging work was in progress, since conductor repairs were frequently performed on such days. They exclude days when only clipping or jumpering was in progress, since there is no persuasive evidence that these latter operations were affected by fabricator-caused defects in the wire.

Equipment also must be taken into account. Appellants' managing partner testified that equipment charges for transmission line jobs would run at about 25 percent of labor under normal conditions, and the evidence fails to show that a different relationship obtained with respect to the inspection and repair measures here in question. The

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<sup>47</sup> Time consumed in connection with matters such as cutoffs, that form the subject of allowances made elsewhere in this decision, is excluded.

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25 percent figure, however, is only for ownership or rental expense, and so excludes such items as gas, oil and repairs. Other data in the record would justify an allowance of 15 percent for these latter items, thereby increasing to 40 percent the ratio of equipment to wages.

Computed in accordance with the foregoing factors, the additional compensation due appellants on account of the stoppages and repairs described above is as follows:

Wages (676 man hours at an average cost of \$3.85) .....	\$2, 602. 60
Payroll taxes and insurance ( $\$2,602.60 \times 15\%$ ) .....	390. 39
Equipment cost ( $\$2,602.60 \times 40\%$ ) .....	1, 041. 04
Total direct cost .....	4, 034. 03
Overhead and profit ( $\$4,034.03 \times 15\%$ ) .....	605. 10
Total .....	\$4, 639. 13

The next particular of additional stringing expense comprehended within this claim is that alleged to have been brought about by the abnormal length of some of the cutoffs required at the heads and tails of the reels. This item of the claim parallels Claim 1-C-2 of IBCA-77 and Claim 1-C of IBCA-80, both of which were allowed in part by the contracting officer. The instant claim, on the other hand, appears to have been considered by him as not encompassing abnormal cutoffs. The Board, however, is of the view that the broad terms of the letter presenting the claim, particularly when read in the light of their background, do encompass abnormal cutoffs.

We believe that the principles developed by the contracting officer for dealing with this subject, as upheld in our decisions on IBCA-77 and IBCA-80, are equally applicable here. The main difficulty lies in the paucity of the available factual data. Appellants have supplied no information from which the number, length, time required for making, or expense of the abnormal cutoffs can be identified. The records offered in evidence by the Government include tabulations of cutoff lengths prepared by the inspection staff, which, while carefully kept, cover only part of the job. The coverage of sleeving locations in these records is sufficiently comprehensive to justify its projection to other like locations, but the data concerning cutoffs at dead-ends is too fragmentary to be usable.

The "Chukar" used in stringing Schedule II included approximately 120 reels of field reworked or factory rewrapped wire. Of the some 240 heads and tails on these reels, 95 are accounted for in the Bonneville tabulations. Among the 95 cutoffs so recorded there

were 32 which exceeded 10 feet in length and which were not due to improper handling of the conductor by appellants. These 32 cut-offs had an aggregate length, inclusive of the first 10 feet, of 634 feet. Applying the same proportion, 634 feet in 95 cutoffs, to the approximately 240 heads and tails on all of the reels in question would give 1,602 feet as the total length of all the abnormal cutoffs.

The stringing precedures used by Montgomery-Macri-Western were generally similar to those involved in IBCA-80, where we sustained the contracting officer's determination that abnormal cutoffs should be paid for at the rate of \$1.35 per foot. In the light of this similarity, we believe that the same rate should be utilized in the instant case.

Considering all the pertinent evidence, the Board finds that \$2,162.70 (1,602 feet @ \$1.35 per foot) is a fair and reasonable approximation of the additional compensation due appellants on account of cutoffs of abnormal length necessitated by fabricator-caused defects in the conductor. This would represent about 315 man hours of work.<sup>48</sup>

The final particular in which additional stringing problems are alleged to have been caused by fabricator-caused wire defects has to do with the spiraling action of the conductor. Appellants' witnesses stated that the field reworked and factory rewrapped wire had a tendency to twist or rotate while it was being pulled out from the reels, and sometimes laid in rolls or snakelike formations when not under tension. The witnesses were of the opinion that this spiraling action was due to locked-in stresses in the wire, but, not being familiar with the technology of wire fabrication, they could only conjecture as to the nature and origin of the stresses. Bonneville's wire expert testified, on the other hand, that, just as some steel cables tend to twist one way or the other when under tension, so too do some large multi-strand conductors that, like "Chukar," have a steel core. He stated that the propensity to spiraling was less pronounced for "Chukar" than for steel cables, and varied in intensity as between individual reels.

There is no convincing evidence that any of the conductor furnished by Bonneville spiraled to an extent which would be particularly surprising for conductor having as many steel strands in its core and as many aluminum strands wrapped around its core as does "Chukar." The evidence with respect to the cause of the spiraling is not conclusive,

<sup>48</sup>The computation set out above for the inspection and repair items of this claim fixes \$4,639.13 as the proper compensation for 676 man hours of extra stringing work, a sum which amounts to \$6.86 for each productive labor hour. The quotient obtained by dividing this latter figure into \$2,162.70 is 315.

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but tends to point more strongly towards the steel core than towards any other possible cause. Stresses arising from the manner of construction of the core could not possibly have been affected, one way or the other, by the procedures to which the field reworked and factory rewrapped wire was subjected, yet it is only this wire which appellants contend had undue spiraling tendencies.

The witnesses for Montgomery-Macri-Western asserted that the spiraling action made the wire both difficult and dangerous to handle and necessitated the use of extremely careful methods and extraordinary safety precautions in handling it. However, they did not explain what those methods and precautions were. The only specific illustration they mentioned of a stringing problem brought about by spiraling was the incident which forms the subject of Claim C-3.

What there happened was that, while two reels of conductor were being pulled out in tandem, the double sock connecting the two lengths of wire broke, causing them to drop to the ground with resultant damage to several hundred feet of conductor. The evidence indicates that the breaking of the double sock was probably due to the twisting force of the wire. It also indicates that the breaking of the sock would probably have not occurred if a swivel had been included in the sock assembly, so as to make it possible for the two lengths of wire to rotate independently of each other. A swivel was inserted in the assembly when the broken sock was replaced, whereupon the pulling out of the reels involved was completed without further mishap. Swivels were also used upon subsequent occasions when reels were pulled out in tandem, but how consistently the record does not reveal.

Department Counsel contend that appellants were under a specific duty to use a swivel in each double sock assembly. This contention is based upon the following provision of the contract:

Stringing the conductor shall be by methods that will prevent damage to the conductor or its supporting structures in any way. The running line for each conductor shall be of sufficient length to avoid overloading the structures, and in no case less than 1500 feet. Any part of the structure subject to abrasion by the running line or conductor passing over it shall be protected against damage by suitable lagging. The running line shall be connected to the conductor with a swivel connection and the grip used on the conductor shall be a stocking-type grip which has been approved by the contracting officer. The tail wires of the grip shall be taped down so that the grip will run freely in the sheaves.<sup>49</sup>

<sup>49</sup> Paragraph 10-110-C of the specifications.

The foregoing provision is construed by Department Counsel as meaning that, where reels of conductor are being pulled out in tandem, the wire from the first reel constitutes the "running line" for the wire from the second reel, and as requiring, therefore, that a swivel be used, not only at the sock connecting the steel pulling cable with the first length of conductor, but also at the sock connecting that length with the second one. The validity of this construction may be questioned on the ground that it ascribes to the term "running line" a meaning which is not consistent with the principle that technical terms and words of art in a contract are given their technical meaning unless the context or an applicable usage otherwise requires,<sup>50</sup> nor with the principle that a contract is construed most strongly against the party who drafted it, in this case the Government.<sup>51</sup> It is, however, unnecessary to decide what is the proper interpretation of the quoted provision, because a clearly valid ground for the use of swivels is to be found in the general obligation of Montgomery-Macri-Western to string successfully the conductor.

Appellants seem to consider that their obligation under the contract was merely to apply to "Chukar" the stringing methods that had been found suitable in the past for the most nearly comparable varieties of conductor, with no changes other than the expansion in the scale of the stringing operations obviously necessitated by the greater size and weight of "Chukar." Conversely, they seem to consider that it was the Government's obligation to bear the cost of such experimentation, of such novel procedures, and of such further measures as might be necessitated by any less readily foreseeable differences in handling qualities between "Chukar" and other conductor, whether resulting from its greater size and weight or from more fundamental innovations in its design. This, however, is not a correct view of the respective responsibilities of the parties.

Montgomery-Macri-Western by entering into a contract for the stringing of "Chukar" undertook the task of resolving the problems and of overcoming the obstacles incident to the successful stringing of this new product, even though to do so might require the exercise of skills, the development of techniques, or the use of devices not previously employed in handling conductor. The ability to string the wire successfully notwithstanding its novelty was, to quote a phrase used by the Supreme Court in a like situation, "the very essence of

<sup>50</sup> *Restatement, Contracts*, sec. 235(b).

<sup>51</sup> *Northern Electric Corporation*, IBCA-194 (August 29, 1962), 1962 BCA par. 3494, 4 Gov. Contr. par. 444; *Flora Construction Company*, *supra* note 11; *Fluor Corporation*, IBCA-53 (January 23, 1956), 63 I.D. 24, 29-31, 6 CCF par. 61,777.

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the promise" made by appellants.<sup>52</sup> The contract itself was an "unqualified representation" that appellants possessed the ability to perform their promise.<sup>53</sup> Bonneville had, of course, an obligation to furnish conductor that was capable of being strung, and an obligation to accept stringing work that met the contractual standards, such as freedom from damage caused by appellants. But it was Montgomery-Macri-Western's responsibility to ascertain whether the methods of stringing customarily used in the past would work well with "Chukar," and, if not, to find and adopt methods that would.<sup>54</sup>

The responsibility thus undertaken by appellants was, in the opinion of the Board, broad enough to comprehend the devising and use of so relatively simple and inexpensive a procedure as the insertion of swivels in the sock assemblies for the purpose of overcoming the spiraling action of the wire. Propensity to spiraling appears from the evidence to be a quality often exhibited by multi-strand conductors with steel cores, and there is nothing in the record to suggest that the "Chukar" furnished appellants manifested this propensity to such a degree as to make the wire substantially unstringable. There is, likewise, no showing that the propensity to spiraling would affect in any way the serviceability of the finished transmission line, or that Bonneville required appellants to take any measures for correcting or protecting against this propensity. In short, to the extent that appellants chose to install swivels at double socks they were merely using an appropriate means for performing their contractual obligation of putting the conductor in the air,<sup>55</sup> and to the extent that they chose not to do so they assumed the risk, customarily borne by a construction contractor, that their chosen methods of performance might be inadequate for achievement of the result specified in the contract.<sup>56</sup>

For these reasons, appellants are not entitled to additional compensation on account of the spiraling action of the conductor.

<sup>52</sup> *Carnegie Steel Company v. United States*, 240 U.S. 156, 164 (1916).

<sup>53</sup> *Alert Electric Company*, ASBCA No. 1296 (July 1, 1953).

<sup>54</sup> See *Central Wrecking Corporation*, IBCA-69 (March 29, 1957), 64 I.D. 145, 159-60, 57-1 BCA par. 1209. Cf. *General Electric Company*, ASBCA No. 2458 (October 12, 1956), 56-2 BCA par. 1093.

<sup>55</sup> See *William A. Smith Contracting Company, Inc.*, IBCA-83 (June 16, 1959), 66 I.D. 233, 240, 59-1 BCA par. 2223, 1 Gov. Contr. pars. 481, 482.

<sup>56</sup> See *Andersen*, IBCA-223 and 229 (July 17, 1961), 68 I.D. 201, 225-28, 61-1 BCA par. 3082, 3 Gov. Contr. par. 505; *Henly Construction Company*, IBCA-165 (January 22, 1960), 60-1 BCA par. 2487, 2 Gov. Contr. par. 185; *Lord Bros. Contractors*, IBCA-125 (February 16, 1959), 66 I.D. 34, 46-47, 59-1 BCA par. 2069, 1 Gov. Contr. par. 176; *Koeneke*, *supra* note 11.

The Board determines, therefore, that Claim B-2 is allowable in the amount of \$6,801.83 (composed of \$4,639.13 for stoppages and repairs and \$2,162.70 for abnormal cutoffs) of which \$45.77 was allowed by the contracting officer, leaving \$6,756.06 as the remainder due appellants.

*Claim B-3*

*Additional Sagging Cost*

This claim is for the sum of \$10,395.33, none of which was allowed by the contracting officer. It reflects the extent to which the cost of sagging the field reworked and factory rewrapped conductor is alleged to have been increased by reason of defects in its manufacture.

The record, however, is devoid of any evidence tending to show that fabricator-caused defects were the source of any additional sagging cost as such. Indeed, appellants' own sagger testified that the "Chukar," including that which had been field reworked or factory rewrapped as well as that subsequently manufactured, was "the easiest wire to sag I ever saw." The complaints voiced by him had to do with the excessive amount of lagging allegedly required by the inspectors, and with the conductor repairs that had to be made on account of excessive looseness and basketing encountered during the sleeving, sagging and dead-ending operations. The first of these complaints is groundless since, as we have found in connection with Claim B-1, excessive lagging was not required. The second has been considered in connection with Claim B-2, and, in fixing the amount there allowed, we have taken account of work done and time lost incident to conductor repairs made during the sleeving, sagging and dead-ending operations.

Claim B-3, therefore, is denied.

*C. Specific Conductor Claims for Schedule II*<sup>57</sup>

*Claim C-1*

*Replacement of Sleeves at Tower 457*

This claim is for the sum of \$122.20, none of which was allowed by the contracting officer. When the lengths of conductor that met in the vicinity of tower 457 had been spliced together, by compressing sleeves around their ends, basketing was observed near two of the sleeves. Appellants were directed to cut out these two sleeves together

<sup>57</sup> The five claims considered under this heading were determined by the contracting officer in the finding of facts dated September 28, 1956, where they were designated, respectively, as Claims 1, 2, 3, 4, and 5 for Schedule II.



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with the basketed portions of the wire, and to install new sleeves. The claim is for the cost of complying with this direction.

The contracting officer found that the basketing was caused by a failure of appellants to observe the precautions necessary for overcoming the natural tendency of multi-strand conductor to unravel at the ends. Such precautions normally involve the cutting off of any excessively loose wire at the ends of the lengths to be spliced together, and the placing of tape, clamps or other "seizing" devices around the neighboring portions of the wire in order to hold the strands firmly together while the splicing is being done.<sup>58</sup> The contracting officer's finding is supported by evidence to the effect that appellants failed to cut off all of the excessively loose wire, failed to tighten sufficiently the "seizing" clamps, and failed to lay out the wire straight for a distance of 50 feet, as specifically required by the contract.<sup>59</sup>

Appellants contend that the basketing was caused by defects in the wire, but have adduced no evidence to overcome the contracting officer's finding and the Government's evidence that it was, in fact, caused by appellants' failure to observe the procedures requisite for the proper splicing of "Chukar" conductor.

Claim C-1, therefore, is denied.

*Claim C-2*

*Replacement of Dead-End Body at Tower 582*

This claim is for the sum of \$1,196.41, of which \$945.50 was allowed by the contracting officer, leaving \$250.91 as the amount now in dispute. As presented, the claim covered nine separate items of extra work. The contracting officer allowed eight of these items in full. The remaining item was for the cost of cutting out a dead-end body, furnished by Bonneville, that was discovered to be defective after it had been pressed on the wire, and of installing a new body. For this item appellants claimed \$353.46, plus 15 percent for overhead and profit, while the contracting officer allowed only \$135.21, plus 15 percent.

The dispute is solely as to the number of man-hours and equipment-hours for which appellants should be reimbursed. The amount claimed is for three crews, composed in the aggregate of twenty-nine men with seven pieces of equipment. The amount allowed is for one crew, composed of eleven men with four pieces of equipment. The most reliable

<sup>58</sup> For a fuller discussion of this subject see Claim 1-B in IBCA-77, *supra* note 1, and Claim 3 in IBCA-80, *supra* note 2.

<sup>59</sup> Paragraph 10-115-A of the specifications.

evidence as to how many crews were involved is a contemporaneous entry in the diary of appellants' general foreman for wire stringing operations. According to this entry, performance of the work in question required the services of two crews, while a third crew was idled because the sagging work scheduled for performance by it would have necessitated the participation of one of the other two crews. We find that the number of man-hours and equipment-hours claimed by appellants is supported by a preponderance of the evidence. Altogether, the nine items of extra work absorbed a total of 206 man-hours for their performance.

The Board determines, therefore, that Claim C-2 is allowable in the sum of \$1,196.41, of which \$945.50 was allowed by the contracting officer, leaving \$250.91 as the remainder due appellants.

#### *Claim C-3*

##### *Breaking of Double Sock at Tower 475*

This claim is for the sum of \$2,128.02, none of which was allowed by the contracting officer. The circumstances out of which it arises are stated in the discussion of Claim B-2, and, as there shown, do not justify an award of additional compensation.

Claim C-3, therefore, is denied.

#### *Claim C-4*

##### *Faulty Presses and Fittings*

This claim is for the sum of \$7,130.40, of which \$1,960.73 was allowed by the contracting officer, leaving \$5,169.67 as the amount now in dispute. The contracting officer found that the presses, but not the fittings, were faulty, and limited his allowance to expenses caused by the presses. Appellants contend that both the presses and the fittings were faulty. Department Counsel contend that neither were faulty, and seem to seek reversal of the contracting officer's allowance for the presses.<sup>60</sup>

The presses involved in this claim were used to compress around the conductor the fittings—sleeves and dead-end bodies—whereby separate pieces of wire were spliced or otherwise joined together. The contract provided that the presses were to be furnished by the Gov-

<sup>60</sup> The term "presses" as used in the discussion of this claim and of its Schedule III counterpart, Claim D-1, also comprehends the dies for the presses. These dies were furnished by the Government, and instances where they were malformed or otherwise structurally defective are recorded in the inspection reports.

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ernment and that four would be supplied by it for each schedule.<sup>61</sup> The presses contained a hydraulic mechanism that was designed to be operated by hand pumping, but that could also be operated by an engine-driven pump. Appellants ordinarily employed the latter procedure, which was the faster, and in so doing used their own pumps and engines, since the Government was under no obligation to furnish these items of equipment.

When satisfactory results were not achieved in compressing a fitting, appellants' employees were prone to blame either the fitting or the press. If the latter, they would turn the press in to an inspector and ask that it be replaced with another. The inspector would accept the press—usually without attempting to check whether there was any malfunction—and would endeavor to furnish a replacement as soon as possible. The press that had been turned in would be sent to a Bonneville shop where it would be inspected and, if found to have defects, would be repaired. Then, the press would be placed in the Bonneville material yard serving the job, where it would be available for reissue to appellants if and when other presses were turned in by them as faulty. At times the turning in of presses by appellants proceeded at so rapid a pace that the inspectors were unable to keep the job supplied with the requisite four presses.

It is plain that not all of the presses turned in by appellants had mechanical defects. Often, the real trouble was with the pumps and engines used by appellants. The presses were designed to develop a maximum pressure of 14,100 pounds per square inch, whereas the pumps were designed to develop a maximum pressure of only 10,000 pounds per square inch. The resultant continual overloading of the pumps caused them to lose efficiency, and this in turn led to poor compressions, which appellants' employees would at times erroneously attribute to malfunctioning of the presses themselves. A further problem was that in this forested area it was difficult for appellants' employees, when adding oil, to keep bits of dirt or debris from entering the presses, thereby causing the valves to become clogged. Finally, the real trouble was sometimes with the fittings, a matter that will be mentioned later.

It is likewise plain that a number of the presses turned in by appellants did have mechanical defects. As the presses were tested before they were issued to appellants, most of these defects would seem to

<sup>61</sup> Section 1-105 of the specifications.

have been ones which were latent at that time or which developed while the presses were in service. The contractual obligation of Bonneville to furnish four presses per schedule obviously referred to workable presses, and, under the practical construction given it by both parties, included the responsibility of replacing presses that had ceased to be workable as a result of normal wear and tear or of other circumstances for which appellants were not at fault. Equally obviously, Bonneville would be entitled to a reasonable opportunity, after learning that a press was not working properly, within which to tender a replacement, unless the press when delivered to appellants was in so obviously poor a condition that a breakdown should have been anticipated.<sup>62</sup>

The Board finds that on Schedule II Bonneville did not fully perform its contractual obligation to furnish presses, as just explained, and that this failure did, to some extent, cause increased expense to Montgomery-Macri-Western.

One pertinent consideration in this connection is that the findings of the contracting officer were favorable to appellants. In particular, he found that the presses did not operate efficiently under circumstances when maximum output was demanded, and that appellants were entitled to an adjustment of \$1,960.73 in the contract price on account of faulty presses. The burden of proving that no price adjustment should have been made, or, if made, should have been in a lesser amount, rested on the Government.<sup>63</sup> It has not, in our opinion, carried that burden.

Another pertinent consideration is that the presses were of a standard model, developed before the introduction of "Chukar" conductor, that does not seem to have been fully suited for handling the large "Chukar" fittings. This limitation tended to conduce to an abnormally rapid wearing out of parts and, in turn, to an abnormally high incidence of breakdowns, even among presses that were sound when issued to appellants. Moreover, there is evidence that a few, at least, of the presses were in a poor condition when issued. Such factors, while not the sole cause of appellants' press problems, did contribute substantially to them.

<sup>62</sup>The provisions of paragraph 3-102-F of the specifications, quoted in the discussion of Claim C-5, offer a pertinent analogy, although they are not directly in point since the instant claim is based primarily on unserviceability of the presses, rather than on lack of reasonable efforts to supply them at the times when needed.

<sup>63</sup>*Vade P. Loftis v. United States*, 110 Ct. Cl. 551, 635 (1948); *Montgomery Construction Co.*, ASBCA No. 2556 (January 23, 1956).

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The second element of the claim has to do with alleged defects in the sleeves and dead-end bodies. This part of the claim is essentially on all fours with Claim 3 of IBCA-77 and Claim 2 of IBCA-80. For the reasons stated in the decisions on those claims, the Board considers that the contracting officer erred in failing to make a monetary allowance for faulty sleeves and dead-end bodies.

This brings us to the question of the amount of the additional compensation that should be allowed. Appellants' computation, which is not broken down as between presses and fittings, states that the man-hours involved amounted to 960, and that the equipment-hours involved amounted to 960 for each of two pieces of equipment. At the hearing it was conceded that the equipment-hours should be decreased to 240 for each of the two pieces, thereby reducing the total amount of the claim to \$4,970.40. As is pointed out elsewhere in this opinion, such an unsubstantiated and unexplained computation as the one here presented by appellants is quite insufficient to discharge the burden of proof that rested upon them.

The contracting officer's allowance of \$1,960.73 was based on an estimate that the faulty presses resulted in an excess over the normal work time of 390 man-hours, and of 78 equipment-hours for each of two pieces of equipment. Previously, Bonneville's Chief of Construction had submitted to the contracting officer a recommendation that an allowance be made for faulty fittings as well as for faulty presses, in which he estimated that the faulty fittings increased the work time by 280 man-hours, and by 56 equipment-hours for the same two pieces of equipment. This latter estimate is the best evidence available in the record as to the costs incurred by appellants on account of the faulty fittings, and should be added to the contracting officer's tabulation. Apart from the number of man-hours and equipment-hours, the contracting officer used the same cost factors as do appellants.

Computed in accordance with the foregoing findings, the amount of the additional compensation due is as follows:

Wages (670 man-hours at an average cost of \$3.85) -----	\$2, 579. 50
Payroll taxes and insurance (\$2,579.50×15%) -----	386. 93
Equipment cost:	
1 manhaul truck (134 hours @ \$1.50) -----	201. 00
1 press truck (134 hours @ \$1.50) -----	201. 00
Total -----	\$3, 368. 43

The Board determines, therefore, that Claim C-4 is allowable in the amount of \$3,368.43, of which \$1,960.73 was allowed by the contracting officer, leaving \$1,407.70 as the remainder due appellants.

*Claim C-5*

*Shortage of Hand Shackles*

This claim is for the sum of \$88.37, none of which was allowed by the contracting officer. It stems from the fact that the work of hanging insulators was stopped for a period of about four hours on June 29, 1955, because hand shackles were not available. These shackles formed a part of the construction materials which the Government had agreed to furnish appellants.

The contracting officer granted a time extension of one-half day on account of the delay, but ruled that any monetary reimbursement was precluded by the following provision of the contract:

The Government will make every reasonable effort to secure delivery of construction materials, tools, and equipment which the Government is to furnish so as to avoid any delay in the progress of the contractor's work as outlined in his construction program. However, should the contractor be delayed because of failure of the Government to make such deliveries, the contractor shall be entitled to no additional compensation or damages on account of such delay. The only adjustment will be the granting of an appropriate extension of time within the provisions of Clause 5 of this contract.<sup>64</sup>

The Board has construed this provision as meaning that if the Government makes every reasonable effort to deliver on time materials which it has agreed to furnish, the contractor is not entitled to additional compensation for delays brought about by the unavailability of the materials; but that if the Government does not make such an effort, then the contractor is entitled to additional compensation for such delays.<sup>65</sup>

In the present case the record adequately establishes that the hand shackles were not available when needed, but it contains no evidence at all as to what efforts Bonneville had made to deliver them by the time when they would be needed. This latter was a subject about which Bonneville could reasonably be expected to have information, and about which appellants would have little opportunity to become informed. In these circumstances the burden of offering some rea-

<sup>64</sup> Paragraph 3-102-F of the specifications.

<sup>65</sup> *Witzig Construction Company, IBCA-92* (July 11, 1960), 67 I.D. 273, 277, 60-2 BCA par. 2700, 2 Gov. Contr. par. 442.

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sonable explanation for the delay in furnishing the shackles rested upon the Government.<sup>66</sup> This burden not having been borne, we find that the Government did not make every reasonable effort to secure timely delivery of the shackles.

The amount claimed on account of such failure is based upon a loss of time amounting to 16 man-hours and 4 equipment-hours. When considered in conjunction with the finding of the contracting officer as to the duration of the delay, it appears to be reasonable.

The Board determines, therefore, that Claim C-5 is allowable in the amount of \$88.37.

#### *D. Specific Conductor Claims for Schedule III*<sup>67</sup>

##### *Claim D-1*

##### *Faulty Presses and Fittings*

This claim is for the sum of \$5,218.80, none of which was allowed by the contracting officer. It closely parallels Claim C-4, which relates to faulty presses and fittings on Schedule II. Whereas, however, the contracting officer made an allowance under Claim C-4 on account of faulty presses, he rejected Claim D-1 in its entirety. He appears to have considered that the presses furnished for Schedule III were in better condition than those furnished for Schedule II, and that more extra presses were available for issuance as replacements on the former than on the latter.

The Board's examination of the evidence leads us to conclude that the situation with respect to presses and fittings was substantially the same for both schedules. As to the presses, the distinctions drawn by the contracting officer are not supported by the evidence. As to the fittings, common problems were encountered on all the "Chukar" stringing jobs mentioned in this opinion. We find that appellants are entitled to additional compensation for faulty presses and for faulty fittings on Schedule III.

The amount due may be fairly and reasonably approximated on a comparative basis. Schedule II is reported to have had 270 sleeves

<sup>66</sup> *Peter Kiewit Sons' Company v. United States*, 138 Ct. Cl. 668, 678 (1957); *George A. Fuller Company v. United States*, 108 Ct. Cl. 70, 101 (1947); *John C. Rodgers et al. v. United States*, 48 Ct. Cl. 443, 448 (1913).

<sup>67</sup> The four claims considered under this heading were determined by the contracting officer in the finding of facts dated September 28, 1956, where they were designated, respectively, as Claims 1, 2, 3, and 4 for Schedule III.

and 486 dead-end bodies, or 756 fittings in all. Schedule III is reported to have had 198 sleeves and 306 dead-end bodies, or 504 fittings in all. The faulty presses and faulty fittings appear, on average, to have increased the man-hours and equipment-hours required for compressing sleeves and dead-end bodies by about the same amount, per fitting, for each of the two schedules. Hence, the ratio of 756 to 504 may properly be applied to the 670 man-hours and 134 equipment-hours established by the evidence for Schedule II in order to determine the corresponding quantities for Schedule III, namely, 447 man-hours and 89 equipment-hours.

Computed in accordance with the foregoing findings, the amount of the additional compensation due is as follows:

Wages (447 man-hours at an average cost of \$3.85)-----	\$1,720.95
Payroll taxes and insurance (\$1,720.95×15%)-----	258.14
Equipment cost:	
1 manhaul truck (89 hours @ \$1.50)-----	133.50
1 press truck (89 hours @ \$1.50)-----	133.50
Total-----	\$2,246.09

The Board determines, therefore, that Claim D-1 is allowable in the amount of \$2,246.09.

#### *Claim D-2*

##### *Broken Butt weld Between Towers 622 and 623*

This claim is for the sum of \$520.90, of which \$514.28 was allowed by the contracting officer. At the hearing counsel for appellants conceded that the amount allowed by the contracting officer was satisfactory. In view of this abandonment, Claim D-2 is hereby denied by the Board, except with respect to the sum allowed by the contracting officer.

#### *Claim D-3*

##### *Excessive Polishing of Fittings*

This claim is for the sum of \$1,060.39, of which \$165.67 was allowed by the contracting officer, leaving \$894.72 as the amount now in dispute. It is based upon the high degree of smoothness to which the sleeves and dead-end bodies initially installed were required to be brought.



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Montgomery-Macri-Western started stringing work early in 1955 upon the portion of the transmission line between towers 718 and 757. At the outset of this work Bonneville required that the sleeves and dead-end bodies be polished until a high degree of smoothness had been achieved. Before long, however, Bonneville ascertained that this degree of smoothness was unnecessary for proper functioning of the transmission line, and, thereupon, relaxed its polishing demands. The contracting officer found that the amount of polishing initially required was in excess of the amount called for by the contract.

The only matter in dispute is the number of fittings as to which excessive polishing was required by Bonneville. Appellants contend that 42 sleeves and 36 dead-end bodies were over-polished, whereas the contracting officer found that only 6 sleeves and 6 dead-end bodies were over-polished. The burden of proving that the quantities were greater than those found by the contracting officer rested upon appellants. The evidence offered by them, however, includes no definite showing of the number of fittings that were polished excessively, and is quite insufficient to carry the burden of proof.

Claim D-3, therefore, is denied, except with respect to the sum allowed by the contracting officer.

*Claim D-4*

*Loose Conductor Between Towers 691 and 701*

This claim is for the sum of \$308.56, none of which was allowed by the contracting officer. It is for loss of productive time and extra work, allegedly due to fabricator-caused defects in certain reels of conductor.

As has been mentioned previously, the "Chukar" used on Schedule III was manufactured at a later date and by a different process than the conductor that forms the basis of the general conductor claims asserted in the present appeals, in IBCA-77, and in IBCA-80. When stringing was begun on the portion of Schedule III between towers 691 and 701—a double circuit portion of the line—six reels of conductors were pulled out for their full length, six more reels were connected to them by socks, and the whole twelve reels were then drawn ahead until the second set of reels had been pulled out for a part of their length. During the progress of this work it was discovered that the conductor on at least seven of the reels in the two setups had a great

deal of looseness in the outer layer of strands, that the conductor on two of the reels in the first setup had basketed near the tail end, and that the gripping force of some of the socks connecting the two setups had become impaired by reason of the strands in the outer layer having elongated more than the strands of the inner layers and core.

Appellants' chief representative at the job thereupon asked for a determination by Bonneville as to whether the wire with loose outer strands should be strung, and ordered discontinuance of the pulling out of the wire until such a determination had been made. The Area Construction Superintendent promptly came to the job site and, after examining the wire, ruled that it should be strung, but approved a recommendation of appellants that the two baskets be cut out and that the socks be readjusted on the wire before stringing was resumed. This was done, with 18 feet of wire being cut out for one basket and 14.5 feet being cut out for the other. The discontinuance of work lasted for about 1½ hours, and the cutting out of the baskets and readjustment of the socks consumed another 1½ hours.

We find that the looseness of the wire on these particular reels was so pronounced as to justify appellants in discontinuing work until Bonneville had had an opportunity to decide whether the wire should be put in the air. The looseness was observed and commented upon adversely by several of the inspectors. The wire technician whom the fabricator had assigned to the job for the purpose of observing the condition of the conductor was quoted by two of the inspectors as having said that the wire on these reels was "the worst" he had seen of this conductor. At stake was not only the serviceability of the completed transmission line, but also the safety of the workmen in the event the conductor tore loose from a sock. The inspectors appear to have felt that they did not have the authority to make a binding decision upon whether stringing should be suspended.

We also find that the cutting out of the basketed conductor and the readjustment of the socks constituted extra work, occasioned by defects in the Government-furnished conductor. These measures are shown by a preponderance of the evidence to have been necessitated by the exceptional looseness of the conductor rather than by any lack of care or skill on the part of appellants. Their authorization by the Area Construction Superintendent was clearly within the scope of his powers, for he had been specifically directed by Bonneville's central office to determine what should be done about stringing the reels here in question.

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The amount of additional compensation sought is supported by a detailed itemization and appears reasonable. Particularly is this so when it is borne in mind that the man-hours and equipment-hours allowable include not only those consumed in performing the extra work, but also those lost by men and equipment that had to be left idle while the work was being done, as well as during the preceding period of uncertainty.

The Board determines, therefore, that Claim D-4 is allowable in the sum of \$308.56.

#### *E. Time Extensions for Schedule II*

The claims included within this group have to do with the allowance of time extensions as a basis for relieving appellants from liquidated damages for delay in completing the work.<sup>68</sup> The contract provided that if the work under either of the two schedules was not completed within the stipulated time, liquidated damages should be paid for each subsequent calendar day of delay at the rate of \$300 per day, computed separately for each schedule.<sup>69</sup> The contract also included the customary provision that liquidated damages should not be imposed "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes."<sup>70</sup>

The contract completion date for Schedule II was September 9, 1955, but the work was not actually completed until January 3, 1956. This was a delay of 116 days, and represented a potential liability for liquidated damages of \$34,800. The time extensions granted by the contracting officer amounted to 53 days, thereby deferring the completion date to November 1, 1956, and reducing the liability for liqui-

<sup>68</sup> All of these claims were determined in two mutually complementary letters, both dated September 23, 1955, in one of which the Assistant Administrator of Bonneville granted certain portions of the extensions requested by appellants for Schedule II, and in the other of which a principal subordinate of the contracting officer notified appellants that the balance of such extensions had been rejected. This rejection was expressly ratified by the contracting officer in a letter to appellants dated December 5, 1955.

<sup>69</sup> Section 1-106 of the specifications.

<sup>70</sup> Clause 5(e) of the General Provisions.

dated damages by \$15,900.<sup>71</sup> Appellants contend that they are entitled to further extensions in at least the amount of 63 days that would be needed to justify remission of the remaining \$18,900 of liquidated damages. The Board is allowing on account of the causes of delay here at issue an additional time extension of 8 days, thereby deferring the completion date to November 9, 1955, and reducing the liability for liquidated damages by \$2,400. The reasons will appear in the discussion of Claim E-3.

Running through many of appellants' time extension claims is the thought that a contractor is necessarily entitled to an extension having exactly the same duration as the quantity of time that elapsed between the beginning and the end of the period while extra work was being performed, or while work was being prevented by the Government, or while some other excusable cause of delay was operative. This is not correct. The true principle is that the duration of the time extension is to be governed by the extent to which the excusable cause of delay either increases the amount of time required for performance of the contract work as a whole, or defers the date by which the last of that work will be reasonably capable of completion. The Board has summarized this principle in the statement that: "A contractor who seeks an extension of time on account of an excusable cause of delay has the burden of proving \* \* \* the extent to which the orderly progress or ultimate completion of the contract work as a whole was delayed thereby";<sup>72</sup> while another authority has commented that: "The contractor is entitled to only so much time extension as the Government's delay actually delayed the contractor in performing the contract."<sup>73</sup>

Depending upon the way in which the excusable cause of delay affects the contractor's operations, the time extension to which the latter is entitled may be either longer or shorter than the duration of the excusable cause. For example, a contractor who had a 100-man crew on the job, who was given an order to do extra work that would require 700 man-hours for its performance, who elected to do the extra

<sup>71</sup> The extensions granted by the letters of September 23, 1955, aggregated 52 days. One additional day was allowed by the finding of facts of September 23, 1956, on account of delays caused by transactions that form the subject of Claims C-2 and C-5.

<sup>72</sup> *Merz*, IBCA-64 (March 10, 1959), 59-1 BCA par. 2086, 1 Gov. Contr. pars. 193, 197, 202.

<sup>73</sup> *Wynn Enterprises, Inc.*, ASBCA No. 3028 (May 27, 1957), 57-1 BCA par. 1301. See also *Allied Contractors, Inc.*, IBCA-265 (September 26, 1962), 69 I.D. 147, 149-51, 1962 BCA par. 3501, 4 Gov. Contr. par. 512; *Weidfab, Inc.*, IBCA-268 (August 11, 1961), 68 I.D. 241, 242-43, 61-2 BCA par. 3121, 3 Gov. Contr. par. 500; *Younger Bros., Inc.*, IBCA-148 (May 28, 1958), 65 I.D. 238, 243-45, 58-1 BCA par. 1756; *Central Wrecking Corporation*, *supra* note 54.

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work by assigning ten men to its performance for a period of 10 days of 7 hours of productive working time apiece, and who during this period continued to prosecute the original contract work with the remaining ninety men, obviously would not be entitled to have 10 days added to the contract time. Other things being equal, one day would be an appropriate extension in such a case.<sup>74</sup> Conversely, an excusable delay occurring during good construction weather that prolonged the contract work as a whole into a bad season could justify an extension measured by the slower rate of performance attainable during that season rather than by the faster rate attainable when the delay actually occurred.<sup>75</sup>

Where a part of the original work is delayed, but the period of delay can be efficiently utilized for the performance of another part that is comparable in volume or duration, no time extension at all may be in order.<sup>76</sup> But where the delay affects a sequence of operations that cannot reasonably be rescheduled, allowance must be made in the extension not only for the delay of the operation immediately affected but also for the delay of subsequent operations in the sequence.<sup>77</sup> Moreover, if extra work is ordered or the original work delayed in circumstances which necessarily require that such work be performed after the completion date specified in the contract, as, for example, where extra work having a lead time of several months is ordered shortly before the completion date, the extension should be sufficient to cover the period of time by which such date is necessarily exceeded.<sup>78</sup>

Regard must also be had for the possibility that the impact of the cause of delay might have been avoided or, at least, shortened by the contractor. As one decision aptly says, the "contractor is not relieved of liability \* \* \*, however, when by the exercise of reasonable means it could overcome the damaging effects of delays which otherwise would be excusable."<sup>79</sup>

<sup>74</sup> See *Larsen-Meyer Construction Company*, IBCA-85 (November 24, 1958), 65 I.D. 463, 466-68, 58-2 BCA par. 1987.

<sup>75</sup> See *Witzig Construction Company*, *supra* note 65.

<sup>76</sup> See *Farnsworth & Chambers Company*, ASBCA Nos. 4945 *et al.* (November 24, 1959), 59-2 BCA par. 2433.

<sup>77</sup> See *Allied Contractors, Inc.*, *supra* note 73; *Farnsworth & Chambers Company*, *supra* note 76.

<sup>78</sup> See 34 Comp. Gen. 230 (November 18, 1954).

<sup>79</sup> *H. O. Harlan Builders, Inc.*, Eng. C&A No. 520 (February 4, 1954). See also *General Excavating Company*, IBCA-188 (September 21, 1960), 67 I.D. 344, 348-49, 60-2 BCA par. 2771, 2 Gov. Contr. par. 539.

The foregoing examples will serve to illustrate the application of the general principle in situations akin to those involved in the present appeals.

Lack of notice presents no obstacle to the allowance of any of the time extension claims since the contracting officer considered on their merits, without invoking the notice requirements of the contract, all such claims except those based upon alleged inadequacy of clearing, and since appellants' failure to give timely notice of these latter claims did not prejudice the Government, as our findings concerning Claim A-1 demonstrate.

*Claim E-1*

*Lateness of Clearing*

Under this heading the Board will consider three instances where clearing of the right-of-way is alleged to have been completed by so late a date as to hold back the building of the transmission line. The first of these instances concerns the four tower sites in the Lanham Creek area, running from tower 569 to tower 572.<sup>80</sup> The second concerns the six tower sites in the Stevens Pass area, running from tower 596 to tower 601.<sup>81</sup> The third concerns the four tower sites in the Tunnel Creek area, running from tower 602 to tower 605. In each instance the delay in clearing is alleged to have protracted appellants' work into or beyond a period of adverse weather, thereby adding another cause of delay.

The clearing contract with Paul C. Helmick Company required that, at all tower sites along the portion of the line between tower 568 and tower 608, the major elements of the clearing work should be completed by not later than July 1, 1954. This deadline was not met, for the reason, at least in part, that Bonneville was unable to obtain some of the necessary right-of-way in time for the deadline to be met.<sup>82</sup> It was November of 1954 before the last of this work was done. Some of the tower sites in the Lanham Creek, Stevens Pass, and Tunnel Creek areas were among those where the clearing was not finished until after

<sup>80</sup> The term tower sites, as used in the discussion of this claim and Claim F-2, also comprehends the assembly areas.

<sup>81</sup> In the record this portion of the line is usually denominated the Mill Creek area, because it was entered through the valley of Mill Creek. To avoid confusion with the more extensive areas that are also denominated Mill Creek at various places in the record, the portion of the line from tower 596 to tower 601 is termed the Stevens Pass area in this opinion, since the line crosses the summit of that pass at tower 598.

<sup>82</sup> *Paul C. Helmick Company, IBCA-39* (July 31, 1956), 63 I.D. 209, 56-2 BCA par. 1027.

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July 1, 1954. Just when each of these sites was cleared is not shown by the record.

It does appear, however, that in the Lanham Creek area all four sites had been cleared by about the middle of October, 1954, since footings were started by Montgomery-Macri-Western at those sites on dates that ranged from September 14 to October 19. In the Stevens Pass area all six sites had been cleared by about the beginning of October, 1954, since footings were started at those sites on dates that ranged from September 15 to October 6. The clearing of the four Tunnel Creek sites was not finished until November of 1954, and work on the footings in that area was not started until early August in 1955.

Appellants contend that the delay in clearing the Lanham Creek sites more than doubled the construction work at them by throwing it into the winter season. With respect to Stevens Pass, they contend that the onset of winter forced a suspension of construction work on October 11, 1954, and that the slowness of the drifts to melt prevented a resumption of operations until after mid-July of 1955. With respect to Tunnel Creek, they contend that the clearing was completed so late in 1954 as to preclude construction work being started until the winter was over, and that bad snow and ground conditions still prevailed even in mid-July of 1955. The amount of time lost is put by appellants at 10 working days for Lanham Creek, is left unspecified for Stevens Pass, and is put at 20 working days for Tunnel Creek. The contracting officer found that 3, 8 and 5 working days, respectively, had been lost, and included a commensurate number of calendar days in the time extensions allowed by him.

All three of the areas mentioned are situated in the heart of the Cascade Mountains, where snow deeply mantles the range throughout even an ordinary winter. The Stevens Pass area, which includes the summit of the range and is at an elevation of from 4,000 to 5,000 feet, has the heaviest snow cover. The Lanham Creek and Tunnel Creek areas both lie in the zone of 3,000 to 4,000 feet, and, because of the smaller precipitation on the eastern slope, the former has the lightest snow cover.

The first part of the winter of 1954-1955 was unusually mild for these areas, but, beginning in February, some exceptionally heavy and late snowfalls were experienced. At Lake Wenatchee, the nearest Weather Bureau station on the eastern slope of the Cascades for which data as to depth of snow on the ground is available, a depth of 5 inches was not

recorded until December 9, the maximum depth of 57 inches was recorded on March 1, and a depth of 5 inches was last recorded on April 19. At Scenic, the nearest Weather Bureau station on the western slope for which such data is available, a depth of 5 inches was not recorded until December 7, the maximum depth of 175 inches was recorded on March 24, and a depth of 5 inches was last recorded on May 30.

The foregoing data, while generally representative of conditions along the higher sections of the transmission line, are not entirely applicable to Stevens Pass, which is at a considerably greater elevation than either Lake Wenatchee or Scenic. On October 11, 1954, a storm deposited approximately one foot of snow at the summit of the pass. From the available temperature and precipitation data it would appear, however, that this snow melted fairly rapidly, and that the next storm of consequence did not occur until November 26. By comparison, it was the opinion of Bonneville construction engineers familiar with the locality that in a normal year suitable working weather could not be depended upon at Stevens Pass after October 22. The winter was also slow in leaving that area. Drifts approximately 25 feet deep remained on the access road into Stevens Pass as late as July 11, 1955, and appellants were not able to reenter the area until July 23. By comparison, in a normal year the drifts would have melted fast enough to admit of the area being reentered by about July 1.

The construction programs which appellants had submitted to Bonneville under date of July 21, 1954, stated that operations on both schedules would be shut down from December 1, 1954, through April 1, 1955, "due to anticipated bad weather conditions." The program for Schedule II showed June 23, 1954, as the starting date and August 1, 1955, as the completion date for the footings. It showed July 6, 1954, as the starting date and August 15, 1955, as the completion date for the steel work.

Seemingly because of the better-than-average weather that prevailed during most of the winter of 1954-55, appellants did not put into effect the shut-down of operations forecast in their construction programs but, instead, worked throughout the entire winter on each of the schedules. However, they reduced materially the size of their crews and avoided almost entirely the portion of the line between towers 596 and 634, where severe snow conditions were most apt to occur. Prior



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to December 1, the date planned for the shut-down, appellants had, in fact, placed more footings and had erected nearly as many or, in the case of Schedule II, more towers than would have been called for by their programs. This result, however, was partially achieved through the expedient of concentrating upon the easier sites and leaving the more difficult ones until later. For Schedule II, the footings were complete at about 50 percent of the sites on October 1, at about 70 percent of them on November 1, and at about 90 percent on December 1. For the same schedule, the steel work was complete at about 28 percent of the sites on October 1, at about 37 percent of them on November 1, and at about 43 percent on December 1.

The contracting officer's allowance of 3 working days for Lanham Creek was based upon loss of time by the footing crew in September, 1954, while waiting for the sites in that area to be cleared. His allowance of 5 working days for Tunnel Creek was based upon loss of time by the footing crew in July and August, 1955, while waiting for the snow to melt and the ground to dry in that area. At each of the times mentioned, the footing crew comprised only about 10 percent of the total work force then employed on Schedule II. In September, 1954, it had, as the statistics just cited indicate, a wide range of other sites on which it could, and did, work. In July and August, 1955, the only unfinished footings on Schedule II outside the Tunnel Creek area were at Stevens Pass, where bad snow and ground conditions also prevailed. However, on the portion of Schedule III just west of the Tunnel Creek area, where elevations were lower, at least 19 tower sites with unfinished footings were available. Appellants' chief representative at the job testified that the men did not stand idle while waiting for the Lanham Creek and Tunnel Creek sites to become available, but that the moves necessary in order to provide work for them elsewhere consumed time which could have been saved if these sites had been more promptly cleared.

The allowance of 8 working days for Stevens Pass was based on a determination that appellants lost one-third of the time between July 1, the normal date for entry into that area, and July 23, the actual date when entry became feasible in 1955. The remaining two-thirds were disallowed on the ground that appellants' crews could and did work on other portions of the job during the period from July 1 to July 23. Throughout this period towers were being erected and conductor was

being strung elsewhere on Schedule II, and, as pointed out above, opportunities for footing work existed on Schedule III.

The contracting officer obviously assessed the causes of delay involved in the three items of this claim from the standpoint of what Montgomery-Macri-Western would have been doing during the period of delay if those causes had not existed. Judged from such a standpoint, the contracting officer's allowances, which aggregate 16 working days, are shown by the evidence to have been liberal ones. But while the factors considered by him were factors that needed to be considered, they are not the only factors which are pertinent in assessing situations such as these. What must now be determined by us is whether any of the clearing delays started a train of events that ultimately prolonged the duration of the job by more than the time initially lost, as found by the contracting officer.

The first of the problems of the latter type which requires examination is presented by the contention of appellants that the delay in clearing the Lanham Creek sites more than doubled the work at them by throwing it into the winter season. The record, however, contains no intimation that in 1954 winter descended on Lanham Creek any earlier than on Scenic or Lake Wenatchee. As has been seen, appellants started work at the Lanham Creek sites on dates that ranged from September 14 to October 19, whereas the first snow of consequence reached Scenic on December 7 and Lake Wenatchee on December 9. Thus, at the four Lanham Creek sites the construction period available to appellants before the onset of winter was not less than seven weeks for any site, and ran to as many as twelve weeks for one. This was an adequate period within which to place the footings and erect the towers. Many of the other sites on which work was performed during the fall of 1954 were in areas where the winter season would be apt to be less severe than at Lanham Creek. Considering all the circumstances, it is a fair inference that appellants' failure to complete the Lanham Creek towers before winter set in was not due substantially to the clearing delay, but was brought about by appellants' failure to plan and prosecute the job in a manner which would take account of the need for finishing in the fall of 1954 as many as possible of the towers along the higher portions of the line. Appellants' managing partner appears to have been fully cognizant of this need, but their supervisory staff in the field seem to have been more intent on turning out as many units of work as possible, without regard to the sequence dictated by terrain and weather conditions.

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In the case of the Stevens Pass area consideration must be given to appellants' contention that the delay in clearing, combined with the failure of the snow to leave the area until an abnormally late date, projected into the latter part of 1955 tower construction work that otherwise could have been done in the fall of 1954. We have already mentioned the fact that the foundations for the Stevens Pass towers were started in 1954, at dates ranging from September 15 to October 6. The operations in that area, however, were shut down for the winter once the snowstorm of October 11 had occurred, and their resumption in 1955 did not become practicable, as has been noted, until July 23. It is true that, the way the weather actually turned out in 1954, appellants probably could have continued working at Stevens Pass from shortly after the snowstorm of October 11 until the snowstorm of November 26. But this was because the weather continued generally good for more than a month after the end of the time when it would have been reasonable, in the light of past experience, to depend upon the continuance of good weather. We believe it would be an unjustifiable exercise of hindsight to hold that appellants were at fault in breaking off work at Stevens Pass following the snowstorm of October 11.

Appellants completed tower 600, the last finished of the six Stevens Pass towers, on September 29, 1955. This was 68 days after that area became open to entry on July 23, 1955. Since the footings for tower 600 had been started on October 1, 1954, ten days before the snowstorm of October 11, a total of about 78 days (disregarding the winter shut-down) elapsed during its construction. None of the other Stevens Pass towers took as long to build. Had their sites been cleared by the prescribed date, July 1, 1954, all six could have been completed before October 11 of that year.

Stringing of Stevens Pass was begun about September 26, 1955, and was finished about October 13. Thus the portion of that year which elapsed between the time when access to the summit became practicable and the time when stringing over it was completed amounted to approximately 82 days. The adverse impact which the unfinished towers at Stevens Pass—and also those at Lanham Creek—had upon stringing operations in the summer of 1955 was cogently summarized by appellants' general foreman in his diary entry for August 11 of that year:

Steel not being built has sure hurt the wire operation. Had to skip from 564 to 573 & then move back from 596 to get wire from 564 to 573 & then will have to

move back to 596 to go over to 602 & it looks like that section won't be ready when we finish 573. So we will probably have to go to 718 and string back until towers on top are built, and then move back again.

Stevens Pass was a highly critical area in two respects. First, suitable construction weather could be safely anticipated for less than four months out of each year. So far as that area is concerned, the loss of most of the 1954 construction season as a result of clearing delay had the effect of crowding into the 1955 season the successive operations of placing footings, erecting towers, and stringing conductor to a degree which made the contract completion date of September 9 impractical of attainment. Second, the towers in that area, by reason of their isolation, the rockiness of their sites, and the design requirements necessitated by their exposed position, were among the most difficult to build of all the towers on the line. Bonneville's Area Construction Superintendent for the area where Schedule II was located observed that tower 600 was situated "in the toughest spot to put a tower I've ever seen."

It is manifest from all the circumstances that at Stevens Pass most of the tower footing and erection work, which but for the lateness of the clearing could and should have been performed during the 1954 construction season, was projected by an excusable cause of delay into the 1955 season. This projection of tower construction necessarily deferred in turn the stringing work in the same area. The stringing work not having been completed until October 13, 1955—a date which we find to be reasonable—the contractor plainly would be entitled to have the contract completion date extended to the same day. This, however, has been accomplished, since the contracting officer extended the contract completion date to November 1, 1955. The projection of tower construction into the 1955 season did not add extra work to the contract, and, hence, does not admit of a further extension being granted on the ground that manpower or equipment had to be diverted from the original contract work. Such projection did not impede materially tower footing and erection operations outside the Stevens Pass area, and, hence, does not admit of the granting of a further extension on the ground that tower construction was delayed elsewhere. Stringing operations outside that area were likewise not affected materially except at Tunnel Creek, to which consideration will next be given.<sup>83</sup>

<sup>83</sup> Cf. *Farnsworth & Chambers Company*, *supra* note 76.

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The situation with respect to Tunnel Creek is generally similar to that at Stevens Pass. In the former area the clearing was slower to reach completion than in the latter, thereby establishing an even firmer factual basis for holding that the delay in clearing caused a projection of the tower work into the 1955 construction season. The rate of prosecution of the construction operations was also slower, with the result that the last of the Tunnel Creek towers was not finished until approximately November 1, about 100 days after entry into that area became practicable. This was more time than should have been consumed. Tunnel Creek was exceeded only by Stevens Pass in the severity of its winters, and, hence, obviously called for the scheduling and maintenance of a rapid pace of operations once access was obtained. The record amply shows that during the summer of 1955 appellants did not plan and prosecute their operations in this high-country area with the degree of vigor, of effectiveness, and of priority over other operations, that its critical location demanded. No good reason appears why appellants could not have completed all four of the Tunnel Creek towers by September 29, the date when tower 600, seemingly the most difficult one on the line, was finished. The stringing at Tunnel Creek was performed over a period of approximately 12 days, from December 19 to December 30. Had the tower work in this area been completed by September 29, or by any later date prior to the time when the main stringing crew left Stevens Pass, it would have been possible to perform the stringing at Tunnel Creek immediately following that at Stevens Pass. This would have meant that the Tunnel Creek stringing could have been finished within, at most, 12 days after the completion of the Stevens Pass stringing on October 13, that is, no later than October 25. The contracting officer, however, has already extended the contract time beyond that date and, as in the case of Stevens Pass, no valid ground for a further extension appears.

Claim E-1, therefore, is denied, except with respect to the time allowed by the contracting officer.

*Claim E-2*

*Unavailability of Conductor*

This claim is predicated on the ground that conductor was not delivered to appellants by Bonneville until a considerable time after it

was initially needed. A number of requests for extensions on this basis were presented by appellants. The amount of time sought varied, the maximum being 60 days for Schedule II and 90 days for Schedule III. All such requests were denied by the contracting officer.

It must be conceded that Bonneville did not furnish conductor as soon as appellants asked that it be furnished. In the letter of October 11, 1954, mentioned in connection with claim A-1, appellants stated that they were "now ready" to start stringing the portion of Schedule III between tower 724 and tower 757, and asked to be informed "when we can expect to proceed with stringing operations." More correspondence followed. At a conference with Bonneville representatives on November 1, 1954, appellants requested that conductor be furnished for Schedule II as well, in order to admit of difficult crossings of highways, railroads and existing transmission lines being strung immediately, and to admit of reels being stockpiled along the right-of-way as a precaution against the closing of roads to heavy traffic during the spring thaw. Further exchanges of views ensued. Conductor was first made available for Schedule III on or about December 3, 1954, and for Schedule II on or about December 22, 1954. Stringing of Schedule III began on January 3, 1955, and of Schedule II on March 20, 1955.

The contracting officer considered that the granting of a time extension for unavailability of conductor was precluded by the following provision of the contract:

The Government makes no representation as to the availability of materials. Current examination of production schedules indicates that deliveries of footing steel will be substantially complete within 30 days after bid opening date, leg extensions and tower steel approximately 60 days later; however, lack of conductor hardware will prevent stringing operations until approximately 8 months after bid opening date. The contractor shall arrange his construction program (see Paragraph 2-102) so as not to require materials prior to these dates. Portions of the material may be available before dates indicated, but unavailability of material prior to those dates will not be considered grounds for granting an Extension of Time (see Paragraph 3-102-F).<sup>84</sup>

The bid opening date was May 25, 1954, so that the period of approximately 8 months mentioned in the quoted provision terminated on or about January 25, 1955. Under the quoted provision it was appellants' duty to arrange their construction programs in a way which

<sup>84</sup> Addendum No. 2, dated April 29, 1954.

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would not require the availability of materials for stringing operations prior to the latter date, and, as will be explained subsequently, they did so arrange these programs at first. Under the quoted provision appellants also expressly disclaimed any right to an extension on account of the unavailability of material for stringing operations prior to January 25, 1955. As things actually worked out, the first deliveries of conductor for each schedule were made more than a month in advance of that date, and there is no evidence that subsequent deliveries failed to keep pace with appellants' needs. Hence, it would seem that the contracting officer rightly denied any extension for conductor unavailability.

Appellants argue for a restricted interpretation of the quoted provision under which its applicability would be limited to situations where the Government does not actually have on hand any materials of the particular category at issue. This, in our opinion, is too narrow a construction. The Government in general, and Bonneville in particular, has many transmission line jobs, and materials on hand may not be available for a given job simply because they are needed for another job. Materials on hand may also be unavailable, from a practical standpoint, because the Government doubts their suitability for the given job, as Bonneville here, for a while, doubted the suitability of the field reworked and factory rewrapped wire for use in areas where the risk of radio interference was substantial. Appellants, when entering into the contract, were fully aware that Bonneville carried on a wide range of material operations, and, in the light of this background information, they could scarcely have read the contract as meaning that all material on hand would be channeled to their particular job irrespective of any other considerations. We construe the quoted provision as meaning that Bonneville reserved the right to exercise its own judgment with respect to the timing of conductor deliveries, so long as the specified period of 8 months was not exceeded.

Appellants also make a point of the fact that the provision mentions conductor hardware, but not conductor itself. This is a distinction without a difference since "stringing operations," which necessarily require conductor as well as conductor hardware, are expressly mentioned.

The claim here advanced, moreover, runs counter to still another provision of the contract. This is the provision, quoted in the discussion of Claim C-5, which defines the time when materials are to be

delivered by the Government as being such as will "avoid any delay in the progress of the contractor's work as outlined in his construction program."<sup>85</sup> In *Witzig Construction Company*<sup>86</sup> the Board construed this provision as meaning that the construction program submitted by the contractor was to be used as the criterion for determining the time when materials would be needed for installation, and held that Bonneville was entitled to rely upon such program in scheduling the flow of materials to the job, for at least as long as it was unaware that the contractor had in mind a different timing of the contract work.

In the instant case the construction programs submitted by appellants on July 21, 1954, set the dates when wire operations would begin at April 1, 1955, for Schedule II and at July 1, 1955, for Schedule III, with September 1, 1955, being set as the completion date for both schedules. While appellants had, at the award meeting, expressed a wish to string across Stevens Pass for a distance of about seven miles during the fall of 1954, the programs made no provision for stringing any portion of the line during that period. By July 21, 1954, therefore, appellants seemingly had come to realize that the problems confronting them in the high-country areas would not be overcome in time for stringing across Stevens Pass to be commenced before the 1955 construction season.

The letter of October 11, 1954, appears to be the first definite intimation which Bonneville was given, after receipt of the construction programs, that appellants wished to obtain conductor at dates earlier than those set in such programs for the beginning of wire operations. The record indicates that Bonneville, once it learned of appellants' desire to better the program dates, exercised reasonable diligence to furnish conductor as soon as feasible. The time, however, was a particularly bad one for making changes in the planned flow of conductor because of the defects known or suspected to be present in much of the "Chukar" then on hand.

Appellants' own conduct during the period in question was surprisingly lax for parties who asserted that they were being delayed through lack of materials. Thus, they did not carry out a commitment made at the conference on November 1 that Bonneville would be furnished a list showing the places for which, and the quantities in which, conductor would be needed for the making of difficult cross-

<sup>85</sup> Paragraph 3-102-F of the specifications.

<sup>86</sup> *Supra* note 65.



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ings or for stockpiling in advance of the spring thaw. Again, they waited until November 29 to submit for approval revised construction programs advancing the dates for commencement of wire operations, although the contract specifically stated that the "contractor shall at no time change his program without the approval of the contracting officer."<sup>87</sup> Finally, when conductor was made available early in December, they allowed an entire month to elapse before stringing any of it.

In these circumstances it must be concluded that the failure to start stringing during the last three months of 1954 was not caused by any act of the Government, but was the result of the stringing dates chosen by appellants for inclusion in their construction programs, coupled with the lukewarmness of their efforts to initiate stringing during this period. The same is true of the failure to stockpile conductor along the right-of-way.

Claim E-2, therefore, is denied.

*Claim E-3*

*Defects in Conductor*

This claim is for the time alleged to have been lost through inspections, repairs and other incidents occasioned by fabricator-caused defects in the "Chukar," or by faulty accessories. In essence, an extension of time is sought on account of the same occurrences for which monetary relief is sought in the various claims considered under headings B and C. Appellants assert that 20 working days were lost because of these occurrences. The contracting officer rejected the claim as such, but did allow extensions aggregating one calendar day for incidents that form the subject of Claims C-2 and C-5.

The working time consumed or lost on Schedule II as a result of fabricator-caused wire defects or of accessory faults amounted to approximately 1,883 man-hours.<sup>88</sup> During the period of 16 months within which the bulk of the job was performed, that is, the period running from July 1, 1954 (when the initial building up of the crews had brought them to sizeable proportions) until November 1, 1955

<sup>87</sup> Section 2-102 of the specifications.

<sup>88</sup> Composed of 676 man hours for stoppages and repairs and 315 man hours for abnormal cutoffs under Claim B-2, 206 man hours under Claim C-2, 670 man hours under Claim C-4, and 16 man hours under Claim C-5.

(when the final cutting down of the crews was about to begin), appellants' working force on Schedule II averaged 79 men. After making allowance for travel time, the productive period of a working day seems to have been in the neighborhood of 7 hours. Thus, appellants' capacity for productive work was, on average, about 553 man-hours per working day. Such capacity, however, is only one of the factors that determined the extent to which the completion of the contract work was delayed by the addition of the 1,883 man-hours in question.

Judged from the standpoint of their effect upon job performance, the causes of delay that led to this increment fall into two classes. One class consists of events that delayed the completion of particular operations under the contract, but that did not hold up the concurrent prosecution of other operations, and whose primary effect upon the job was to increase the volume of the work remaining to be done, rather than to defer the time when the doing of that work would become practicable. Conductor cutoffs form a good example of this class of events, since they are necessarily made after the conductor has been pulled out, and since they usually can be accomplished while other parts of the stringing work are going ahead. Difficulties in connection with sleeving and dead-ending fall into the same category, and for like reasons.

The other class of causes of delay here at issue consists of events that delayed the performance of the contract work as a whole, that is, put off for a time roughly equivalent to the duration of the cause of delay the date by which the job could otherwise have been brought to an end, with reasonable efforts. A typical example of such an event would be a stop for inspection or repair of fabricator-caused wire defects. Since the stringing of the conductor forms the last major group of operations in the construction of a transmission line, and since the pulling out of the wire must precede most of the other steps in that group—such as sleeving, sagging, dead-ending, clipping and jumpering—a stoppage of the pulling out of the conductor for a given period of time ordinarily results in holding up the final completion of the job, other things being equal, by about the same amount of time.

The Board finds that the stops for inspection and repair set back the performance of the contract work as a whole, but that the other transactions covered by the instant claim did not, except to the minor extent apparently recognized by the contracting officer in granting time extensions for Claims C-2 and C-5. We find that the delays in

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completion attributable to such stops, and to allied repair work, may be fairly measured by the figures for daily loss of time ascertained in the course of granting monetary relief for the same events under Claim B-2, that is, 20 minutes per day for 78 days. Taking 7 hours as the average number of productive working hours per day, the inspection stops and repair work in question resulted in a delay of 3.7 working days. We find that the delays in completion due to abnormal cutoffs and to faulty presses and fittings may be fairly measured by the relationship between the number of man-hours of work thereby added to the performance requirements of the contract and the number of man-hours of work which the contractor had the capacity to perform per average working day. The increase in the volume of work attributable to abnormal cutoffs and to faulty presses and fittings amounted to approximately 985 man-hours.<sup>89</sup> Taking 553 man-hours as appellants' average daily work capacity, the 985 man-hours so consumed or lost resulted in a delay of 1.8 working days. The aggregate loss of 5.5 working days obtained by adding together these two classes of delay entitles appellants to a time extension of 8 calendar days.

We find no valid reason for disturbing the one additional day allowed by the contracting officer on account of Claims C-2 and C-5.

In developing these findings the Board has recognized the impossibility of placing every individual occurrence in precisely the right pigeonhole, or of determining with mathematical exactitude the duration of the delay occasioned by any particular class of occurrences. Our computations reflects a studied effort to balance out opposing borderline considerations, and to achieve as realistic an evaluation of the circumstances as their nature admits.

The Board determines, therefore, that Claim E-3 is allowable in the amount of 8 calendar days, in addition to the time allowed by the contracting officer.

#### *Claim E-4*

##### *Alterations in Sequence of Work*

Under this heading the Board has grouped a number of instances where appellants allege that their planned sequence of work was interrupted by alterations in the design of individual footings or structures, or by a failure of the Government to make timely delivery

<sup>89</sup> Composed of 315 man hours for abnormal cutoffs under Claim B-2, and 670 man hours under Claim C-4.

of tower materials. Generally speaking, these interruptions necessitated the by-passing of the affected tower in order to perform work at other sites while the new design was being determined or while the necessary materials were being obtained, followed by an ultimate return to the by-passed location when these obstacles to completion of the tower had been overcome.

The claim comprehends a total of six such alleged interruptions, pertaining, respectively, to (1) leg extensions at towers 492, 499 and 505; (2) leg extensions at tower 469; (3) footings at tower 548; (4) special steel for towers in the Mill Creek area;<sup>90</sup> (5) incorrect steel at tower 599; and (6) footings at tower 600.

Appellants contend that these occurrences resulted in the loss of an aggregate of 35 working days. The contracting officer found that the first five items resulted in the loss of 6 working days in the aggregate, and included a commensurate number of calendar days in the time extensions allowed. The sixth item he rejected in its entirety.

The record offers no valid reason for upsetting the findings of the contracting officer. Each of the first five occurrences resulted in time being lost only by a particular crew or crews, that comprehended no more than a minor fraction of the total working force on the job at the time of the occurrence. When the size of the crews actually affected is compared with the size of the total working force, the extensions granted were ample enough to allow for the loss by those crews of approximately the following number of working days: 4 days for the first item; 11 days for the second; 9 days for the third; 20 days for the fourth; and 7 days for the fifth. In the circumstances revealed by the testimony, these were liberal allowances. As for the sixth item, the evidence fails to show that any time at all was lost.

Claim E-4, therefore, is denied, except with respect to the time allowed by the contracting officer.

#### *Claim E-5*

#### *Entiat Snow Storm*

The stringing of Schedule II was begun during the latter part of March, 1955. The place selected was the Entiat area, which is situated on a ridge near the eastern end of that schedule. On the night of

<sup>90</sup> The term Mill Creek area, as here used, refers to the portion of the transmission line that extends approximately from tower 573 to tower 601. The record does not identify the particular towers within this area for which special steel was delivered late.

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April 3 a storm of unusual severity for the area and season occurred. This storm left the ground so deeply covered with snow as to force a suspension of stringing. Appellants allege that the stringing operations were not resumed until May 2, but the evidence clearly shows that they were actually resumed on April 21.

A time extension based on a loss of 28 working days was requested for this cause of delay. The contracting officer allowed an extension based on the loss of 14 working days. The reason assigned for this reduction is that appellants' crews were able to work on other portions of the job for 50 percent of the time between April 3 and May 2. Only 13 working days elapsed between April 3 and the resumption of stringing operations on April 21.

Appellants have the burden of proof, but have introduced no evidence to sustain it. On the contrary, such evidence as there is tends to show that the contracting officer's allowance was adequate.

Claim E-5, therefore, is denied, except with respect to the time allowed by the contracting officer.

*Claim E-6*

*Fire Hazard Closure*

This claim has its source in a closure of the country along part of the transmission line to most types of construction operations on account of the prevalence of an extremely high degree of fire hazard. The closure was ordered by authorities of the State of Washington and lasted for two days, September 6 and 7, 1955.

Appellants assert that the fire closure cost them three working days. No time extension was allowed by the contracting officer. The reason given for the rejection is that fire closures are so common in the timbered areas of the Cascades during the summer that a prudent contractor when bidding would have foreseen, and allowed against, the contingency of being shut down because of such a hazard for, at least, so short a period as two or three days. The evidence reveals that appellant was able to, and did, perform a limited amount of work while the closure was in effect.

We believe that this claim was properly denied. In judging the foreseeability of an event consideration must be given to the frequency with which similar events, that would affect the contract work in a like way, happen to occur.<sup>91</sup> That forests, not only in the Cascades,

<sup>91</sup> *Larsen-Meyer Construction Company, supra* note 74.

but also in many other parts of the West, are often closed from time to time during the summer because of fire hazards is a matter of common knowledge. A prudent contractor, when bidding upon a job in such a forest, ordinarily could not predict the exact date or place of a fire closure, but he certainly would realize that there was a substantial probability of such a closure occurring at some time in a place where he was working. In the circumstances there is no realistic basis for concluding that the relatively short fire closure here at issue was "unforeseeable" cause of delay within the meaning of the contract.

Claim E-6, therefore, is denied.

#### *F. Time Extensions for Schedule III*

The claims included within this group, like those in group E, are directed to obtaining time extensions as a basis for remission of liquidated damages on account of delay in completing the work.<sup>92</sup>

The contract completion date for Schedule III was September 9, 1955, but the work was not actually completed until March 14, 1956. This was a delay of 187 days and represented a potential liability for liquidated damages of \$56,100. The time extensions granted by the contracting officer amounted to 43 days, thereby deferring the completion date to October 22, 1955, and reducing the liability for liquidated damages by \$12,900.<sup>93</sup> Appellants contend that they are entitled to further extensions in at least the amount of 144 days that would be needed to justify remission of the remaining \$43,200 of liquidated damages. The Board is allowing on account of the causes of delay here at issue additional time extensions totaling 18 days, thereby deferring the completion date to November 9, 1955, and reducing the liability for liquidated damages by \$5,400. The reasons will appear in the discussions of Claim F-3 and Claim F-7.

#### *Claim F-1*

##### *Delay in Giving Notice to Proceed*

This claim is to the effect that the Government was unduly late in giving notice to proceed. The duration of the time extension sought

<sup>92</sup> All of these claims, except Claims F-2 and F-3, were determined by the contracting officer in a letter dated February 29, 1956. Claims F-2 and F-3 were determined in the finding of facts of the same date.

<sup>93</sup> The letter of February 29, 1956, granted an extension of 40 days, and the finding of facts of the same date granted 3 additional days.

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is left unclear by the record. The contracting officer rejected the claim in its entirety.

The contract does not specify either the time within which an award is to be made, or the time within which notice to proceed is to be given. In the absence of such a specification, the law allows a reasonable time for the taking of each of these measures.<sup>94</sup>

The bids in the instant case were opened on May 25, 1954. The award was made 16 days later on June 10. At the award conference, held on the latter date, there was a discussion of the timing of notice to proceed. Following this discussion appellants were given, and accepted, a notice to proceed which stated that it would become effective on June 16, that is, 22 days after the bid opening.

Under the contract appellants were bound to begin work within 10 days from the giving of notice to proceed. Work on each schedule was actually begun within less than 10 days from June 16.

Montgomery-Macri-Western contend that the general practice of Bonneville had been to make awards and give notice to proceed within 10 to 15 days after the bid opening, and that the greater time which elapsed in this case resulted in throwing the contract performance into a period of bad weather. This contention is easily answered. In the first place, the mere fact, if it be true, that Bonneville ordinarily acted within 10 to 15 days, would not, standing by itself, be sufficient to prove that a period of some 22 days was unreasonable in a particular situation, where abnormal circumstances might conceivably exist. In the second place, even if the time consumed was unreasonable, there is no proof that it projected the contract work into bad weather. Had the award been made and the notice to proceed become effective on June 4, the tenth day after the bid opening, then the first day of the contract performance period would have been June 5, instead of June 17, and the last day would have been August 28, instead of September 9. Hence, the net effect of the alleged delay was to exchange 12 days in June of 1954 for 12 days in late August and early September of 1955. There is no intimation in the record that the weather during this latter period was less favorable for transmission line work than the weather during the early and middle parts of June, 1954. Obviously, no time extension would be allowable for such an exchange, absent evidence that the contractor was actually hindered thereby.<sup>95</sup>

<sup>94</sup> *Parish v. United States*, 120 Ct. Cl. 100, 124-26 (1951), cert. denied, 342 U.S. 953 (1952); *Restatement, Contracts*, sec. 40.

<sup>95</sup> *Black Hills Ditching Company*, IBCA-145 (August 15, 1958), 65 I.D. 342, 345-46, 53-2 BCA par. 1888; *J. A. Terteling & Sons, Inc.*, IBCA-27 (December 31, 1957), 64 I.D. 466 500-01, 57-2 BCA par. 1539.

A second contention put forward by Montgomery-Macri-Western is that during the first month or so of contract performance they were under a practical necessity of holding down the scope of their operations, because one of the unsuccessful bidders had filed a protest against the award, and because appellants understood that if the protest were allowed the notice to proceed would be withdrawn, without compensation being paid them for any work already done. The protest was discussed at the award conference, and appellants assert that the understanding just mentioned was based on statements made by Bonneville representatives at that meeting. Department Counsel retort that the statements in question were not reasonably susceptible of the interpretations put upon them by appellants and that, as a matter of fact, Bonneville would have compensated appellants, if the notice to proceed had been withdrawn, for any work done after its effective date and before its withdrawal.

We do not find it necessary to determine just what was said at the award conference, or how reasonable was the alleged understanding of appellants that they would not be paid for work done were the protest against the award to be sustained. If, as appellants say, this was their understanding, the logical course for them to pursue would have been to suggest that the issuance of notice to proceed be deferred until the protest had been finally disposed of, one way or the other. Such a course would have protected them fully, whereas their alleged policy of going ahead with the work, but at a retarded pace, would have left them to carry the supposed risk of loss for so much of the work as they actually did do. The record shows, however, that, after learning of the existence of the protest, appellants' managing partner nevertheless urged Bonneville to permit an early start on the work. The record also tends to indicate that during the month or more of alleged uncertainty appellants built up crews, mobilized equipment, and otherwise went ahead with the prosecution of the work in a manner which fails to suggest any design of limiting the scope of their operations. Under the circumstances, we find that the protest against the award did not, in fact, cause a slow-down or other delay in contract performance.

Claim F-1, therefore, is denied.

#### *Claim F-2*

##### *Lateness of Clearing*

This claim is the Schedule III counterpart of Claim E-1. The areas to which it appears to be mainly directed are the section of the



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transmission line extending from tower 606 to tower 634, and the Index Ridge area, running from about tower 709 to tower 718. The length of the time extension sought is not specified by appellants. No extension was allowed by the contracting officer.

The clearing contracts for Schedule III provided that the major elements of the clearing of the tower sites should be completed by not later than July 1, 1954, at tower 693 and all sites to its east, and by not later than August 1, 1954, at tower 694 and all sites to its west. Clearing of a number of the sites had not been finished by the prescribed dates. While the parties have not tabulated the sites at which the clearing was late, it is evident that each of the two areas mentioned above did contain some such sites. It is also evident that the clearing of the last of the sites was completed during November of 1954.

The construction program for Schedule III showed June 23, 1954, as the starting date and August 1, 1955, as the completion date for the footings. It showed July 19, 1954, as the starting date and August 15, 1955, as the completion date for the steel work. During the fall of 1954—the period while the clearing of the tower sites was being finished—appellants ran well ahead of this program in terms of the number of footings placed, and stayed nearly abreast of it in terms of the number of towers erected. The Schedule III footings were complete at about 54 percent of the sites on October 1, at about 62 percent of them on November 1, and at about 68 percent on December 1. The steel work was complete at about 19 percent of the sites on October 1, at about 26 percent of them on November 1, and remained at the same percentage on December 1.

From the standpoint of determining whether the lateness in clearing some of the tower sites actually delayed the construction of the transmission line, the progress achieved by appellants in starting work on the footings is even more significant than the figures for completed work set out above. This is because a tower site was not staked for construction by Bonneville, nor was construction begun at it by appellants, until the clearing contractor had finished his operations at that site. Between mid-June of 1954, when the notice to proceed became effective, and the close of the ensuing November, when the clearing had come to an end at all of the tower sites, appellants started the foundations for 119 towers out of the 152 on Schedule III. This was a rate of approximately 22 starts per month. During the period initially planned for a shut-down of operations,

running from the first of December to the last of March, appellants started the foundations at 9 additional towers, a rate of about 2 starts per month. During the period from the first of April to the last of July, the day preceding the scheduled completion of the footing operations, appellants started the foundations at 17 more towers, a rate of about 4 starts per month. The foundations for the remaining 7 towers were begun in August and September of 1955.

The construction program establishes that appellants did not contemplate placing footings at all the tower sites prior to the anticipated winter shut-down. The rate of 22 starts per month achieved during the construction season of 1954, while clearing was still under way at some of the sites, ran well ahead of the program. Compared with the rate then achieved, the rate of 4 starts per month obtained during the 1955 season, after all of the sites had been cleared, was exceedingly slow. It is evident from this comparison that lateness of clearing did not cause delay, from an over-all standpoint, in the construction of Schedule III.

The section of the line from tower 606 to tower 634 calls for particular consideration because it is the locale of all but four of the sites where footing operations were not begun until the 1955 construction season.<sup>96</sup> Out of the 29 towers in this area, the footings were started at eight in the June to November period of 1954, at one in the December to March period, at thirteen in the April to July period, and at seven in August and September of 1955. Performance of the subsequent phases of the work went ahead at a very slow pace, with the result that not a single one of the twenty-nine towers was completed until September of 1955. The area in question, while not as exposed as Stevens Pass or Tunnel Creek, was for the most part at an elevation of more than 2,000 feet and within the zone of heavy winter snow, as revealed by the records of the Scenic weather station, located near tower 614. This being so, it is difficult to understand why appellants, even though the snow had left in May, made so little use of the generally favorable weather of the 1955 construction season until the completion date of September 9 was almost at hand. Appellants have offered no evidence adequate to establish that the ultimate failure to complete on time the section from tower 606 to tower 634 was caused, in whole or in part, by delays in clearing this area, and the circumstances outlined above tend to refute the existence of any such causal relationship.

<sup>96</sup> The four remaining sites were at towers 687, 710, 711 and 712.

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Particular consideration needs to be given the Index Ridge area because it is the only area as to which written notice of a delay allegedly caused by untimely clearing was given contemporaneously with such delay. This notice appeared in the letter of October 11, 1954, the contents of which are described in our discussion of Claim A-1. The evidence indicates that, at the time when this letter was written, the only sites not yet cleared on Index Ridge were at towers 710, 711, 712 and 713, and that the sites for those towers were cleared by not later than October 21, 1954. These four sites were located in the hard-to-reach area to which an access road was subsequently constructed by appellants, as explained in the discussion of Claim A-2. Excavation for the footings was started in March and April of 1955, the work at each site being undertaken only when the access road had been constructed as far as that site. The erection of the towers was completed in August, and the stringing of the entire area was finished in early September.

The alleged by-passing of Index Ridge in October of 1954 seems to have turned out in the end to be a time-saving maneuver, since the subsequent construction of the access road avoided the tedious packing methods of transport that would have been necessary had construction operations been undertaken in 1954. There is no showing to connect the delay in the final completion of the line across Index Ridge with the delay in clearing that area, and the unexplained slowness with which the tower work was prosecuted during the spring and summer of 1955 negatives the establishment of such a connection by inference.

Claim F-2, therefore, is denied.

### *Claim F-3*

#### *Inadequacy of Clearing*

This claim is for the time alleged to have been lost through inadequate clearing of the tower sites, assembly areas, and central strips on Schedule III. In essence, what is sought is an extension of time on account of the circumstances for which monetary relief is sought in Claims A-1 and A-2. Appellants regard the quality of the clearing as a major cause of delay, but have not specified the duration of the extension which, they believe, should be allowed on its account. The contracting officer granted an extension of three calendar days

for the tower sites and assembly areas, but did not allow any extension for the central strips.

The findings made by the Board in the course of considering Claims A-1 and A-2 lead necessarily to a conclusion that appellants are entitled to a time extension on account of inadequate clearing not only for the tower sites and assembly areas, but also for the central strips. The only question that calls for examination here is: "What should be the duration of this extension?"

As is true of a number of other claims, appellants have not supported their allegations of delays due to inadequate clearing by tabulations, founded on evidence, from which the extent of the delays could be ascertained with any reasonable degree of accuracy. This deficiency has made it necessary for the Board to rely on inferences drawn from the available data, a process in which doubtful issues must be resolved against appellants, since they have the burden of proof.

The record indicates that the contracting officer's allowance of three calendar days was computed by applying to the \$4,534 granted for tower sites and assembly areas the same ratio of time to money as that which the performance period of 450 calendar days set by the contract for Schedule III bore to the estimated price of approximately \$803,844.90 set by the contract for that schedule. Application of this ratio to the \$4,534 gives a figure of 2.5 calendar days, which seemingly was rounded to three by the contracting officer. If the same ratio were to be applied to the larger sums being granted by the Board, the time extension allowable for the tower sites and assembly areas would amount to 9.2 calendar days, while that allowable for the central strips would amount to 10.6 calendar days, or a total of 19.8 days.

Another approach would be to determine the duration of the allowable extension from the relationship between the work requirements created by inadequate clearing and the work capacity possessed by the contractors. There is testimony in the record to the effect that the wages paid by appellants averaged \$3.85 per productive man-hour; that payroll taxes and insurance would run about 15 percent of wages; that equipment ownership or rental charges for transmission line work normally amount to about 25 percent of wages; that gas, oil and repairs would run about 15 percent of wages; and that 15 percent would be a fair allowance for overhead and profits. The average cost of a productive labor-hour, determined from the factors just mentioned, would be \$6.86.<sup>97</sup> The latter figure, when divided into the

<sup>97</sup> See *supra* note 48.

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amounts allowed for Claims A-1 and A-2, respectively, gives us a reasonably reliable indication of the number of man-hours added to the job by inadequate clearing. This is 2,383 man-hours for the tower sites and assembly areas, and 2,759 man-hours for the central strips.

During the period of 16 months, running from July 1, 1954, until November 1, 1955, within which the bulk of the job was performed, appellants employed an average working force of 61 men on Schedule III. Taking 7 hours as the productive period of a working day, appellants' capacity for productive work amounted to about 427 man-hours per working day, on average, for Schedule III. At this rate, performance of the additional man-hours of work occasioned by inadequate clearing would require, in the case of the tower sites and assembly areas, 5.6 working days and, in the case of the central strips, 6.5 working days. The total of 12.1 would be equivalent to about 17.5 calendar days.

The foregoing computations are not widely different in result, and each is entitled to some weight. The median between 19.8 and 17.5, rounded to the nearest integer, is 19. On the evidence as a whole, we consider that a fair and reasonable approximation of the delay caused by inadequate clearing would be 19 calendar days. For 3 of these days a time extension has already been granted by the contracting officer.

The Board determines, therefore, that Claim F-3 is allowable in the amount of 16 calendar days, in addition to the time allowed by the contracting officer.

*Claim F-4*

*Access Road 28C*

This claim is for delay occasioned by the allegedly unusable condition of Access Road 28C in the spring of 1955. Appellants assert that the condition of the road, coupled with the inadequacy of the clearing at the towers to which it led, caused 15 working days to be lost. The contracting officer denied any time extension on account of the alleged deficiencies in the road.

The circumstances out of which this claim arises are stated in the portion of this opinion that deals with Claim A-3. They reveal that the deficiencies of which appellants complain were foreseeable, and, hence, were not such as would constitute an excusable cause of delay under the contract.

Claim F-4, therefore, is denied.

*Claim F-5**Index Ridge Access Road*

This claim is for the time allegedly used in constructing an access road to towers 710, 711, 712, 713 and 714 on Index Ridge. The circumstances leading up to the building of the road are outlined in the portions of this opinion that deal with Claim A-2 and Claim F-2. Appellants contend that the building of the road added 30 working days to the job. No time extension on account of this cause was allowed by the contracting officer.

Appellants constructed the access road pursuant to an agreement the terms of which were incorporated, after the work had been begun, in a change order duly accepted by them.<sup>98</sup> The order added to the contract price \$9,600 as compensation for the building of the road, but deducted \$3,200 as compensation for the use of the road by appellants, thus resulting in a net upward price adjustment of \$6,400. Nowhere in the order was there any mention of the contract performance time, or of alterations therein.

The construction of the access road was spread over a period of time which, although its duration cannot be determined with certainty, may in all likelihood have encompassed as many as 30 working days. Appellants' managing partner testified that the crew assigned to the building of the road did not exceed 4 or 5 men, and that other operations under the contract were not suspended while it was being built. During the general period within which the road was being constructed, appellants' labor force on Schedule III averaged at least 40 men. It is, therefore, readily apparent that the portion of the contract time diverted to the building of the road was far less than the duration of the period over which such work was spread.

Another matter which must be taken into account is the time saved through the availability of the access road. The portion of Index Ridge which it opened up was a rugged, heavily-timbered area into which, absent an access road, materials and equipment for the footings and towers would have had to be packed by man or animal power. Bonneville's Area Construction Superintendent testified that appellants "actually made time and money by the road," and in the light of the physical conditions we see no reason for discrediting this opinion. It is a reasonable inference from the evidence as a whole

<sup>98</sup> Change Order "C," dated April 29, 1955.

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that the time saved by appellants through the availability of the access road for furtherance of their line construction operations was at least equal to the time consumed in its building.

Claim F-5, therefore, is denied.

#### *Claim F-6*

##### *Unavailability of Conductor*

This claim is the Schedule III counterpart of Claim E-2. It stems from reiterated requests by appellants for allowance of a time extension, in amounts as high as 90 days, on account of delays allegedly caused by the failure of Bonneville to deliver conductor as soon as it was needed. The contracting officer disallowed all of these requests.

The subject of unavailability of conductor is dealt with fully, as to both Schedule II and Schedule III, in our discussion of Claim E-2. For the reasons there stated, the instant claim is without merit.

Claim F-6, therefore, is denied.

#### *Claim F-7*

##### *Defects in Conductor*

This claim is the Schedule III counterpart of Claim E-3. The time sought is an unspecified portion of the maximum of 90 days mentioned in connection with Claim F-6. No extension was granted by the contracting officer.

The subject of conductor defects is one that has limited application to Schedule III, since field reworked or factory rewrapped wire was not used on that schedule. The record reveals no causes of delay attributable to defects in the wire, or in Government-furnished fittings or equipment, other than the events that form the subject of the claims considered under heading D. The approximate time lost or consumed by reason of all these events, as measured by the allowances made by the contracting officer and the Board, totals 588 man-hours.<sup>99</sup> Only the incident that forms the subject of Claim D-4 set back the performance of the contract work as a whole. By applying to these facts the methods of analysis utilized for Claim E-3 and Claim F-3, the delay in completion attributable to the defects here in question is found to be 2 calendar days.

<sup>99</sup> Composed of 447 man hours under Claim D-1, 81 man hours under Claim D-2, 30 man hours under Claim D-3, and 30 man hours under Claim D-4.

The Board determines, therefore, that Claim F-7 is allowable in the amount of 2 calendar days.

*Claim F-8*

*Alterations in Sequence of Work*

Under this heading the Board has grouped, as in the case of Claim E-4, instances where appellants' planned sequence of work is alleged to have been interrupted by changes in tower location or design. The three items so grouped have to do, respectively, with (1) relocation of tower 627, (2) change in design of tower 666, and (3) relocation of tower 679. Appellants contend that 9 working days in all were lost by reason of these occurrences. The contracting officer denied all three items.

Appellants have failed to carry the burden of proof with respect to any of these occurrences. On the contrary, the preponderance of the evidence is to the effect that the amount of time lost by reason of the relocation of tower 627 was inconsequential and, in any event, was counterbalanced by a saving in time resulting from the fact that the new site was easier to reach than the old. The preponderance of the evidence, likewise, is to the effect that the revisions in the design of tower 666 and in the location of tower 679 were made before appellants had initiated work at those sites, did not entail any moves or operations that would have been unnecessary in the absence of such revisions, and did not otherwise affect the progress of the job.

Claim F-8, therefore, is denied.

*Claim F-9*

*Excessive Rainfall*

This claim was initiated by a letter from Montgomery-Macri-Western, dated July 11, 1955, which requested an extension of 45 calendar days for Schedule III on account of excessive rainfall during the period from June 16 to December 1, 1954. The contracting officer in his letter of February 29, 1956, granted an extension of 40 calendar days on account of "unusually severe weather" during "the period of your contract." The evidence reveals that the extension granted was based upon an analysis of precipitation data for the period from May of 1954 through September of 1955, and upon determinations of the contracting officer, made on the basis of this analysis, that the work had been delayed for 10 days by excessive rainfall in November of 1954,



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and for 30 days by excessive rainfall in April and July of 1955. What appellants seem now to be seeking, under this claim, is an extension of 35 calendar days for excessive rainfall prior to December of 1954, in addition to the 10 days allowed by the contracting officer for the same period.

Recordings from several Weather Bureau stations situated along Schedule III are in evidence. However, data from which it is possible to determine the extent to which the weather during the period of contract performance was better or worse than that during a representative number of prior years is available only for three of these stations, located, respectively, at Scenic, Index and Startup. This comparative data, moreover, is not broken down into units smaller than months.

At the three stations mentioned there was in 1954, from the beginning of June until the end of October, more rain than usual, but only to a limited degree. Indeed, precipitation was slightly less than normal in September and substantially less than normal in October. The average precipitation for the whole period from June through October exceeded the long-term mean by approximately 16 percent.<sup>100</sup> This was hardly enough of a difference to have any significant effect upon the progress of the job.

In November of 1954 the average precipitation at the three stations mentioned exceeded the long-term mean by approximately 57 percent. Even so, an appreciable volume of work was accomplished, amounting to about 2½ percent of the job and equivalent, when adjusted for the deduction of one-third of November from the contract time, to a monthly rate of 3¾ percent. This figure does not compare badly with the monthly rate of about 7¾ percent achieved during the preceding two months of less than normal precipitation, when account is taken of the fact that in November appellants maintained on Schedule III a labor force that was substantially less than one-half the size of the force employed during each of the two preceding months.

All in all, appellants have failed to carry the burden of proving that prior to December 1, 1954, they were delayed by excessive rainfall for a period longer than 10 calendar days.

Claim F-9, therefore, is denied, except with respect to the time allowed by the contracting officer.

<sup>100</sup> In making this comparison June has been accorded only one-half as much weight as the other months, since the contract performance period did not begin until one-half of June had elapsed.

*G. Winter Work Claims*<sup>101</sup>*Claim G-1**Remission of Liquidated Damages*

This claim is for remission of all liquidated damages, with respect to both Schedule II and Schedule III, because of the adverse working conditions that were encountered during the winter of 1955-56. Montgomery-Macri-Western assert that the severe winter weather entitled them to the allowance of time extensions for periods running to, and beyond, the respective dates when the work under each schedule was actually completed. Reliance is had on two theories, one being that the winter of 1955-56 was unusually severe, the other being that the substitution of one day of poor working weather for one day of good working weather is not an adequate time extension for a delay that occurred when weather of the latter type prevailed. No extensions based upon either of these theories were allowed by the contracting officer.

The general characteristics of the weather encountered in the Cascade Mountains during the winter of 1955-56 are described in our opinion upon Claims 10 and 11 of IBCA-77.<sup>102</sup> The territory involved in the instant appeals lies to the west of that involved in IBCA-77 and attains to substantially higher elevations. Because of these differences, the weather was worse, and the difficulties of working in it were greater, than in the IBCA-77 territory. At Lake Wenatchee, snow on the ground to a depth of 5 inches was first recorded on October 31, and, prior to the completion of Schedule II in January, a maximum depth of 75 inches had been attained. At Scenic, snow on the ground to a depth of 5 inches was first recorded on October 30, and, prior to the completion of Schedule III in March, a maximum depth of 204 inches had been attained. At Stevens Pass, snow heavy enough to bring about a temporary suspension of work fell on October 5.<sup>103</sup> The record contains many illustrations of the severity of the winter and of the problems created for appellants thereby. It is plain beyond question, and seems to be conceded by the Government, that "unusually severe

<sup>101</sup> The two claims considered under this heading were denied, by necessary implication, in the letter of February 29, 1956, in the finding of facts of the same date, and in the finding of facts of September 28, 1956.

<sup>102</sup> *Supra* note 1.

<sup>103</sup> The foregoing data may be profitably compared with the corresponding data for the winter of 1954-55 set forth under Claim E-1.

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weather" within the meaning of the contract was encountered during the winter of 1955-56 on both Schedule II and Schedule III.

Determination of the precise amount of unusually severe weather so encountered is made difficult by the limited number of stations for which data has been furnished that admits of the 1955-56 weather being compared with the weather of a representative number of prior years, and is also made difficult because such comparative data as the record does contain is stated only on a monthly basis.

The comparative data available for Weather Bureau stations in the vicinity of Schedule II consists of precipitation data from the Leavenworth and Lake Wenatchee stations and of temperature data from the former station. The precipitation data for the two stations, averaged together, indicates that precipitation, whether in the form of rain or snow, exceeded the long-term mean by 183 percent in October of 1955, by 161 percent in November, by 78 percent in December, and by 35 percent in January of 1956. The temperature data from the Leavenworth station indicates that the temperature fell below the long-term mean by 1.9 degrees in October, by 8.2 degrees in November, by 6.0 degrees in December, and by 1.3 degrees in January.

Performance of the Schedule II work was completed on January 3, 1956, and was accompanied by 55 days of delay for which extensions have not been allowed by the contracting officer or in the preceding portions of this opinion. The comparative data summarized above, read in conjunction with the other facts disclosed by the record, justifies a finding that as many as 55 days of delay because of unusually severe weather were experienced on that schedule during the period beginning October 1, 1955, and ending January 3, 1956. Approximated by months, there were, at least, 20 such days in October, 20 such days in November, and 15 such days in December and January. Appellants are, consequently, entitled to remission of all the liquidated damages assessed with respect to Schedule II.

The comparative data available for stations along Schedule III consists of precipitation data from the Scenic, Index and Startup stations, and of temperature data from the last mentioned station. The precipitation data for these stations, averaged together, indicates that precipitation, whether as rain or snow, exceeded the long-term mean by 101 percent in October of 1955, by 97 percent in November, by 36 percent in December, by 10 percent in January of 1956, by 72

percent in February, and by 68 percent in March.<sup>104</sup> The temperature data from the Startup station indicates that the temperature fell below the long-term mean by 1.3 degrees in October, by 6.9 degrees in November, and by 2.6 degrees in December, exceeded the long-term mean by 0.7 degrees in January, and fell below it by 3.3 degrees in February.<sup>105</sup> This data reveals that conditions on Schedule III during the winter of 1955-56, while abnormally bad, were consistently less so than on Schedule II. It is also pertinent to note that Schedule III did not include any areas that were as much exposed to heavy snow or bitter cold as were the Stevens Pass and Tunnel Creek sections of Schedule II.

Performance of the Schedule III work was completed on March 14, 1956, and was accompanied by 126 days of delay for which extensions have not been allowed by the contracting officer or in the preceding portions of this opinion. The comparative data summarized above, read in conjunction with the other facts disclosed by the record, justifies a finding that 55 days of delay because of unusually severe weather were experienced on that schedule during the period beginning October 1, 1955, and ending March 14, 1956. The approximate breakdown by months best supported by the evidence is 15 days in October, 15 days in November, 10 days in December and January, and 15 days in February and March. There is no adequate basis in the data for a finding that more than 55 days of delay because of unusually severe weather were experienced on Schedule III during the period in question.

This leaves to be resolved the issue of whether any of the remaining 71 days are excusable in order to make up for the differential between the volume of work capable of being accomplished under normal weather conditions on those days during the preceding construction seasons that were excusably lost and the lesser volume of work capable of being accomplished during the same number of normal winter days. Appellants' construction programs indicate that December 1 was regarded by them as marking the approximate time when winter usually began in the region here involved, and such date appears to be a reasonable one for that purpose. The extensions that have been allowed on account of excusable causes of delay occurring prior to December 1 of 1955 include 70 days for unusually

<sup>104</sup> The January and February figures exclude the Index station, since the record does not contain data from that station for those months. The March figure is for the Scenic station alone, since the record does not include March data from the other stations.

<sup>105</sup> No comparative temperature data is available for March.

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severe weather<sup>106</sup> and 21 days for causes that increased the quantum of appellants' operations.<sup>107</sup> Adding to the contract time the 70 days lost before December 1 because of unusually severe weather would extend the completion date from September 9 to November 18. Adding the remaining 21 days would further extend the completion date to December 9, thereby projecting into the normal winter season 9 of the 21 days allowed on account of causes of delay that increased the work to be done.

The evidence concerning the extent to which the weather customarily prevailing in the Cascades during wintertime would lengthen the time required for transmission line construction is quite vague. Considering that the burden of proof is on appellants, the Board finds that an allowance of one extra day for each of the 9 days by which the increased quantum of operations was projected into or beyond December is the largest allowance which the record will justify. Taking this extra 9 days into account, appellants are entitled to remission of liquidated damages for 64 out of the 126 days here sought with respect to Schedule III.

The Board determines, therefore, that Claim G-1 is allowable in the amount of 55 calendar days for Schedule II, thereby deferring the required date of completion to January 3, 1956, and extinguishing the last \$16,500 of liability for liquidated damages under that schedule, and in the amount of 64 calendar days for Schedule III, thereby deferring the required date of completion to January 12, 1956, and reducing the liability for liquidated damages under that schedule by \$19,200.

### *Claim G-2*

#### *Additional Compensation*

This claim is for compensation on account of the expense to which Montgomery-Macri-Western consider they were put by reason of performing during the winter of 1955-56 work which could have been done more cheaply in summer weather. Its underlying factual assumption is that but for the various occurrences which form the subject of the claims considered under headings A through F, appellants

<sup>106</sup> Composed of 40 days allowed under Claim F-9, and 30 days allowed under the instant claim for unusually severe weather in October and November of 1955.

<sup>107</sup> Composed of 19 days allowed under Claim F-8, and 2 days allowed under Claim F-7.

would have completed the job before the onset of bad weather in the latter part of 1955. Appellants regard these occurrences as having placed the Government in a position where it was bound either to grant them an extension of time that would be long enough to admit of the unfinished work being deferred until the 1956 construction season, or else to reimburse them for the amount by which the expense of performing this work in the winter exceeded the expense that would have been incurred if completion had been put off until the next summer. Since Bonneville did not grant such an extension, but insisted that appellants continue working, notwithstanding the adverse weather, until the job had been finished, appellants contend that the Government elected the latter alternative and is bound to pay additional compensation for the winter work. They have not specified the amount claimed on this account, but state that is included in the sum of \$202,992.80 sought under Claim A-2 for alleged inadequate clearing of the central strips on Schedule III, even though unsegregated parts of the amount are for faulty conductor or accessories rather than for inadequate clearing, or are for Schedule II instead of Schedule III. The reason assigned for this inclusion is that the work done during the winter was mostly stringing work, which was performed mostly on the central strips, and, therefore, was classified under Claim A-2. No compensation was allowed by the contracting officer on the grounds here outlined.

The extent to which favorable consideration may be given to this claim is defined and circumscribed by certain general principles.

First, the expense of measures undertaken for the purpose of performing extra work resulting from a change ordered by the Government, or of overcoming hindrances resulting from a breach of contract by the Government, is allowable to the extent to which the expense was actually and reasonably incurred, and, hence, if such measures were actually and reasonably undertaken during the winter, the cost incurred in performing them at that time of the year would be allowable.<sup>108</sup>

Second, when the measures actually and reasonably undertaken form an integral component of a series of operations that is pushed, wholly or partially, into the winter as a necessary consequence of the incorporation of such measures within the series, then the compensation due the contractor would include, not only the cost of such meas-

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<sup>108</sup> *Abbett Electric Corporation v. United States*, 142 Ct. Cl. 609, 613-16 (1958) (breach of contract); *Inter-City Sand and Gravel Company*, *supra* note 40 (change); *Paul C. Helmick Company*, *supra* note 82 (change and breach of contract).

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ures themselves, but also the amount by which the cost of the subsequent operations in the series was increased through their projection into an unfavorable season.<sup>109</sup>

Third, a contractor is entitled to reimbursement for expense actually and reasonably incurred in complying with a direction of the Government to perform work in advance of the date when performance is due.<sup>110</sup> It follows that a contractor who has encountered an excusable cause of delay, who has requested an extension of time on account of such cause, who has been denied an appropriate extension, who has been instructed to complete the work within a lesser time than would have been available if an appropriate extension had been granted, and who complies with that instruction, is entitled to reimbursement for expenditures, such as the cost of working under adverse weather conditions, that could have been saved if an appropriate extension had been granted.<sup>111</sup>

Fourth, where the Government directs that the work be accelerated, but the contractor in fact does not accelerate its performance, no additional compensation is allowable.<sup>112</sup>

Fifth, the risk of loss on account of increases in the cost of the job that are not the product of any compensable act or omission of the Government, but that are caused merely by the encountering of bad construction weather, whether normal for the season of the year involved or sufficiently abnormal to constitute an excusable cause of delay, rests upon the contractor.<sup>113</sup> Hence, no consideration may be given to the expense of winter work caused by events, such as, for example, the condition of Access Road 28C, with respect to which

<sup>109</sup> The formulation of this principle in relatively narrow terms is necessitated by the rule concerning the scope of equitable adjustments for delay laid down in *United States v. Rice*, 317 U.S. 61 (1942). An illustration of the application of such principle to an equitable adjustment on account of a change is afforded by Claim 10 in IBCA-77, *supra* note 1. With respect to claims for breach of contract, to which the rule of *United States v. Rice* does not extend, the application of such principle is made as a part of the general law of damages, see *J. A. Ross & Company v. United States*, *supra* note 13; *Kirk v. United States*, 111 Ct. Cl. 552, 565-67 (1948); *Langevin v. United States*, *supra* note 14.

<sup>110</sup> *Utah Construction Company*, *supra* note 15; *Ensign-Bickford Company*, ASBCA No. 6214 (October 31, 1960), 60-2 BCA par. 2817.

<sup>111</sup> *Hagstrom Construction Company*, ASBCA No. 5698 (June 23, 1961), 61-1 BCA par. 3090; *Farnsworth & Chambers Company*, *supra* note 76; *Standard Store Equipment Company*, ASBCA No. 4348 (August 28, 1958), 58-2 BCA par. 1902; see *William L. Warfield Construction Company*, IBCA-196 *et al.* (May 3, 1962), 1962 BCA par. 3374, 4 Gov. Contr. par. 314; *W&W Company*, IBCA-54 (August 4, 1958), 58-2 BCA par. 1860; *Farnsworth & Chambers Company*, ASBCA No. 5988 (August 16, 1960), 60-2 BCA par. 2733. See also Claim 5 in IBCA-80, *supra* note 2.

<sup>112</sup> *William L. Warfield Construction Company*, *supra* note 111; *Paul C. Helmick Company*, *supra* note 82; *Roy L. Bair & Company*, *supra* note 26.

<sup>113</sup> See authorities cited *supra* note 40.

the Board has found that no obligation rested upon the Government either to pay additional compensation or to grant a time extension.

The occurrences within the scope of the present appeals that are not ruled out of consideration by the principle last mentioned will be examined, initially, from the standpoint of determining their eligibility under the first two principles for the payment of additional compensation on account of winter work, and then from the standpoint of determining their eligibility under the third and fourth principles for such a payment.

In the case of Schedule II the occurrences that involve the first two principles are the stoppages and repairs for which allowance has been made under Claim B-2, the abnormal cutoffs for which allowance has been made under the same claim, the nine items of conductor work for which allowance has been made under Claim C-2, the faulty presses and fittings for which allowance has been made under Claim C-4, the shortage of hand shackles for which allowance has been made under Claim C-5, and the stringing work in the Stevens Pass and Tunnel Creek areas that was evaluated under Claim E-1. In so far as these events are concerned, October 5 may appropriately be taken as the beginning of the winter of 1955-56, since that was the date of the first severe snow storm at Stevens Pass, and since the majority of the Schedule II work that then remained undone was in the Stevens Pass and Tunnel Creek areas.

The stoppages and repairs necessitated by fabricator-caused conductor defects for which allowance has been made under Claim B-2 were, as explained in the discussion of Claim E-3, integral components of the stringing operations. Their incorporation in that series of operations had, in general, the necessary effect of adding to the time needed for completion of the job a period roughly equivalent to that lost or consumed by the main stringing crew in effecting such stoppages and repairs. The Board finds, therefore, that all of the \$4,639.13 allowed for stoppages and repairs under Claim B-2 should be included in the basis for payment of winter costs.

The work incident to abnormal cutoffs under Claim B-2 and to faulty presses and fittings under Claim C-4 was scattered throughout the period while conductor stringing was in progress, and did not delay performance of the contract as a whole. There is no practicable means by which it can be established precisely how much of this work was done during the winter of 1955-56, and how much was done before that time. The record shows, however, that approximately 92 percent



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of the stringing of Schedule II had been completed before October 5.<sup>114</sup> The Board finds that the remaining 8 percent is a fair and reasonable measure of the portion of the work attributable to abnormal cutoffs and to faulty presses and fittings as to which a payment for winter costs would be in order. The sum obtained by applying this percentage to the \$2,162.70 allowed for abnormal cutoffs under Claim B-2 is \$173.02, and the sum obtained by applying it to the \$3,368.43 allowed for faulty presses and fittings under Claim C-4 is \$269.47.

All the events that form the subject of Claims C-2 and C-5 occurred prior to October 5, 1955, and none was a substantial factor in projecting performance beyond that date. Accordingly, no basis exists for the recognition of any winter costs in connection with either of these two claims.

The stringing work in the Stevens Pass and Tunnel Creek areas requires more extended consideration. Those construction operations, whether on Schedule II or Schedule III, that remained undone at the beginning of October, 1955, were concentrated for the most part along the section of the transmission line between tower 596 and tower 676. None of this section of the line had been strung, and, while the portion to the west of tower 633 was ready for stringing, the portion to the east of that point still lacked a number of towers. Some backfilling, clipping and jumpering remained to be done on other sections of the line.

With respect to the major unfinished segment of Schedule III, that is, the areas between tower 606 and tower 676, the preponderance of the evidence is to the effect that the necessity for working under adverse weather conditions did not spring from compensable acts or omissions of the Government, except to the limited extent caused by the inadequate clearing and the faulty presses and fittings for which winter costs are being allowed elsewhere in this opinion. On the contrary, such necessity arose from appellants' own deficiencies, as indicated in the discussion of Claims A-1 and F-2.

With respect to the major unfinished segment of Schedule II, that is, the Stevens Pass and Tunnel Creek areas, the story is a different one. In their case the evidence demonstrates, as outlined in the discussion of Claim E-1, that the stringing operations were projected into

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<sup>114</sup>This was a higher percentage than would have been attained by that time if the stringing had been prosecuted at a constant rate over the period beginning on April 1, 1955, the date set by appellants' original construction program for the initiation of wire operations, and ending on November 9, 1955, the date by which those operations should have been completed but for the intervention of unusually severe weather in the latter part of 1955.

the winter of 1955-56 by reason of the lateness of the date when clearing was completed. It has also been established that the delay in clearing was due to the inability of the Government to obtain the right-of-way across two key tracts, and its consequent inability to authorize their clearing, until June of 1954.<sup>115</sup> These tracts comprehended the sites of towers 599 through 601 and towers 603 through 607. The first permission to enter them was given to the clearing contractor by Bonneville on June 18, 1954. This was 8 days after the award of the construction contract to Montgomery-Macri-Western, and was also subsequent to the effective date of the notice to proceed. At the time of making the award and giving the notice Bonneville was aware that it would be impractical for clearing of the tower sites and assembly areas on the tracts in question to be finished by July 1, 1954, the date specified in the clearing contract. While this situation was explained to appellants at the award conference, there is no evidence that they acquiesced in it. Instead, they voiced a desire to start work in the summit areas as soon as the weather would admit, an eventuality which, as has been stated, would occur in a normal year about July 1. This desire was eminently reasonable in view of the shortness of the construction season, and the difficult nature of the construction, at Stevens Pass and Tunnel Creek.

The rule that governs such a situation as this is expressed in the following quotation from *Ben C. Gerwick, Inc. v. United States*, 285 F. 2d 432, 436-37 (Ct. Cl. 1961), a case where recovery was unsuccessfully sought by a harbor improvement contractor on the ground that its work had been made more expensive because another contractor with the Government had failed to dredge the area to be improved within the time specified in the dredging contract:

The delay in availability of the site of plaintiff's work resulted from the delays by the dredging contractor in the performance of the dredging contract. It follows that if the defendant was not at fault, it is not liable in damages for the delays caused by another contractor. *Standard Accident Insurance Co. v. United States*, 102 Ct. Cl. 770, 790, certiorari denied 325 U.S. 870. Furthermore, unless the Government expressly covenants to make the site available at a particular time, plaintiff has the burden of proving that the United States was in some way at fault because the site did not become available to it at an earlier date. *United States v. Howard P. Foley Co.*, 329 U.S. 64. Since plaintiff has failed to prove fault or negligence on the part of the United States, his claim, in this respect, must fail.

In *Peter Kiewit Sons' Company v. United States*,<sup>116</sup> where a dam construction contractor succeeded in obtaining recovery on the ground

<sup>115</sup> *Paul C. Helmick Company*, *supra* note 82.

<sup>116</sup> *Supra* note 66, at 674-75.

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that its work had been made more expensive because another contractor with the Government had failed to deliver a penstock for the dam within the time specified in the penstock fabrication contract, the court said:

Generally the Government is not liable for delays in making the work or material available to a contractor, *United States v. Rice*, 317 U.S. 61; *United States v. Foley Co.*, 329 U.S. 64. However, where the Government or its authorized representatives are guilty of some act of negligence or willful misconduct which delays the contractor's performance, the Government is liable for the resulting damages, *Chalender v. United States*, 127 C. Cls. 557. This is so because there is in every Government contract, as in all contracts, an implied obligation on the part of the Government not to willfully or negligently interfere with the contractor in the performance of his contract, *Chalender, supra*; *Fuller v. United States*, 108 C. Cls. 70. When the contract does not specify particular dates upon which delivery of the material is to be made, the implied obligation just referred to is an obligation not to willfully or negligently fail to furnish the materials in time to be installed in the ordinary and economical course of the performance of the contract, *Walsh v. United States*, 121 C. Cls. 546; *Thompson v. United States*, 130 C. Cls. 1; *Chalender, supra*. If the Government exerts every effort to supply the contractor with the necessary materials on time, it cannot be held that it has willfully or negligently interfered with performance, *Otis Williams & Co. v. United States*, 120 C. Cls. 249; *W. E. Barling v. United States*, 126 C. Cls. 34.

We think that the Government acted without proper and adequate consideration for the interests of the plaintiffs in regard to the penstock. *When it gave the plaintiffs notice to proceed*, which is a notice to get the equipment and the men on the job for the efficient performance of the work, *it knew that Darby [the penstock fabricator] was having difficulties getting the necessary raw materials, and it had no right to surmise, at the plaintiff's expense, that the situation would improve in time for Darby to meet its schedule of deliveries.* The Government's further conduct, in placing another contract for penstock with Darby, and giving it priority in delivery over the contract on which the plaintiffs depended, was inexcusable. \* \* \* (Italics supplied).<sup>117</sup>

In the circumstances revealed by the evidence, the Board finds that, as a result of fault on the part of the Government, the tower locations in the Stevens Pass and Tunnel Creek areas of Schedule II did not become available to appellants by the time when, in the ordinary and economical course of contract performance, they would be needed. Under the authorities just cited, it follows that the Government is liable for the cost of so much of the winter work as was caused by the delay in clearing those locations. The amount of such cost will be considered at a later place in this opinion.

While the Board has evaluated all of the foregoing events in the light of both the first and the second of the principles that have been

<sup>117</sup> See also *Weldfab, Inc.*, *supra* note 78; *Witzig Construction Company*, *supra* note 65; *W&W Company*, *supra* note 111; *Paul C. Helmick Company*, *supra* note 82.

mentioned, it has applied the second only to the stoppages and repairs for fabricator-caused conductor defects. As brought out in the discussion of Claim E-3, the remainder of these events did not, in general, hold up the performance of other operations under the contract, or defer the time when completion of the work would become practicable—a statement which also holds good for Schedule III. The real reason why much of the work done during the winter of 1955-56 had not been performed earlier is to be found, as the evidence amply demonstrates, in the manner in which the job was equipped and managed by appellants, rather than in any compensable act or omission of the Government. Deficiencies on the part of appellants which had a significant bearing upon the extent of the winter work are noted in our discussion of Claim A-1, Claim E-1 and, with respect to Schedule III, Claim F-2. Moreover, even if any of the events to which the first principle only has been applied could be said to have projected other parts of the work into the winter season, simply by reason of the fact that they increased the total volume of work to be done under the contract, the payment of winter costs with respect to such other parts of the work would appear to be precluded by the rules laid down in *United States v. Rice*, 317 U.S. 61 (1942) and *United States v. Howard P. Foley Co., Inc.*, 329 U.S. 64 (1946).<sup>118</sup>

In the case of Schedule III the occurrences that involve the first two of the principles mentioned previously are the inadequate clearing of the tower sites and assembly areas for which allowance has been made under Claim A-1, the inadequate clearing of the central strips for which allowance has been made under Claim A-2, the faulty presses and fittings for which allowance has been made under Claim D-1, the item of conductor work for which allowance has been made under Claim D-2, the excessive polishing of fittings for which allowance has been made under Claim D-3, and the loose conductor for which allowance has been made under Claim D-4. In so far as these events are concerned, October 30 may appropriately be taken as the beginning of the winter of 1955-56, since that was the date when snow on the ground first reached a depth of 5 inches at Scenic, and since most of the work then remaining to be done on Schedule III was in the general vicinity of the latter place.

The costs allowed under Claim A-1 on account of inadequate clearing of the tower sites and assembly areas were incurred from time to

<sup>118</sup> The amount payable under the first principle for the stringing work at Stevens Pass and Tunnel Creek is the same as would be payable if the second principle were to be applied, since all of the stringing work that supports this item of the claim was performed, in fact, during the winter season.

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time during the whole period of contract performance. Their precise allocation as between the winter of 1955-56 and the earlier seasons of work is not possible on the basis of available information. The record shows that approximately 92 percent of the entire Schedule III job had been completed before October 30, 1955. This, however, was a lesser degree of completion than should have been attained by that date in order to assure that the time requirements of the contract would be met. As things stood on October 30, those requirements called for completion of Schedule III by not later than November 24.<sup>119</sup> If performance had conformed to appellants' construction program, extended over the longer period permitted by the latter date, approximately 93 percent of Schedule III would have been completed before October 30. The Board finds that the remaining 7 percent is a fair and reasonable measure of the portion of the work attributable to inadequate clearing of the tower sites and assembly areas as to which a payment for winter costs would be in order. The sum obtained by applying the foregoing percentage to the \$16,348 allowed for this work under Claim A-1 is \$1,144.36.

The costs allowed for inadequate clearing of the central strips under Claim A-2 and for faulty presses and fittings under Claim D-1 were incurred at times scattered throughout the period while conductor stringing was in progress. They need to be prorated in the same general manner as has been employed for the costs allowed under their respective counterparts, Claim A-1 and Claim C-4. The record shows that approximately 72 percent of the stringing of Schedule III had been completed before October 30. This, however, was a lesser degree of completion than should have been attained by that date in order to assure that the time requirements of the contract would be met. If the stringing had been begun on July 1, the date set by appellants' original construction program for the initiation of wire operations on Schedule III,<sup>120</sup> and had been prosecuted thereafter at a constant rate sufficient to finish the job by November 24, approximately 82 percent of the stringing would have been completed before October 30. The Board finds that the remaining 18 percent is a fair and reasonable measure of the portion of the work attributable to inadequate clearing of the central strips and to faulty presses and

<sup>119</sup> This date is derived from the contract completion date of September 9, as extended by the 61 days allowed under Claims F-3, F-7, and F-9, and by the additional 15 days allowed for unusually severe weather in October under Claim G-1.

<sup>120</sup> Actually, the section of the transmission line from tower 718 to tower 757 had been strung before that date.

fittings as to which a payment for winter costs would be in order. The sum obtained by applying this percentage to the \$18,925 allowed for inadequate clearing of the central strips under Claim A-2 is \$3,406.50, and the sum obtained by applying it to the \$2,246.09 allowed for faulty presses and fittings under Claim D-1 is \$404.30.

The work to which Claim D-2 relates was performed in January of 1956, but the costs of performing it under the weather conditions then prevailing appear to have been already adjusted, since the sum of \$514.28 allowed by the contracting officer for this work is substantially equal to appellants' itemization of the costs incurred in performing it. As the events which form the subject of Claims D-3 and D-4 occurred prior to October 30, 1955, a basis is also lacking for the recognition of winter costs in connection with those two claims.

Other questions pertinent to the application of the first and second principles to Schedule III have been resolved in the discussion of the application of those principles to Schedule II.

This brings us to the subject of acceleration of work, with which the third and fourth of the principles mentioned above have to do. Appellants contend, in effect, that under the third principle they are entitled to the allowance of winter costs for all of the work performed during the winter of 1955-56. The premise underlying this contention is that the Government should have granted, before or upon the advent of bad weather, a time extension sufficiently long to enable appellants to shut down operations until spring and to perform the unfinished portions of the job during the construction season of 1956. Various requests for such an extension were made, culminating in two letters dated December 30, 1955, wherein appellants formally demanded that the time for completion of each schedule be extended to September 1, 1956.

The Board is unable to find in the record any basis for the allowance of time extensions that would admit of the unfinished work being put over until spring. The contract itself set a performance period of 450 days for each schedule, and, although such a period would manifestly include the whole of the winter of 1954-55, the contract did not exclude any part of that season from the performance period. We know of no rule of construction by which we could interpolate into the contract an exclusion for the winter of 1955-56 when no intention to exclude that or any other winter was there expressed.<sup>121</sup> True, the second winter was more severe than the first, but the contract provided for extensions on account of "unusually severe weather," and,

<sup>121</sup> *Cf. Condon-Cunningham Company, W.D. BCA No. 1355 (April 23, 1946).*

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to the extent that the evidence shows the weather to have been unusually severe, appropriate extensions are being granted under Claim G-1. The risk that performance of the contract, notwithstanding the granting of all of the extensions requisite to fulfill its terms, might necessitate the doing of work under the difficult and expensive conditions apt to be created by even normal winter weather in much of the region traversed by the transmission line was a risk which the contract placed squarely upon appellants' shoulders.<sup>122</sup>

Montgomery-Macri-Western assert, not without justification, that time extensions, if they are to be helpful to a contractor in planning his work, need to be granted contemporaneously with the events that give rise to them. In the instant case the first extension for Schedule II was not granted until 14 days after the completion date specified in the contract, and the first extension for Schedule III was not granted until 173 days after that date. Montgomery-Macri-Western allege, moreover, that Bonneville, through its central office officials, not only refused their requests to be allowed to suspend work during the winter of 1955-56, but also instructed them to expedite their rate of performance notwithstanding the adverse weather conditions and even intimated that, if appellants did shut down operations for the winter, Bonneville would take over the job and complete it by force account at their expense. The correctness of this allegation is virtually admitted, and is supported by the evidence.

The foregoing circumstances would, subject to applicable procedural requirements, lay a strong basis for an acceleration of work claim if, in fact, the work had been accelerated.<sup>123</sup> But it was not accelerated. Neither the lack of contemporaneous time extensions nor the urgings of Bonneville to work faster resulted in the job being completed by the contract date of September 9. Neither resulted in the job being completed by December 1, the approximate date when it would be usual for winter to begin. Most important of all, neither resulted in the job being completed before the date when the allowable time extensions expired. Because of the key significance of this latter date, the Board has given minute consideration to all of the grounds upon which extensions have been sought. Our findings reveal, however, that the date on which the Schedule II work was actually completed, January 3, 1956, was very close to, if not identical with, the date on which such

<sup>122</sup> See authorities cited *supra* note 40.

<sup>123</sup> See *Dunnigan Construction Company & J. S. Sweitzer & Son, Inc. v. United States*, 122 Ct. Cl. 262, 290-94 (1952); *Ross Engineering Company, Inc. v. United States*, 118 Ct. Cl. 527, 532 (1951).

work should have been completed, and that the date on which the Schedule III work was actually completed, March 14, 1956, was two months later than the date on which such work should have been completed. It is plain that there was no acceleration, and, therefore, no basis for the allowance of winter costs on that ground.<sup>124</sup>

In reaching these conclusions the Board has recognized the possibility that, with respect to Schedule II, appellants might have been entitled to extensions running beyond January 3, 1956. This is because, conceivably, there might have been a few more days of unusually severe weather than the 55 allowed, or there might have been grounds for granting additional time in order to compensate for the differential between the days of good working weather excusably lost and the days of poor working weather into which the final parts of the job were projected. However, the only work on Schedule II that was actually and reasonably performed during the winter of 1955-56 was the stringing work at Stevens Pass and Tunnel Creek, together with so much of the other work on that schedule as was projected into the winter season by reason of the stoppages and repairs for fabricator-caused wire defects. For all of the work thus performed appellants are to receive, under the findings contained in this opinion, the full amount of the expense caused by the adverse weather which prevailed during its performance, so far as such expense is capable of being ascertained from the record. Hence, even if it should be found that appellants were entitled to extensions running beyond January 3, 1956, thereby laying a basis for concluding that performance had been accelerated to such date, the additional compensation due them would not be increased, by reason of such acceleration, to more than the sums here being allowed.<sup>125</sup>

We come now to the assessment of the amount of the winter costs. Appellants' managing partner testified that in his judgment the cost of the work performed during the winter 1955-56 was approximately four times greater, and for some parts of the job over four times greater, than would have been the cost of the same work if performed during ordinary construction season weather. Bonneville's Chief of Construction testified that in his judgment the cost was from three to four times greater. It would be difficult to find witnesses better qualified to speak on the subject than were these two, and their estimates are in remarkably close agreement. The consensus of these

<sup>124</sup> Cf. *William L. Warfield Construction Company*, *supra* note 111.

<sup>125</sup> Cf. *Kirk v. United States*, *supra* note 109; *Paul C. Helmick Company*, *supra* note 82.



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estimates would be that the cost of the winter work was almost four times as great, or, expressed in other terms, exceeded by almost three times, the cost that normally would have been incurred. The Board, accordingly, will use 3.9 times as great, that is, exceeding by 2.9 times, as the proper factor.

So measured, the additional costs of performing during the winter of 1955-56 those items of work as to which an allowance has been made for the costs of performing the same work during normal construction season weather are as follows: stoppages and repairs on Schedule II,  $2.9 \times \$4,639.13$ , or  $\$13,453.48$ ; abnormal cutoffs on Schedule II,  $2.9 \times \$173.02$ , or  $\$501.76$ ; faulty presses and fittings on Schedule II,  $2.9 \times \$269.47$ , or  $\$781.46$ ; tower sites and assembly areas on Schedule III,  $2.9 \times \$1,144.36$ , or  $\$3,318.64$ ; central strips on Schedule III,  $2.9 \times \$3,406.50$ , or  $\$9,878.85$ ; and faulty presses and fittings on Schedule III,  $2.9 \times \$404.30$ , or  $\$1,172.47$ .

The winter stringing work at Stevens Pass and Tunnel Creek must be approached from a different angle, since this is work that would have needed to be performed in any event, and, hence, no allowance based on the costs of performing the same work during normal construction season weather has been made, or could properly be made. An analysis of appellants' daily time slips shows that stringing operations in these areas on and after October 5, 1955, were charged with approximately 3,120 man-hours of labor time. Equipment cost could properly be measured by the 40 percent ratio that was found to obtain in ascertaining the amount to be allowed for stoppages and repairs under Claim B-2. An over-all factor of 5 percent for overhead would seem to be appropriate, the claim being of a type as to which an allowance for profit would not be proper.<sup>126</sup>

Utilizing these figures, the gross expense incurred for the winter stringing work at Stevens Pass and Tunnel Creek would be:

Wages (3120 man hours at an average cost of \$3.85) -----	\$12,012.00
Payroll taxes and insurance ( $\$12,012.00 \times 15\%$ ) -----	1,801.80
Equipment cost ( $\$12,012.00 \times 40\%$ ) -----	4,804.80
<hr/>	
Total direct cost -----	\$18,618.60
Overhead ( $\$18,618.60 \times 5\%$ ) -----	930.93
<hr/>	
Total -----	\$19,549.53

<sup>126</sup> For the rule with respect to profit allowances see Claim 1-A and Claim 1-D-2 in IBCA-77. See also *Oliver-Finnie Company v. United States*, 279 F. 2d 498, 508 (Ct. Cl. 1960); *Gustav Hirsch v. United States*, 94 Ct. Cl. 602, 635 (1941).

This tabulation includes, however, the expense that would have been incurred if the stringing had been done in good construction weather. Applying the factor of 3.9 times as great, established above, the expense incurred by reason of the fact that the stringing was done in poor construction weather would be twenty-nine thirty-ninths of \$19,549.53, or \$14,536.83.

The tabulation also includes the expense attributable to abnormal cutoffs and to faulty presses and fittings on Schedule II for which winter costs of \$501.76 and \$781.46, respectively, have been separately assessed. As substantially all of the winter work on that schedule brought about by abnormal cutoffs or faulty presses and fittings was performed in the Stevens Pass and Tunnel Creek areas, it is obvious that a duplication exists which needs to be eliminated and which can most appropriately be eliminated, in the absence of any basis for allocation, by crediting the aggregate of such \$501.76 and \$781.46 against the winter stringing expense of \$14,536.83, thereby reducing the latter to \$13,253.61.

Finally, the tabulation includes the expense attributable to stoppages and repairs on account of fabricator-caused wire defects to the extent that such stoppages occurred, or such repairs were made, in the Stevens Pass and Tunnel Creek areas on or after October 5, 1955. Out of the approximately 78 working days that were devoted to the stringing of field reworked or factory rewrapped wire on Schedule II, about 10½ working days were spent in stringing such wire at Stevens Pass and Tunnel Creek on or after the date in question. This same proportion, when applied to the sum of \$13,453.48 that has been assessed as the winter work costs occasioned by conductor stoppages and repairs, gives \$1,811.05 as the portion of such costs which is attributable to stringing work in those areas on or after October 5, 1955. The elimination of this final duplication leaves \$11,442.56 as the net expense incurred for winter stringing work at Stevens Pass and Tunnel Creek.<sup>127</sup>

To recapitulate, the compensable costs incurred for winter work on Schedule II consist of \$13,453.48 for conductor stoppages and repairs, \$501.76 for abnormal cutoffs, \$781.46 for faulty presses and fittings, and \$11,442.56 for stringing expense caused by clearing delays, a total of \$26,179.26; and the compensable costs incurred for winter work on Schedule III consist of \$3,318.64 for inadequate clearing of tower sites and assembly areas, \$9,878.65 for inadequate clearing of central strips, and \$1,172.47 for faulty presses and fittings, a total of \$14,369.96.

<sup>127</sup> Cf. *Abbott Electric Corporation v. United States*, *supra* note 108.

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The Board determines, therefore, that Claim G-2 is allowable in the sum of \$40,549.22.

### Summary

The action taken with respect to the claims involved in these appeals is summarized below.

Claim No.	Amount claimed	Allowance by contracting officer	Additional allowance by board	Amount disallowed
A-1.....	\$196,176.25	\$4,534.00	\$11,814.00	\$179,828.25
A-2.....	202,992.80	0	<sup>1</sup> 59,474.22	143,518.58
A-3.....	3,500.00	0	0	3,500.00
B-1.....	7,941.29	0	0	7,941.29
B-2.....	12,486.59	45.77	6,756.06	5,684.76
B-3.....	10,395.33	0	0	10,395.33
C-1.....	122.20	0	0	122.20
C-2.....	1,196.41	945.50	250.91	0
C-3.....	2,128.02	0	0	2,128.02
C-4.....	7,130.40	1,960.73	1,407.70	3,761.97
C-5.....	88.37	0	88.37	0
D-1.....	5,218.80	0	2,246.09	2,972.71
D-2.....	520.90	514.28	0	6.62
D-3.....	1,060.39	165.67	0	894.72
D-4.....	308.56	0	308.56	0
E-1 through E-6.....	34,800.00	15,900.00	<sup>2</sup> 18,900.00	0
F-1 through F-9.....	56,100.00	12,900.00	<sup>3</sup> 24,600.00	18,600.00
G-1—Included in the claims of the E and F series.				
G-2—Included in claim A-2.				
Total.....	542,166.31	36,965.95	125,845.91	379,354.45

<sup>1</sup> Inclusive of \$40,549.22 allowed under Claim G-2.

<sup>2</sup> Inclusive of \$16,500 allowed under Claim G-1.

<sup>3</sup> Inclusive of \$19,200 allowed under Claim G-1.

The appeals are sustained to the extent of the allowances summarized above, which, inclusive of the sums allowed by the contracting officer, amount to a total of \$162,811.86, and are otherwise denied.

THOMAS M. DURSTON, *Member*.      HERBERT J. SLAUGHTER, *Member*.

*Chairman* PAUL H. GANTT disqualified himself from participation in the consideration of these appeals.

**APPEAL OF LEWIS CONSTRUCTION COMPANY, INC. AND  
S. L. BOUTELLE**

IBCA-340

*Decided July 3, 1963***Contracts: Appeals—Rules of Practice: Appeals: Timely Filing**

The limitation upon the time for taking appeals imposed by the "Disputes" clause of the standard forms of Government contracts is jurisdictional. An appeal from a decision of the contracting officer must be dismissed if it was not taken before the end of the thirtieth day after the receipt of the decision by the contractor, or before the end of the next business day if the thirtieth day falls on a Sunday or Federal holiday, unless the appeal involves only questions of law. Such limitation may not be waived or extended once the 30 days have run.

**BOARD OF CONTRACT APPEALS**

This appeal arises under a contract of the Bureau of Reclamation for the construction of drains on the Columbia Basin Project in the State of Washington. The contract, dated July 15, 1958, and designated No. 14-06-116-7011, was on Standard Form 23 (January 1961 edition) and incorporated the General Provisions of Standard Form 23A (March 1953) for construction contracts. The matters in dispute largely have to do with the subject of whether changed conditions, within the meaning of Clause 4, were encountered in the building of the drains.

At the threshold of the appeal, we are met by a contention that the Board lacks jurisdiction over it because the notice of appeal was not timely mailed. This contention has been raised through the filing of a motion to dismiss by the Department Counsel. A copy of the motion was mailed to appellants, a joint venture. Another copy was mailed to a firm of attorneys which, although not designated as counsel of record in this appeal, seem to have been consulted by the joint venture concerning the matters to which the appeal relates. Return receipts indicate delivery of both copies. Appellants, however, have not submitted a reply to the motion to dismiss, nor have they presented in any other form a statement of reasons for considering the appeal to be timely. The question of jurisdiction, accordingly, will be considered solely on the basis of the documents appearing in the appeal file.

The governing contractual requirement is to be found in the portion of the "Disputes" clause of the contract—Clause 6, as amended by Clause 27(b)—which reads as follows:

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\* \* \* any dispute concerning a question of facts arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, who shall furnish to the contractor a written copy of his decision. Such decision shall be final and conclusive unless within 30 days from the date of receipt thereof, the contractor appeals therefrom by mailing or otherwise furnishing to the contracting officer a written appeal addressed to the Secretary.

In the instant case the decision of the contracting officer is dated June 12, 1962, and was transmitted to appellants by a letter that is dated June 26, 1962. Both the decision and the letter of transmittal invited appellants' attention to their right of appeal "within 30 days," and contained references to the procedures that should be used in taking an appeal. The decision and letter were sent to appellants by registered mail. The Post Office return receipt indicates that they were delivered to appellants on June 27, 1962, and constitutes prima facie evidence that delivery was made on that date.<sup>1</sup>

The decision having been received by appellants on June 27, 1962, the period of 30 days specified in the "Disputes" clause ran until the end of the thirtieth day after that date. As such thirtieth day was neither a Sunday nor a Federal holiday, the time for taking an appeal expired at its close, that is, at midnight on July 27, 1962.<sup>2</sup>

Appellants' headquarters were at Kennewick, Washington, and the notice of appeal was mailed at that place. The contracting officer's station was at Ephrata, Washington, and the notice was mailed to that place. The notice of appeal is dated August 13, 1962. The envelope in which it was received bears a Kennewick postmark that is dated August 14, 1962. Both the envelope and the notice have impressed on them receipt stamps of the Ephrata office of the Bureau of Reclamation that are dated August 15, 1962. It is thus self-evident that the notice of appeal was not mailed, or otherwise furnished, to the contracting officer within the 30 days specified in the contract.<sup>3</sup>

The documents before us reveal that the appeal involves material issues of fact. Hence, the instant case does not fall within the rule that

<sup>1</sup> 39 U.S.C., 1958 ed., Supp. IV, sec. 5010. Return receipts for certified mail have a like effect, 39 U.S.C., 1958 ed., Supp. IV, sec. 5013.

<sup>2</sup> *Bushman Construction Company*, IBCA-193 (April 23, 1959), 66 I.D. 156, 59-1 BCA par. 2148, 1 Gov. Contr. pars. 312, 319, 324; *Bennett Industries, Inc.*, IBCA-102 (April 23, 1957), 64 I.D. 113, 57-1 BCA par. 1237; *Emsco Manufacturing Company*, IBCA-66 (April 6, 1956), 63 I.D. 92, 6 CCF par. 61,847.

<sup>3</sup> *Cf. Commonwealth Electric Company*, IBCA-342 (March 19, 1963), 1963 BCA par. 3700; *Craftsmen Construction Company*, IBCA-326 (August 20, 1962), 1962 BCA par. 3465, 4 Gov. Contr. par. 433(j); *Alcan Pacific Company*, IBCA-276 (May 8, 1961), 68 I.D. 133, 61-1 BCA par. 3015, 3 Gov. Contr. par. 358(f); *Bushman Construction Company*, *supra* note 2; *Bennett Industries, Inc.*, *supra* note 2; *Wiscombe Painting Company*, IBCA-78 (October 26, 1956), 56-2 BCA par. 1106; *Emsco Manufacturing Company*, *supra* note 2.

appeals to the Board which involve only questions of law need not necessarily be taken within 30 days.<sup>4</sup>

It is well settled that the time limitation imposed by the "Disputes" clause upon the taking of appeals which involve disputes concerning questions of fact is jurisdictional, and may not be waived or extended once the specified period has elapsed.<sup>5</sup> The rules governing procedure before the Board expressly incorporate this principle.<sup>6</sup>

The Board, therefore, is without jurisdiction to consider the appeal on its merits, and, hence, the motion to dismiss is well taken.

#### Conclusion

The appeal is dismissed.

HERBERT J. SLAUGHTER, *Member*.

I concur:

PAUL H. GANTT, *Chairman*.

### CLAIM OF MAUDE S. VINCENT

T-1178

*Decided July 11, 1963*

#### Torts: Licensees and Invitees

In accordance with District of Columbia law, a visitor to a national memorial is a licensee by invitation. The duty owed to the visitor by the Government is to use reasonable and ordinary care and to provide reasonably safe premises, and to protect or warn the visitor against any danger known to the Government which a careful visitor might not discover.

#### Torts: Licensees and Invitees

The duty owed by the Government to a visitor to a national memorial in the District of Columbia includes the duty to provide adequate lighting in order that the visitor may observe any part of the premises and any condition of the premises which may endanger the visitor.

<sup>4</sup> *Rea Construction Company*, IBCA-227 (November 4, 1960), 60-2 BCA par. 2847, 2 Gov. Contr. par. 592; *Bushman Construction Company*, *supra* note 2; *Hagerman Construction*, IBCA-183 (January 21, 1959), 59-1 BCA par. 2065, 1 Gov. Contr. par. 97; *Gustav Hirsch Organization, Inc.*, IBCA-175 (October 30, 1958), 58-2 BCA par. 1972.

<sup>5</sup> *Ray Kiser Construction Company*, IBCA-274 (August 8, 1961), 61-2 BCA par. 3103, 3 Gov. Contr. par. 509 (a); *Midland Constructors, Inc.*, IBCA-272 (May 3, 1961), 61 I.D. 124, 61-1 BCA par. 3012, 3 Gov. Contr. par. 358 (c); *Rea Construction Company*, *supra* note 4; *Refer Construction Company*, IBCA-209 (October 20, 1960), 67 I.D. 457, 60-2 BCA par. 2831, 2 Gov. Contr. par. 561; *Bushman Construction Company*, *supra* note 2; *Westinghouse Electric Supply Company*, IBCA-107 (July 30, 1957), 57-2 BCA par. 1365; *Bennett Industries, Inc.*, *supra* note 2; *Wiscombe Painting Company*, *supra* note 3; *Emsco Manufacturing Company*, *supra* note 2; *cf. Central Wrecking Corporation*, IBCA-69 (March 29, 1957), 64 I.D. 145, 148-49, 57-1 BCA par. 1209.

<sup>6</sup> 43 CFR 4.5, 4.16.

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### Torts: Generally

An accident cannot be considered an act of God simply because it is raining when the accident occurs. If the rainfall is ordinary, the accident cannot be considered an act of God.

#### ADMINISTRATIVE DETERMINATION

Mrs. Maude S. Vincent, 221 Wellesley Avenue, Glen Echo, Maryland, has filed a claim in the amount of \$83<sup>1</sup> for personal injury allegedly received in a fall at the Lincoln Memorial in United States Reservation No. 332, known as West Potomac Park, in Washington, D.C. This is Federally owned property under the jurisdiction of National Capital Region of the National Park Service.<sup>2</sup> The claim will be considered under the Federal Tort Claims Act.<sup>3</sup>

The fall occurred on Saturday, April 7, 1962, at about 9:00 p.m. The claimant states:<sup>4</sup>

I had descended the main steps to the landing. It was dark and raining. There was no railing and no light on the steps and distant lights shone in my eyes so that I missed the top of the first short flight of steps and fell. My shins struck the edge of a step and I fell prone on the walkway knocking my breath out and causing a sharp pain in my chest. The fall was caused directly by the lack of adequate lighting, or even a handrail.

The Chief, Division of Safety and Tort Claims, describes the scene of the fall as follows:<sup>5</sup>

The physical scene at the area of the fall shows that from the sidewalk to the floor of the Lincoln Memorial there are six groups of steps, separated by level walks. First there is a group of eight granite steps, adjacent to the inner sidewalk around the Memorial, then three sets of three granite steps, next a group of twenty-three granite steps and finally a set of eighteen marble steps. The eighteen marble steps are white in color and illuminated a little by the reflection of the lights inside of the Memorial, however, the others are not. The claimant fell on the first set of three granite steps as she was leaving the Lincoln Memorial.

We find on the basis of the administrative record that at the time of the fall:

1. There was a heavy rainfall, and that the steps are slippery when wet.
2. It was dark, and there were no lights of any kind on the front of the memorial.

<sup>1</sup> The claim was filed on June 23, 1962, in the amount of \$53. On August 25, 1962, the amount was amended to \$83 because the claimant received an additional medical bill.

<sup>2</sup> This area is under the exclusive charge and control of the Director of the National Park Service. D.C. Code 1961, sec. 8-108.

<sup>3</sup> 28 U.S.C., 1958 ed., sec. 2671 *et seq.*

<sup>4</sup> Standard Form 95. Claim for Damage or Injury, submitted by claimant.

<sup>5</sup> Memorandum to the Solicitor, dated January 15, 1963.

3. Because of the lighting conditions visibility was poor and the steps were deceptive.

4. There was no handrail on the steps.

At the time of the accident the claimant was a visitor to a National Memorial<sup>6</sup> in Washington, D.C. The leading case dealing with the status of visitors to a National Memorial in the District of Columbia, and the duty owed to them by the Government is *Firfer v. United States*.<sup>7</sup> The *Firfer* case rules that such visitors are "licensees by invitation," and states that "licensees by invitation" are

\* \* \* usually regarded as \* \* \* persons invited upon the land not for the benefit of the landowner but by him either by some affirmative act or by appearances which would justify a reasonable person in believing that such landowner (or occupant) had given his consent to the entry of the particular person or of the public generally. If the licensee by direct or implied invitation is within the scope and the chronological and geographical limits of the invitation, he may expect the owner and his agents to exercise reasonable and ordinary care and to provide reasonably safe premises, *Gleason v. Academy of the Holy Cross*, 1948, 83 U.S. App. D.C. 253, 168 F. 2d 561; Restatement, Torts sec. 342 (1934), and he may hold the owner liable for injuries resulting from active negligence. *Radio Cab v. Houser*, 1942, 76 U.S. App. D.C. 35, 128 F. 2d 604.

Mrs. Vincent, as a member of the public visiting the Lincoln Memorial, was a licensee by invitation. She was entitled to expect the Government to use reasonable and ordinary care "for her safety" and to provide "reasonably safe premises." These duties of the Government could have been properly discharged, among other things, through the provision of proper lighting or adequate handrails. The failure of the Government, under the circumstances present here, to properly light the steps or to provide handrails, was a violation of the duty to provide reasonably safe premises. The *Gleason* case, cited in the quotation from *Firfer*, deals with a fall on steps which were deceptive in the absence of artificial lights. In *Gleason* the Court stated:

\* \* \* Dangers that reasonably careful people are likely not to discover are latent and hidden. The step was such a danger. It is immaterial that the

<sup>6</sup> National Memorials "are structures or areas designated to commemorate ideas, events, or personages of national significance." *Areas Administered by the National Park Service*, January 1, 1962, pp. IV and 38-40.

<sup>7</sup> 208 F. 2d 524 (D.C. Cir. 1953). Apparently the term "licensee by invitation" was used for the first time in a reported case in the District of Columbia. Footnote 1, at page 527 states: "It is to be noted that not all cases draw the distinction between two classes of licensees [licensees by invitation (direct or implied), and bare licensees or licensees by acquiescence], nor, indeed, between bare licensees and trespassers. But it will generally be found that the difference in treatment according to various persons is explainable only in terms of a difference in status." *McNamara v. United States*, 199 F. Supp. 879 (D.D.C. 1961); cf. *Annie M. Martin v. United States*, 225 F. 2d 945 (D.C. Cir. 1955). The status of visitors to national parks, monuments, memorials, etc., in other jurisdictions has been summarized in *Mrs. Hannah Cohen*, FA-247 (May 22, 1963), 70 I.D. 188.



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step was open to view in the sense that it might have been discovered by an extraordinarily prudent person. Appellee knew of the danger and made no effort to protect or warn appellant against it. Occupiers of premises have long been liable, even to gratuitous licensees, for injuries that result from this sort of negligence. "If it could be found that [the step] was a danger which the careful visitor might not discover, and that the proprietor should have realized the fact, the court could not rule as matter of law either that there was no breach of duty by the proprietor, or that there was contributory negligence or an assumption of risk by the visitor." *Recreation Centre Corporation v. Zimmerman*, 172 Md. 309, 191 A 233, 234.

That the steps constitute a danger and might easily deceive even the careful visitor after dark can be seen from the description of the steps previously quoted from the memorandum<sup>8</sup> of the Chief, Division of Safety and Tort Claims, and from the reports of the Tour Leader Supervisor.<sup>9</sup> There are six groups of steps with from three to twenty-three steps in a group. The groups are separated by walks. The top group of eighteen steps is white marble. These steps are "illuminated a little by the reflection of the lights inside the memorial, however, the others are not."<sup>10</sup> What little illumination is available falls only on the white marble steps. The darker granite steps are not illuminated at all. "Many people are lulled into a false state of being safe after they have descended the eighteen marble and twenty-three granite steps."<sup>11</sup> In addition to the lack of proper illumination, and lack of uniformity in the groups of steps, no handrails are provided to assist the visitors to descend the steps.<sup>12</sup>

The existence of danger to visitors descending the steps even in fair weather is demonstrated above. When the claimant fell it was raining. These steps are slippery when wet. There is no evidence in the administrative record that the slipperyness caused the fall. However, it seems clear that a slippery condition would make the steps more difficult to descend. The presence of multiple dangers with which a visitor has to contend implies a likelihood that a visitor may not be successful in contending with all at the same time.

The rainfall was ordinary, and could readily be foreseen. It was not of such quantity that would allow the accident to be considered

<sup>8</sup> *Supra* note 4.

<sup>9</sup> The administrative record contains two reports signed by the Tour Leader Supervisor. One is dated April 10, 1962. The other is a brief undated report which apparently was meant to be an addendum to the dated report.

<sup>10</sup> *Supra* note 4.

<sup>11</sup> Undated report, *supra* note 7.

<sup>12</sup> In other jurisdictions the absence of handrails and adequate lighting was held to constitute negligence. *Eleanor S. Peets v. United States*, 165 F. Supp. 117 (S.D. Cal. 1958); *Shaubell v. Bennett*, 173 Kan. 774, 252 P. 2d 927 (1953).

an act of God.<sup>13</sup> Therefore, the rain does not relieve the Government of liability.

An award has previously been made for personal injuries suffered by a visitor to the Lincoln Memorial in a fall on these steps<sup>14</sup> at approximately the same step where Mrs. Vincent fell. The following is part of a statement of a guard quoted in that determination:

The lights in the building were on but there are no lights going down the steps. It was a clear night, the winter wooden steps were in place and there is a hand rail on the upper two flights, but none on the three steps where she fell.

In the *Wulliger* determination<sup>15</sup> Solicitor White stated:

The Memorial was a part of the Government reservation maintained for visitors, and, if visitors were to be admitted after nightfall, it was the duty of the administrative agency to provide a lighting system adequate to make the steps and intermediate landings reasonably safe for the public. *District of Columbia v. Berberich*, 56 App. D.C. 12, 6 F. (2d) 710 (1925); see also *Mrs. Jessie Johnson*, Solicitor's Determination, June 11, 1948 (T-84). As the lighting facilities were inadequate to permit the safe use of the steps and intervening landings after nightfall, the Government personnel in charge of the Memorial should have closed it to visitors upon the coming of darkness. The failure to take appropriate action for the protection of the visiting public constituted negligence.

It is quite clear from the administrative record that the steps in question constitute a danger to visitors to the Lincoln Memorial in the hours of darkness, and that the Government was on notice of this condition. Further the Government should have realized that a careful visitor might not discover the danger, but no effort was made to protect or warn visitors of the danger. This constituted negligence, and this negligence was the proximate cause of the claimant's injuries.

The claimant was not contributorily negligent. She did not descend the steps in any unusual manner, nor, in so far as the record discloses, did she act other than as a reasonably prudent person. From the mere fact that she avoided the danger when she went up the steps we cannot imply that she was negligent in not avoiding the danger when she descended the steps. It is common knowledge that not everyone who happens upon a dangerous condition will be injured by it, nor will the same individual be injured by it on every occasion. Nevertheless, when an injury does occur, the fact that the injured person had avoided injury at another time does not, in and of itself, imply that the injured party was negligent at the time of the injury.

<sup>13</sup> *District of Columbia v. Gray*, 1 U.S. App. D.C. 500 (1893); *Garner v. Ritzberg*, 167 A. 353 (D.C. Munic. App. 1961).

<sup>14</sup> *Lee Wulliger*, T-187 (July 18, 1949).

<sup>15</sup> *Ibid.*

There is nothing in the administrative record which indicates that the claimant was negligent.

Mrs. Vincent received medical services from Georgetown University Hospital and from Robert J. Coffey, M.D., for injuries sustained in this fall. She was treated for injuries to her shins, a knee, ribs, chest, and right wrist. Mrs. Vincent has submitted itemized statements for services from the hospital and the doctor in the amounts of \$53 and \$30, respectively. These charges for medical services appear reasonable.

Accordingly, it is determined that the Government was negligent, and that this negligence was the proximate cause of this accident.

The claim of Mrs. Maude S. Vincent is allowed in the amount of \$83, subject to the availability of funds for such purpose.

EDWARD WEINBERG,  
*Deputy Solicitor.*

OSCAR C. COLLINS

STANDARD OIL COMPANY OF CALIFORNIA

A-29415

*Decided July 15, 1963*

**Administrative Practice—Bureau of Land Management**

The Director of the Bureau of Land Management has authority at any time to take up and dispose of any matter pending in a land office or to review any decision of a subordinate officer.

**Alaska: Homesteads—Oil and Gas Leases: Lands Subject to**

The act of September 14, 1960, quitclaimed to the patentee all right, title, and interest in oil and gas deposits reserved by the United States in lands in the Kenai Peninsula in Alaska on which all requirements for a homestead patent had been met prior to July 23, 1957, except for submission of acceptable final proof; the act did not affect the mineral reservations to the United States in lands which were patented under the homestead laws prior to July 23, 1957.

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

Reliance on information or advice furnished by an employee of a land office will not confer any right or interest that is not provided by law.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Oscar C. Collins has appealed to the Secretary of the Interior from a decision dated December 26, 1961, wherein the Division of Appeals,

Bureau of Land Management, reversed two decisions of the land office at Anchorage, Alaska, which transferred in part oil and gas lease Anchorage 043432 to the appellant, Collins, and rejected oil and gas application Anchorage 048221.<sup>1</sup> All of the lands involved were embraced in homestead entries patented prior to July 23, 1957, with all rights to oil and gas deposits reserved to the United States.<sup>2</sup> In its decisions, the land office found that the lands came within the purview of the act of September 14, 1960 (74 Stat. 1028),<sup>3</sup> and that the mineral interest of the United States was transferred to the patentees. The Division of Appeals, in reversing the decision of the land office, found that it was not the intent of the act to divest the United States of title to the oil and gas in lands that were patented prior to July 23, 1957.

The appellant contends that the Bureau's decision is invalid because Standard Oil Company did not have any standing to appeal the land office's decision and because the Director of the Bureau of Land Management should have referred Standard's appeal to the State Director for investigation before taking action on it. His contention is without merit. It is sufficient to say that the Director of the Bureau of Land Management has authority at any time to take up and dispose of any matter pending in a land office or to review any decision of a subordinate officer, with or without an appeal. It is, therefore, quite unnecessary to review the appellant's allegations that Standard had no right to appeal. Cf. *Angela Mathews Boos*, A-28712 (September 21, 1962.)

The appellant further contends that he was prejudiced and misled by information furnished by the land office pertaining to oil and gas rights. Whether or not this is so, it is well established that one cannot, either through misunderstanding or reliance on information or advice furnished by an employee of a land office, obtain any right or interest not provided by law. *Fred and Mildred M. Bohem et al.*, 63 I.D. 65 (1956); *Mike Abraham*, A-28163 (November 16, 1959); *Orvil Ray*

<sup>1</sup> Standard Oil Company of California was the oil and gas applicant in Anchorage 048221, and as unit operator of the Deep Creek Unit under agreement #14-08-001-4701, approved April 4, 1958, protested the transfer of lease Anchorage 043432, issued to William N. Wilson, to the homestead patentee, Collins.

<sup>2</sup> The lands in question were included in the following patents:

973630, issued January 30, 1926, to Charles Miller

984425, issued August 26, 1926, to John W. Palmer

984426, issued August 26, 1926, to Claude D. Graham

1026736, issued April 23, 1929, to Jack A. Deitz

1164456, issued September 17, 1956, to Oscar C. Collins

Only Collins has appealed from the decision of the Division of Appeals.

<sup>3</sup> The act quitclaimed to the patentee all right, title, and interest in oil and gas deposits reserved by the United States in lands in the Kenai Peninsula in Alaska which were patented to homestead entrymen pursuant to homestead entries on which all requirements had been met prior to July 23, 1957, except for actual submission of acceptable final proof. The act further provided that any valid mineral lease should be continued in effect with all right, title, and interest of the United States in the lease vesting in the patentee.

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*Mickelberry*, A-28432 (November 16, 1960). Therefore, if the appellant has obtained the rights to any oil and gas deposits that may be located in the land patented to him, it must be by virtue of the act of September 14, 1960, *supra*.

A review of the legislative history of the act of September 14, 1960, as well as the history of the homestead laws, is persuasive that the conclusion reached by the Division of Appeals is correct.

Initially, land which was found to be mineral in character was not subject to entry under the homestead laws, and if homesteaded land was found to be valuable for minerals at any time prior to the issuance of a patent, the entry was canceled. The act of March 3, 1909 (30 U.S.C., 1958 ed., sec. 81), permitted settlement upon coal lands, provided that the patent reserved the coal to the United States. The act of July 17, 1914, as amended (30 U.S.C., 1958 ed., sec. 121 *et. seq.*), permitted settlement of lands valuable for oil, gas, phosphate, nitrate, potash, or asphaltic materials, subject to a reservation of these minerals to the United States. These statutes, however, were not applicable to Alaska. The act of May 14, 1898, as amended (48 U.S.C., 1958 ed., sec. 371), extended the homestead laws to Alaska but provided that "no title shall be obtained hereunder to any of the mineral or coal lands \* \* \*," and until 1922 agricultural entry was not allowed on mineral lands in Alaska. The act of March 8, 1922, as amended (48 U.S.C., 1958 ed., sec. 376), permitted settlement on lands in Alaska that are valuable for coal, oil, and gas, with a reservation to the United States of those minerals. This act further provided—

\* \* \* That should it be discovered at any time prior to the issuance of a final certificate on any claim initiated for unreserved lands in Alaska that the lands are coal, oil, or gas in character, the patent issued on such entry shall contain the reservation \* \* \* [of these minerals].

The Department has interpreted this last provision to mean that land discovered to be valuable for minerals prior to the submission of acceptable proof by the homestead entryman must be patented subject to a reservation of minerals to the United States. Land discovered to be valuable for minerals subsequent to the submission of such proof will be patented without such a reservation on the theory that equitable title vested in the homesteader at the time of submitting final proof, since, when he submitted it, he had complied with all the duties imposed upon him, any subsequent delay being chargeable to the United States.

The act of September 14, 1960, *supra*, did not represent a departure from the established procedure in the patenting of mineral lands.

Neither the language of the act nor its legislative history indicates an intent to release all of the minerals reserved by the United States in homestead patents on the Kenai Peninsula, issued prior to July 23, 1957. Rather, the act was designed to give relief to a group of homesteaders who seemingly suffered an injustice by the effect of an order of the Bureau of Land Management on March 30, 1956. It was for those homesteaders who had completed all of the requirements for their homesteads but were, in effect, dissuaded by the Bureau's order from submitting final proof during the period from March 30, 1956, to July 23, 1957, the date oil was discovered on the Kenai Peninsula, that relief was granted. *Milton H. Lichtenwalner et al.*, 69 I.D. 71, 76 (1962).

Collins plainly is not one of the group for whose relief the statute was devised. He filed his final proof, which was duly processed, and accepted a restricted patent although a regulation, 43 CFR, 1954 Rev., 102.22, provided a method by which he could have attempted to gain one without an oil and gas reservation. In other words, he was not subjected to the added burden imposed by the discovery of oil and gas on the Kenai Peninsula upon entrymen who had delayed the submission of their final proof and who, as a result, would presumably have had a more difficult task if they had sought to dispute an oil and gas classification of their entries.

We concur with the Division of Appeals that the act of September 14, 1960, applies only to those homestead entries in the Kenai Peninsula which were unpatented on July 23, 1957, for which all of the homestead requirements had been met on that date except the submission of final proof. It is not applicable to any entry which was patented prior to that time.

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 appealed from is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

*July 19, 1963***PROPOSED LEASE OF ANNETTE ISLANDS RESERVE FOR  
METALLIFEROUS MINING****Alaska: Indian and Native Affairs—Alaska: Mineral Leases and Permits—  
Indian Lands: Leases and Permits: Minerals**

The Annette Islands reserve in Alaska was specifically created as an Indian reservation by section 15 of the Act of March 3, 1891 (26 Stat. 1101; 48 U.S.C. sec. 358), and is leasable for mining purposes under the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C., sec. 396a-f).

**M-36658***July 19, 1963***TO: THE SECRETARY OF THE INTERIOR.****SUBJECT: PROPOSED LEASE OF ANNETTE ISLANDS RESERVE FOR METALLIFEROUS MINING**

In response to a request from the Bureau of Indian Affairs, I have examined a proposal to lease lands within the Annette Islands Reserve for metalliferous mining, with a view to determining whether such reserved lands are subject to leasing under the act of May 11, 1938.

It appears from a proposal presently pending before the Bureau of Indian Affairs, that Consolidated Minerals Company, Inc., wishes to lease from the Metlakatla Indian Community approximately 6,400 acres of land along the eastern shore of Annette Island, Alaska, for metalliferous mining. The area desired covers a strip of land one mile in width and extends approximately ten miles in length from Crab Bay to Harbor Point. The Company proposes “\* \* \* to mine such ores as can be found, namely, copper, lead, zinc, possibly gold and silver.” The Company proposes to pay an annual rental of \$1 per acre, a royalty of 10 percent on the first \$50 per ton returns, 15 percent on the excess over \$50 returns on any shipment, and a \$5,000 minimum royalty beginning with the third year. The Company further proposes to begin work within ten months after the signing of the lease and will spend \$4 per acre per year on development.

The Anchorage Regional Mining Supervisor, Geological Survey, has been asked by the Commissioner of Indian Affairs, through the Area Director, Juneau, Alaska, for a report and recommendation on the proposed lease, and has asked for a legal opinion as to the authority for such lease. In view of the Solicitor's memorandum of September 7, 1955, to the Commissioner of Indian Affairs, the subject of leasing Indian lands in Alaska has been considered and is reviewed herein.

The Solicitor's memorandum of September 7, 1955, considered the question of whether the United States or the natives residing in the area reserved by Executive Order No. 1764, dated April 21, 1913, "in and surrounding the Village of Klukwan," in Alaska, "for the use of the Natives of Alaska residing now or hereafter at said Village or within the limits of the Reservation," could lease the land for metalliferous mining. The memorandum expressed doubt as to the applicability of the Act of March 3, 1927 (44 Stat. 1347; 25 U.S.C., sec. 398a), and the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C., sec. 396a-f), to the Klukwan reservation, particularly in view of the opinion of the Supreme Court in *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955), and "suggested that legislation is essential which would definitely describe or fix the authority with respect to the leasing for mining purposes of lands within the Klukwan and like Indian reservations in Alaska."<sup>1</sup>

The doubt expressed by the Solicitor was communicated to the Congress in the Department's report on H.R. 6562, 85th Congress, to the Chairman of the House Committee on Interior and Insular Affairs, signed by the Under Secretary on June 10, 1957, and was further recognized by the committees considering the bill. See H. Rept. No. 773, House Committee on Interior and Insular Affairs, 85th Cong., 1st Sess., July 7, 1957, and S. Rept. No. 1031, Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess., August 19, 1957. The bill was enacted and was signed on September 2, 1957, as P.L. 85-271 (71 Stat. 596).

The Solicitor's memorandum of September 7, 1955, dealt solely with reservations created in Alaska by Executive Orders. It did not consider and is not determinative of the leasability of the Annette Islands reserve, which was specifically created by Congress by section 15 of the Act of March 3, 1891 (26 Stat. 1101; 48 U.S.C., sec. 358).<sup>2</sup> That Section provides in part:

Until otherwise provided by law the body of lands known as Annette Islands, \* \* \* is set apart as a reservation for the use of the Metlakahla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and

<sup>1</sup> See also, Solicitor's Opinion, M-36652, May 14, 1963, relating to oil and gas leasing on lands withdrawn by Executive order for Indian purposes in Alaska. In neither that opinion nor in this do we intend to express a view on the question that was before Solicitor Armstrong.

<sup>2</sup> Establishment of the reserve by Executive Order was apparently considered, but was foreclosed by a ruling of the Attorney General which held that the President's power "to declare permanent reservation for Indians to the exclusion of others on the public domain does not extend to Indians not born or resident in the United States." 18 Op. Atty. Gen. 557, 559 (1887).



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regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

The Supreme Court recently had occasion to consider section 15 of the 1891 act in *Metlakatla Indian Community v. Egan, et al.*, 369 U.S. 45 (1962). In passing upon the validity of certain regulations which the Secretary had issued to govern the operation of fish traps in waters surrounding the Annette Islands, the Court made several pointed observations:

\* \* \* In 1915 the Secretary issued regulations, 25 CFR (1939 ed.), pt. 1, establishing an elective council to make local ordinances for Metlakatla, \* \* \* (*Id.*, at p. 48).

\* \* \* Metlakatians, the State tells us, have always paid state taxes, in contrast to the practice described and prescribed for other reservations in *The Kansas Indians*, 5 Wall. 737 (1867), and it has always been assumed that the reservation is subject to state laws. *United States v. Booth*, 17 Alaska 561 (1958), at 563, 161 F. Supp. 269, at 270. \* \* \* Congress in 1936, 49 Stat. 1250, 48 U.S.C., sec. 358a, by authorizing the Secretary of the Interior to create Indian reservations of land reserved for Indian uses under 48 U.S.C., sec. 358, seems to have believed that Metlakatla was no ordinary reservation, since Metlakatla alone is covered in sec. 358. (*Id.*, at p. 51.)

The Court also observed: "This provision subjecting Metlakatla to rules and regulations of the Secretary of the Interior is unusual \* \* \*.<sup>3</sup> The regulations issued by the Secretary for the government of the Annette Islands January 28, 1915, appear to be without parallel."<sup>4</sup> (*Id.*, at p. 53.)

The Court was considering the Secretary's power to regulate fishing in the waters surrounding Annette Islands by means of fish traps, and it found that such power was derived from the 1891 act. In a companion case, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the Court held that such power does not extend to other areas in Alaska occupied by members of native corporations chartered under the Wheeler-Howard Act of June 18, 1934 (48 Stat. 984, 988, as amended,

<sup>3</sup> The Court apparently overlooked the Act of June 23, 1926 (44 Stat. 763) creating a reserve for the Chippewa Indians of Minnesota, which also provides that the reserve "shall be maintained \* \* \* under the jurisdiction of the Secretary of the Interior and under rules and regulations to be prescribed by the said Secretary."

<sup>4</sup> With respect to minerals, the regulations provided in Art. VIII, sec. 3: "Should any minerals be found within Annette Islands Reserve, and it is desired to mine and develop the same, the matter should immediately be brought to the attention of the Secretary of the Interior for his instructions thereon." 25 CFR, sec. 1.64 (1939 ed.). The regulations, insofar as they were incompatible with the Constitution and By-laws of the Metlakatla Indian Community, were by order of the Assistant Secretary of the Interior on August 23, 1944, made inapplicable from and after December 19, 1944, the date of ratification of the Constitution.

49 Stat. 1250; 25 U.S.C., secs. 473a, 476, 477)<sup>5</sup> for whom no such reservations had been established.

The Metlakatla Indian Community is a similarly chartered corporation,<sup>6</sup> but its occupation and use of the lands and surrounding waters of the Annette Islands are unique because, and only because, of the 1891 statute creating its reservation. It is true that the reservation is set apart "until otherwise provided by law" and is thus subject to extinction whenever Congress may choose to act.<sup>7</sup> Until that should occur, however, it is my opinion that the area encompassed by the reservation created by section 15 of the 1891 act is subject to mineral leasing under the provisions of the act of May 11, 1938 (52 Stat. 347; 25 U.S.C., sec. 396a-f). Section 1 of that act provides in part:

Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group or band of Indians under Federal jurisdiction, \* \* \*, may with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

We need not consider whether the Annette Islands are "lands owned by any tribe, group or band of Indians under Federal jurisdiction," nor the extent or quality of the right of possession assured by the Alaska Statehood Act (72 Stat. 339). The island lands and waters were, by specific Congressional enactment, "set apart as a reservation for the use of the Metlakatla Indians," and it would be hard to envisage any clearer description of an Indian reservation. Such express language leaves no doubt, in my opinion, that the Annette Islands comprise an

<sup>5</sup> Section 1 of the Act of May 1, 1936 (49 Stat. 1250; 25 U.S.C., sec. 473a and 48 U.S.C., sec. 362), extended the Wheeler-Howard Act to Alaska and provides that groups of Alaska Indians "having a common bond of occupation, or association or residence within a well-defined neighborhood, community or rural district, may organize to adopt constitutions and by-laws and receive articles of incorporation and Federal loans under Sections 16, 17, and 10 of the Act of June 18, 1934."

<sup>6</sup> The charter was approved and submitted for ratification by the Assistant Secretary of the Interior on August 23, 1944, the same day on which he approved the Constitution and By-laws, and it also was ratified on December 19, 1944. Section 5 of the charter forbids the corporation "to make leases, permits or contracts to or with non-members covering land in the Reserve except with the approval of the Secretary of the Interior."

<sup>7</sup> Section 1 of the act of May 7, 1934 (48 Stat. 667) granted citizenship to the loyal Tshimshians and Metlakatlans and other British Columbia Indian emigrant residents of Annette Island. Section 2 of the act reads:

"The granting of citizenship to the said Indians shall not in any manner affect the rights, individual or collective, of the said Indians, to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive Order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively."

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Indian reservation<sup>8</sup> and as such are subject to mineral leasing under the provisions of the Act of May 11, 1938, *supra*.

We have not overlooked section 2 of the Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C., sec. 358a), *supra*, which authorizes the Secretary to "designate as an Indian reservation," subject to the approval of a majority of the Indian or Eskimo residents, any area of land which has been reserved for their use and occupancy as schools or missions or by Executive order issued prior to the date of the act, or by section 14 or 15 of the Act of May 3, 1891, *supra*. The Secretary has not so designated the Annette Islands reserve. The legislative history of the 1936 act shows that Section 2 thereof was believed necessary "not only to the formation of chartered communities but also to protect projects begun under the provisions of" the Wheeler-Howard Act of June 18, 1934, *supra*,<sup>9</sup> but we do not believe the lack of an administrative designation is of significance in reaching a decision on the applicability of the leasing statute, particularly in view of the repeated recognition of Annette Islands as a statutory reservation.<sup>10</sup>

The Constitution of the Metlakatla Indian Community, approved on August 23, 1944, and ratified on December 19, 1944, expressly provides for mineral leasing. Article VII thereof provides in pertinent part as follows:

Section 3. The mineral and other resources of the Annette Islands and the waters to the distance of 3,000 feet surrounding these islands shall be community assets. \* \* \*

Section 4. The Council shall have the right, subject to the approval of the Secretary of the Interior, to enter into leases for the development of the resources of the Reserve.

Since the beginning the reservation "has been used in common for hunting, fishing, timber cutting and lumber making by the Indians,"<sup>11</sup> and the right of the Secretary to lease lands within the reservation as a site for cannery buildings and fish traps has been expressly

<sup>8</sup> *Infra*, n. 10. But see *United States v. Booth*, 161 F. Supp. 269 (Alaska, 1958), holding that the "community of Metlakatla is not an Indian reservation in the traditional sense and accordingly is not Indian country" within the meaning of the criminal statute (18 U.S.C., sec. 1151) defining "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States government."

<sup>9</sup> H. Rept. No. 2224, House Committee on Indian Affairs, 74th Cong., 2d Sess., March 26, 1936; S. Rept. No. 1748, Senate Committee on Indian Affairs, 74th Cong., 2d Sess., February 24 (calendar day, April 7), 1936. And see *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 108-110, n. 30-32 (1949), which quotes extensively from pertinent portions of the House Report.

<sup>10</sup> *Metlakatla Indian Community v. Egan*, *supra*, pp. 48, 52; *Hynes v. Grimes Packing Co.*, *supra*, p. 112; *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 87-89 (1918); *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671, 672, 674 (1923).

<sup>11</sup> *Territory of Alaska v. Annette Island Packing Co.*, *supra*, p. 672.

recognized as a part of his authority to make rules and regulations for the government of the Indians in their occupation of the islands.<sup>12</sup> Moreover, a lease by the Council of the Annette Islands Reserve to the United States of a part of the reservation lands for airport purposes, dated December 13, 1948, and approved by the Assistant Secretary of the Interior on January 6, 1949, has been expressly approved by the Congress.<sup>13</sup> In addition, the United States has administratively acknowledged the right of the Metlakatla Indian Community to sell to it quarry rock from the reserved lands and to receive payment therefor.<sup>14</sup> We have not found, however, any indication of a prior lease of the lands for mineral exploration or development,<sup>15</sup> but this does not militate against the right to enter into such a lease in a proper case. The authority to lease is, we believe, found in the Act of May 11, 1938, *supra*, and its exercise is prescribed by Section 4 of the Metlakatla Constitution as set out above, and the regulations of the Department in 25 C.F.R., pt. 171.

FRANK J. BARRY,  
*Solicitor.*

<sup>12</sup> *Id.*, at p. 674.

<sup>13</sup> Act of May 9, 1956; 70 Stat. 146. Unfortunately, the lease does not recite the authority on which it was based, and neither the approving statute nor the available legislative history indicate such authority. The lease was for a one-year term, renewable from year to year until June 30, 1959, but not thereafter "unless approved by Congress." The statute was thought to be necessary for renewals after June 30, 1959, "because of the ten-year limitation on leases of Indian land." Letter from the Assistant Secretary of the Interior to the Director, Bureau of the Budget, dated May 5, 1956. The letters to the President of the Senate and the Speaker of the House of Representatives accompanying the proposed bill, referred to Section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C., sec. 477) as imposing the ten-year limitation. That provision prohibits the inclusion in any tribal charter of incorporation of authority to lease reservation lands in excess of ten years. The Metlakatla charter contains no such limitation, but Section 5 thereof prohibits the making of any "leases, permits or contracts to or with nonmembers covering the land in the Reserve except with the approval of the Secretary of the Interior."

<sup>14</sup> Contract No. DA-95-507-eng-1423 (NEG), between the Metlakatla Indian Community of Alaska and Corps of Engineers; letter from District Counsel, U.S. Army Engineer District, Alaska, to Deputy Solicitor, Department of the Interior, dated September 4, 1962.

<sup>15</sup> Mr. Bert L. Libe, of Ketchikan, Alaska, wrote to Delegate Bartlett of Alaska on July 24, 1957, saying that he had "discovered a gold bearing vein on Annette Island" in 1921, that on August 24, 1921, he received a "permit to prospect and mine on the island" from the Native Council, that he discussed the possibility of a mineral lease with the General Superintendent of Indian Affairs in Alaska on October 13, 1939, but that "of course it did not materialize." There is no record of such a permit in the files of this Department. Letter from the Legislative Counsel to Delegate Bartlett, August 16, 1957. Early attempts to prospect and mine under the general mining laws were discouraged. In *Mineral Resources of Alaska*, 1913, U.S.G.S. Bull. No. 592, p. 92, it is said: "Many years ago Annette Island was given to the natives and prospecting or mining by whites forbidden. This prohibition has led to considerable dissatisfaction, owing to the circulation of tales of fabulously rich mineral deposits. Before the prospectors were ordered off some work had been done at several places on the eastern side of this island, notably about 1½ to 2 miles inland from the head of Crab Bay and along the western shore of Cascade Inlet." \* \* \*

## NEWELL A. JOHNSON ET AL.

A-29301

*Decided July 19, 1963***Grazing Permits and Licenses: Adjudication**

The failure of a range manager to comply with the departmental regulation which requires him to notify an owner of base property of an adjudication and allocation of range privileges by registered mail, allowing a right of protest, and, upon issuance of a final decision after protest, allowing a right of appeal, does not nullify an adjudication and allotment otherwise proper if, in fact, the owner does protest and appeal as though the proper notice had been given.

**Grazing Permits and Licenses: Apportionment of Federal Range**

A voluntary agreement among the users of the Federal range in a particular area which is approved by the Bureau of Land Management or its predecessor, the Grazing Service, does not effect a permanent division of the range which nullifies the responsibility of the Department to adjudicate the rights of permittees on the Federal range.

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

The 1956 amendment to 43 CFR 161.6(e) (9) is not so clear in meaning as to warrant holding that one who has been given for many years grazing privileges on the basis of 90 percent Federal range use will lose Class I base property qualifications computed on a 100 percent Federal range use because he fails after the adoption of the 1956 amendment to ask for privileges computed on a 100 percent Federal range use basis.

**Grazing Permits and Licenses: Appeals**

A range user who appeals from a decision effecting a reduction in his allotment of Federal land for grazing use is entitled to graze in the area allowed to him before the proposed reduction while his appeal is pending.

**Grazing Permits and Licenses: Apportionment of Federal Range**

Where the Bureau of Land Management personnel made a range survey and determined grazing capacity in accordance with accepted practices, their conclusions will be accepted in the absence of evidence that their findings were improperly determined; however, if there is substantial evidence that in a subsequent year the range does not have the capacity attributed to it by the survey and that a permanent change in the condition of the range may have occurred, a recheck of the range will be ordered to determine the present capacity of the range.

**Grazing Permits and Licenses: Apportionment of Federal Range**

A permittee may properly be required to confine his grazing operations to an allotment even though it may not have the forage to satisfy his licensed demand pending a recheck of the range to determine its grazing capacity.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Newell A. Johnson and Joy A. Johnson have appealed to the Secretary of the Interior from a decision dated September 25, 1961, by

70 I.D. No. 8

which the Division of Appeals of the Bureau of Land Management affirmed the decision of a hearing examiner on two points on which the examiner ruled in favor of the Bureau and reversed on three points on which he held in favor of the appellants.

The record shows that the area of public land to which this appeal relates is a portion of one of three zones in the House Range Unit of Utah Grazing District No. 10 which had previously been divided among the users in accordance with agreements formally adopted in 1943. A survey of dependent property of the range users which determined the basis of each user's demand upon the Federal range on the basis of past usage of privately controlled land in grazing operations dependent upon the use (for some portion of each grazing season) of Federal range within the unit was made in 1952, and a range survey to determine the grazing capacity of the unit was made in 1953. Several years of checking followed until 1957 when 10-year permits were issued on the basis of a 46.54 percent reduction in the grazing capacity of the unit and the relative rights reflected by individual requests for grazing privileges in 1956. It does not appear that any objection was made by the appellants to the range survey and the resulting determinations of animal-unit-months (AUMs) of grazing privileges assigned to the different range users. There was no objection to the 10-year permits which merely gave permission for the grazing of specific numbers of sheep during a specified period each year in the grazing district without any designation of any specific area to be grazed other than "Johnson Allotment." However, on December 2, 1957, September 25 and December 17, 1958, the range manager sent to Mr. and Mrs. Johnson notices defining the boundaries of the areas to be grazed. The December 2, 1957, notices stated that the allotments described therein "represents your share of Federal Range within the House Range Unit of Utah District No. 10," and, after the description, included a statement that "some compensating adjustments will be necessary to establish better herd lines, etc. These adjustments will be worked out between the various adjoining permittees and representatives of this office." The subsequent notices superseded the earlier ones. The Johnsons protested the notices of September 25, 1958, and appealed from the latest notices dated December 17, 1958, which culminated in a one-third reduction in their combined allotments.

At a hearing on February 4, 1960, both the appellants and the Bureau of Land Management submitted oral testimony and documentary evidence and agreed that the evidence submitted at the hearing on the appeal of the John E. Aagard Trust, on February 2, 1960, should be considered as evidence in their appeal.

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The examiner's decision which followed held (1) that, although the manager did not follow the procedure prescribed by departmental regulations in notifying the appellants by registered mail of their right to protest and appeal from the notices of allotments, there was no injury since they did, in fact, protest an appeal and thus obtained a review of his final decision; (2) that the range divisions evidenced by the agreements between the Grazing Service and the permittees in 1943 and subsequently did not effect a permanent division of the range which nullifies the Bureau's responsibility to adjudicate the rights of permittees on the Federal range; (3) that the Bureau's adjudication of the range, begun with the dependent property survey in 1952 and completed with the determination of the allotments in 1958, was improperly conducted because entitlement to grazing privileges was assumed on the basis of individual applications in 1956 without recognition of the fact that some of the applicants had 90 percent Federal use and others 100 percent; (4) that the Johnsons are entitled to continue to graze on the full extent of their previous allotment while their appeal is pending; (5) that the Johnson allotments do not contain sufficient forage to satisfy the Johnsons' Federal range demand as recognized in their 10-year permits.

The Johnsons did not appeal from the examiner's decision. The State Director of the Bureau of Land Management did, but only as to the examiner's rulings on the last three points. However, in their answer to the appeal, the Johnsons disputed the examiner's rulings on the first two points. Consequently, the Division of Appeals considered all five points, affirming the hearing examiner on the first two points and reversing the examiner on the other three points. The Johnsons have raised all five points in their appeal to the Secretary.

I find that the rulings of the Division of Appeals on the first two points are correct for the reasons set out in its and the hearing examiner's decisions.

As to the third point, it appears that all users of the House Range Unit were limited to 90 percent use of the Federal range in 1942 or 1943 in anticipation of the transfer of included sections of school land to the State of Utah. Some users were subsequently granted 100 percent use so that before 1952, 30 percent to 35 percent of the demand of the users had been raised to 100 percent. The manager testified that he did not take account of the 60 percent to 65 percent which remained at 90 percent in issuing the term permits in 1957. He said there were so many factors that we had no knowledge of or would have no way of determining what the effect might be or whether we could even determine the effect if we went beyond that date and see what caused those differences between the 90 percent and the 100 percent (Tr. 118).

Accordingly, he determined to use the demands of individual users which had been in effect for at least three years so that the right of appeal would be cut off and to disregard completely the percentage difference (Tr. 118). The Johnsons fell within the category of those who were allowed grazing privileges only on a 90 percent Federal range basis.

The Division of Appeals' decision relied on the fact that the appellants did not apply for more than the grazing privileges awarded them for two consecutive years after an amendment of the Federal Range Code which became effective on January 23, 1956, 43 CFR 161.6(e) (9) (20 F.R. 9912, 9915). This amendment provided that

(9) Class I base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:

(1) To offer base property which is not covered by an outstanding current term permit to the full extent of its qualification in an application for a license or permit or renewal thereof, or to apply for nonuse thereof in whole or in part \* \* \*.

After adoption of the regulation, Newell Johnson's first application (for the 1956-1957 grazing season) was for a certain number of sheep on a 100 percent Federal range basis and a larger number on a 90 percent Federal range basis. Joy Johnson's application for the same season was entirely for use on a 90 percent Federal range basis. The following year (1957) both applied for term permits on a 100 percent Federal range basis. However, it appears that the AUMs for which they applied (except for the number that Newell Johnson had previously had on a 100 percent use basis) were based upon their qualifications which had been computed on a 90 percent Federal range basis.

The question presented is whether these applications by the Johnsons for 1956-57 and 1957-58 came within the scope of the regulation quoted and caused them to lose their Class I base property qualifications to the extent of the difference between 100 percent Federal range use and 90 percent use.

I do not believe the regulation so clearly covers the situation of the Johnsons that it should be construed to deprive them of their base property qualifications to the extent indicated. Since 1942 or 1943 they had been (with the exception noted) limited to a 90 percent use of the Federal range as had been originally all users in the House Range Unit. There was never any information given them that they should apply for use on a 100 percent basis, particularly after the 1956 amendment of the regulation. Of course, they were chargeable with notice of that amendment but the language of the amended regulation was not so clear and specific that they could reasonably be held to notice



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that they would lose their base property qualifications unless they applied for privileges equivalent to the amount that would result from computing use on a 100 percent Federal range basis.

This is borne out by the fact that on December 20, 1961, the regulation was amended to read in pertinent part as follows:

(9) Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:

(i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse, except where the base property qualifications are included in an outstanding current term permit, or where the allowable use has been reduced under paragraph (f) (1) (iii), (3), and (5) of this section, or section 161.12(e). 43 CFR 161.6(e) (9) (26 F.R. 12698).

Paragraph (f) (1) of section 161.6 provides that if it is necessary to reach the grazing capacity of any area after licenses or permits have been issued, reductions of grazing privileges shall be made in a certain order and, in the case of regular licenses or permits properly issued, on an equal percentage basis. Paragraph (f) (2) provides that such reductions may be made either by reducing the number of livestock or time on the Federal range. Thus it seems clear after the 1961 amendment that if users in an area were to be reduced from 100 percent use of the Federal range to 90 percent they would not be required to apply in succeeding years for AUMs on a 100 percent Federal range basis in order to avoid loss of their base property qualifications as a result of the reduction of their Federal range use to 90 percent.

In submitting the 1961 amendment for comment prior to adoption, the Director stated in a memorandum dated November 9, 1960, to field officials that

An exception to section 161.6(e) (9) (i) is necessary to eliminate the need for an applicant to apply for base property qualifications duly recognized but which are in excess of the current allowable stocking rate in order to maintain such qualifications in good standing.

He also stated with respect to this and other proposed amendments that they were "intended to correct technical deficiencies in the regulations \* \* \*."

The particular amendment met with varying reception from the local advisory boards which considered it. Some did not understand the intent of the amendment; some thought the language should be improved; others approved it as proposed.

The 1961 amendment and its history suggest that the 1956 amendment was not intended to apply to the situations enumerated in the 1961 amendment and that the 1956 amendment was not clear as to what situations it covered. I do not believe that the language of that amendment was so clear and explicit as to warrant a holding

that by virtue of it the Johnsons lost their Class I base property qualifications to the extent that they asked in 1956 and 1957 for privileges based upon a 90 percent use of the Federal range. *Cf. Canada Southern Oils, Inc., and W. C. McBride, Inc.*, A-28941 (November 16, 1962); *M. A. Machris, Melvin A. Brown*, 63 I.D. 161 (1956); *Madison Oils, Inc., T. F. Hodge*, 62 I.D. 478 (1955).

Accordingly, I conclude that the Johnsons did not lose their Class I base property qualifications to the extent that they may have applied for grazing privileges in 1956 and 1957 equivalent to privileges computed on the basis of a 90 percent Federal range use.

As to the fourth point, the decisions defining the boundaries of the Johnson allotments were not declared to be in full force and effect pursuant to 43 CFR 161.10(i)(2). In this state of affairs, the decisions did not become effective while the appeals were pending. 43 CFR 161.10(i)(1). Furthermore, the record shows that neither the appellants nor other allottees in the same unit understood that the announcements sent to them in 1957 were to be immediately applicable and they did not, in fact, make any change in the areas grazed by their sheep (Tr. 37-38, 54-55, 116, 123). The manager testified that he expressly sanctioned such postponement of the effectiveness of the definitions of allotment boundaries in several instances (Tr. 116-117, 122-123). Thus it is clear that the Johnsons could properly graze within the boundaries of the allotments granted to them before issuance of the notices of 1957 and 1958, while their appeals were pending within the Department.

As to the fifth point, it appears that the Johnsons' allotment, as well as the other allotments in the House Range Unit, were made on the basis of the carrying capacity of the range as determined by the 1953 survey. The Bureau presented testimony as to the manner in which the survey was made and the check-ups that followed in succeeding years. There was no substantial evidence by the appellants which would disprove the overall accuracy of the survey or warrant setting aside the allotments made on the basis of the survey.

However, the Johnsons did present substantial evidence that in the winter grazing season 1958-1959 their allotment contained insufficient forage to satisfy their permitted use. Their evidence was that it fell about one-third short. Several other users in the unit testified that their allotments were also short, that they did not have the carrying capacity to satisfy their Federal range demands.

The insufficiency of the range may be explainable in whole or in part by the fact that several dry years occurred between the range survey and the time of the hearing. But the evidence is not conclusive on this point. Nonetheless, although the evidence is not conclusive that in an

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average precipitation year the unit and the allotments would not have the carrying capacity attributed to them by the range survey, I believe that the evidence as to a possible insufficiency of more than a transitory nature is substantial enough to warrant a recheck of the unit to determine its present carrying capacity. Accordingly, the House Range Unit and the allotments in the unit should be rechecked by the Bureau to the extent necessary to determine the proper carrying capacity of the unit and the allotments. Such an adjustment should be made in the permits issued to the extent indicated to be necessary by the recheck.

In the meantime, inasmuch as the accuracy of the survey has not been disproved with respect to the Johnsons' allotment as defined by the notice of December 17, 1958, the Johnsons should be required to confine their operations to that allotment. It would be unfair to allow the Johnsons to use their former larger allotment pending the results of the recheck when possibly they are receiving their equitable share of the available forage. The necessity for making a recheck should not operate to the disadvantage of other users in the unit.

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 appealed from is affirmed as to points one and two, reversed as to points three and four, and modified as to point five, and the case is remanded for further proceedings consistent with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

JOSEPH C. STERGE

A-29348

*Decided July 26, 1963*

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

A noncompetitive oil and gas lease subject to the automatic termination provision of the act of July 29, 1954, is properly terminated for failure to pay annual rental for the fifth year of the lease on or before the fourth anniversary date of the lease when it appears that the lessee's claim to a well capable of producing oil or gas in paying quantities rests upon an uncompleted well which was then being drilled and was not in a physical condition to produce oil or gas in paying quantities.

**Oil and Gas Leases: Termination—Rules of Practice: Hearings**

There is no occasion for having a hearing on the question as to whether an oil and gas lease is saved from automatic termination for nonpayment of rental because it has a well capable of producing oil or gas in paying

quantities where there is no indication that the lessee accepts the Department's interpretation as to what constitutes such a well and is prepared to submit evidence in accordance with that interpretation.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Joseph C. Sterge has appealed to the Secretary of the Interior from a decision dated November 14, 1961, by which the Division of Appeals affirmed a decision of the land office at Salt Lake City, Utah, denying his petition for reinstatement of his oil and gas lease, Utah 023319, following automatic termination under the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 188), for failure to pay annual rental for the fifth year of the lease on or before July 1, 1961, the fourth anniversary date of the lease.

In his appeal to the Secretary, the lessee repeated the three contentions submitted to the Director: that on the date payment of rental was required there was a well on the leased land capable of producing oil or gas in paying quantities; that any rental due should have been paid by the operator; and that no notice of rental due or claim for rental was ever sent to him. He also repeated his request for a hearing at which he could present evidence.

On April 3, 1963, appellant was allowed 30 days to submit such technical and engineering data as he might have to support his contention that there was a well capable of producing oil or gas in paying quantities on the lease on June 30, 1961.<sup>1</sup> On May 31, 1963, he submitted a printed exhibit prepared by the Electronic Geophysical Company, showing various formations and zones, with red and blue rings superinscribed upon it in ink as indications of showings of oil and gas.

In his letter of May 28, 1963, transmitting the exhibit, the appellant complained of the Department's reluctance to grant him a hearing.

The automatic termination provision applies only to leases "on which there is no well capable of producing oil or gas in paying quantities." In *United Manufacturing Co. et al.*, 65 I.D. 106 (1958), this Department held that the phrase "well capable of producing" means "a well which is actually in a condition to produce at the particular time in question." 65 I.D. at 113. In that case, drilling of a well had been completed and a casing set and cemented. However, the casing had not been perforated and the well was not, therefore, in physical condition to produce. Consequently, the Department held that the lease on which the well was situated was subject to the automatic termination provision.

In the present case, although appellant claims that there was on his lease on July 1, 1961, a well capable of producing oil or gas in pay-

<sup>1</sup> The date should have been given as July 1, 1961, the anniversary date of the lease.

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ing quantities, he does not assert or indicate that the well would meet the test laid down in the *United Manufacturing Company, supra*, case. All indications are to the contrary. After the initial determination by the land office that the lease had terminated automatically, the operator of the lease, Utah Plateau Uranium Co., filed on July 24, 1961, a petition for reinstatement of the lease in which it said that it had commenced drilling operations in September 1960, that drilling operations had been diligently pursued, and that "drilling operations are still being continued." The appellant himself said only that there appeared in the local newspapers "announcements of the fact that a well was being drilled on this lease, and is commercially productive." No other evidence was submitted until May 31, 1963.

On the other hand, the District Engineer, Geological Survey, in Salt Lake City reported on August 22, 1961:

\* \* \* Our records do not indicate any tests of oil or gas in paying quantities have been conducted and on several visits to the well, we have failed to observe any indications of oil or gas being obtained from the hole. On July 24, several of the Utah Plateau Uranium Company officers were in this office and admitted they had no free oil or gas in the well being drilled on the lease.

And the Director of the Geological Survey has made the following comment on the exhibit submitted on May 31, 1963:

The printed portion of the enclosed exhibit obviously was prepared before the well was drilled. The subsequent addition of handwritten notes thereto does not in any way alter the physical condition of the well. Also, the information contained on the exhibit does not show that a well capable of producing oil or gas has been completed. \* \* \* our District Engineer has reported that there was not on the leasehold on June 30, 1961, or prior or subsequent to that date, a well capable of producing oil or gas.

All that the evidence suggests is that there was simply a well being drilled on the lease on July 1, 1961, and at no time has the appellant claimed or even suggested that the well was in a physical condition on that date to produce oil or gas. Nor has he submitted anything at all to indicate that such oil or gas as could be produced from the well existed in paying quantities.

In short, there is no indication of any kind that the appellant has accepted the Department's ruling in *United Manufacturing Co.* and is prepared to submit evidence that the well on his lease meets the statutory requirements as interpreted in that case. There is thus no occasion for having a hearing since there is no agreement as to what must be proved.

Whether, under the arrangements between the lessee and the operator, the operator was or was not obligated to pay the rent on the lease to the United States is a matter of concern to the lessee and the operator only. The statutory provision for termination of a lease for fail-

ure to pay the rental does not specify whose failure shall produce such result.

There is no statutory duty upon the Department to send a notice that a rental payment will be due at a particular time and must be paid. The land office does send such notices as a courtesy and the file shows that it sent one in this case to the appellant on May 10, 1961. It also notified the attorney for the operator at his express and specific request. This was entirely proper under the operating agreement which the land office approved on July 22, 1960. Even if a notice had not been sent to the appellant or he had not received it, there was no invasion of his rights for failure to send him a notice of rental due.

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 request for a hearing is denied and the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

ERNEST J. ACKERMANN  
CLIFFORD V. YOUNG

A-29349

*Decided July 26, 1963*

**Alaska: Homesteads—Homesteads (Ordinary): Settlement**

Where a homestead settler on unsurveyed public land in Alaska initiates his homestead claim by settling upon the land while it was subject to the homestead entry of another and subsequently files notice of such settlement in the land office after relinquishment of the prior entry, his rights attach instantly on the filing of the relinquishment of the existing homestead and are superior to the rights of a homestead settler who files his notice of settlement and settles on the land subsequent to the relinquishment.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Ernest J. Ackermann has appealed to the Secretary of the Interior from a decision dated November 27, 1961, by which the Division of Appeals dismissed his appeal from a notice given him by the land office in Juneau, Alaska, advising him of his right to bring a contest against a subsequent homestead settlement on the land covered by his homestead settlement notice in order to obtain priority for his own.

Clifford V. Young has also appealed from the portion of the decision of November 27, 1961, which held that the homestead application of Young and Claude L. Reams dated October 5, 1960, was not allowable because it was not accompanied by final or commutation proof.

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The land is a tract of 18.87 acres in the vicinity of Juneau, Alaska, now known as U.S. Survey 3751.

The sequence of the pertinent happenings is as follows: Otto Seifert filed his notice of settlement or occupancy for homestead purposes on October 10, 1958, and it was approved March 9, 1959. On May 2, 1960, Seifert filed a relinquishment of his settlement claim. On May 4, 1960, Ackermann filed notice of settlement for homestead purposes, Juneau 011884, on the same land, stating that his settlement or occupancy dated from April 15, 1960. On May 12, 1960, Clifford V. Young and Claude L. Reams filed their settlement notice, Juneau 011894, for the same land.

On September 22, 1960, the land office notified Ackermann that on the date he claimed occupancy the land was covered by Seifert's notice of settlement; that Seifert relinquished all claim to the land on May 2, 1960; and that the land was presently covered by a settlement notice filed by Young and Reams. The land office concluded by advising Ackermann that:

If you feel that the above claim is invalid you have a right to contest the claim.

Also you have the right to withdraw your notice and if a withdrawal is received by this office within 30 days from receipt of this letter, your filing fee will be returned.

The land office also notified Young and Reams on September 22, 1960, that:

We are pleased to inform you that our records do not show any conflicting claims to the land which you have settled. Your Notice of Location is *therefore approved as of the date filed.*

On October 5, 1960, Young and Reams filed an application for homestead entry on the land included in their settlement notice, now surveyed and described as such. The land office allowed the entry on October 19, 1960, under the same serial number as the settlement notice of May 12, 1960.

Meanwhile, Ackermann appealed from the notice from the land office requiring him to contest the Young and Reams settlement claim. He alleged in this appeal that he had known Seifert for several years; that, in the spring of 1960, Seifert told him that because of illness he would be unable to improve the tract covered by his settlement notice; that on April 15, 1960, Seifert assisted Ackermann to stake out the land and post Ackermann's name on the stakes; that Seifert agreed that "as soon as he could find time he would officially relinquish" his claim and Ackermann would then file his location notice on this land; that Seifert did relinquish on May 2, 1960; that he, Ackermann, filed his settlement notice on May 4, 1960; that he began making improvements by clearing a lot several days after May 4 and about the middle

of May began building a house; that he found additional stakes on the claim about the first of June but he continued building the house and at the time of appeal had invested about \$2,500 in materials for the house.

In their answer, Young and Reams alleged that they had staked the claim on May 11, 1960, and filed their notice the following day; that on October 16, after their settlement notice had been approved, they went to the land to select a building spot and found Ackermann working on his partially constructed house; that they told him their filing had been approved and he indicated that he was about to appeal; that Young and Reams proceeded to construct a house and moved into it on November 1, 1960. They requested that the land office advice to Ackermann be regarded as decisive.

Ackermann's attorneys entered an appearance and requested an opportunity to supplement Ackermann's statement of reasons for his appeal after they had had an opportunity to examine the files. In their subsequently filed statement, they conceded that Ackermann's homestead entry initiated by settlement was originally subject to the prior valid entry of Seifert but contended that it was good against the entire world except Seifert and that, because of Seifert's abandonment of his claim on April 15, 1960, followed by formal relinquishment on May 2, 1960, Ackermann's rights vested as against the entire world before Young and Reams filed their settlement notice. They relied upon *Moss v. Dowman*, 88 Fed. 181 (1898), affirmed, 176 U.S. 413 (1900), and early decisions of the Department of the same import.

The decision of the Division of Appeals held that the land office notice advising Ackermann of his right to initiate a contest action was proper. As to the Young and Reams notice, the Division of Appeals held that a land office has authority only to acknowledge receipt of a notice of the initiation of a homestead through settlement and to record a recordable claim. Thus, it held, the notice of Young and Reams should not have been approved and the attempt to do so was void. The Division further held that a homestead may not be initiated by more than one entryman and that since the application to enter filed on October 5, 1960, was not accompanied by final or commutation proof it was not subject to allowance. Ackermann's appeal was dismissed, the allowance of Young and Reams' entry vacated, and the files ordered to be returned to the land office for "further processing consistent with this decision."

Ackermann contends on appeal to the Secretary that his settlement was prior to that of Young and Reams, although subject when made to the existing entry of Seifert which Seifert abandoned on April 15, 1960, and formally relinquished on May 2, 1960; that his, Acker-



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mann's, notice of settlement was filed on May 4, 1960, after Seifert's rights had terminated and before any other rights had intervened; that the settlement notice of Young and Reams was filed on May 12, 1960, at a time when Ackermann's rights had already attached. He prays that the Secretary reverse the decision of the Division of Appeals dismissing his appeal and requiring him to initiate a contest action against the Young and Reams settlement, and determine which of the settlements is valid. In his answer, Young contends that the ultimate question as to which settlement is to be recognized is a mixed question of law and fact which should not be decided in the absence of a record on the factual issues.

On December 18, 1961, immediately preceding Ackermann's appeal to the Secretary, Young filed a new notice of settlement and application for homestead entry bearing his name as the only settler and applicant and referring under each item of information to be furnished therein to the information included in the notice filed May 12, 1960, and the homestead application filed October 5, 1960. Young also filed a quitclaim deed by which Reams purported to convey to Young all of his interest in the land described in the notice of May 12, 1960.

Young also appealed to the Secretary in his own right, conceding that the homestead laws make no provision for settlement upon a homestead by more than one entryman. He contends, however, that the Division of Appeals erred in holding that the application to enter of Young and Reams filed on October 5, 1960, was not allowable because it was not accompanied by final or commutation proof for the reason that it was not an application for patent but simply an application for entry filed in recognition of the fact that the land had been surveyed.<sup>1</sup> He concluded that the decision appealed from merely vacated an "allowance" of the homestead application filed on October 5, 1960, without affecting the location notice filed May 12, 1960, or his subsequent application for homestead entry filed on December 18, 1961, and, by dismissing Ackermann's appeal, left the parties as they were before the vacated allowance. He requested clarification if his views of the decision are erroneous.

On August 27, 1962, while his appeal was pending before the Secretary, Ackermann filed final proof on his homestead, showing residence, cultivation, and improvements totaling \$13,150, including a \$10,000 house. Exterior and interior pictures of the house indicate that it is spacious, attractive, and that it contains an attractive, electrically-equipped kitchen. The proof indicates that Ackermann has resided on

<sup>1</sup> The record shows that U.S. Survey No. 3751 was approved April 25, 1960, and officially filed on July 18, 1960.

the homestead since August 1, 1960, and his family since March 15, 1961.

I am unable to find that there is any necessity for Ackermann to bring a contest against a subsequent settlement claim. The Department has consistently held that the rights of a homestead settler on public land attach instantly on the filing of the relinquishment of a prior entry and are superior to those of a homestead settler who initiates his rights subsequent to the relinquishment. *Rickers v. Tisher*, 19 L.D. 421 (1894); *Dowman v. Moss*, 19 L.D. 526 (1894), affirmed, *Moss v. Dowman*, 176 U.S. 413 (1900); *Spring v. Reimbold et al.*, 25 L.D. 37 (1897); *McNamara v. Morgan*, 34 L.D. 257 (1905); *Ganus v. State of Alabama*, 46 L.D. 263 (1917); *Bauer v. Nuernberg*, 46 L.D. 372 (1918). It is true that in *Newbanks v. Thompson*, 22 L.D. 490 (1896), reversed on other grounds in *Walton v. Monahan*, 29 L.D. 108 (1899), and *Wood v. Bond*, 28 L.D. 369 (1899), the Department refused to recognize any rights in a settler who went upon land covered by the entry of another under an agreement with the prior entryman that the entry would be relinquished for his benefit and who subsequently took no action to obtain the cancellation of the entry by inducing the entryman to file a relinquishment or by initiating a contest against the entry, and the Department recognized rights in the subsequent homestead applicant who obtained the relinquishment of the previous entry. But in this case the first entryman relinquished in accordance with his agreement very soon after Ackermann went upon the land. Ackermann continued to occupy and improve the land and he took the necessary action to formalize his settlement, as required by the act of May 14, 1898, as amended (48 U.S.C., 1958 ed., sec. 371), by filing a notice of settlement in the local land office. However, the land office did not attempt to apply the rule enunciated in these cases to Ackermann since it advised him to bring a contest against the subsequent settlement of Young and Reams. For this, I find no justification. The settlement of Young and Reams, if a joint settlement was possible, was subsequent in time to that of Ackermann which became fully effective, all else being regular, as soon as Seifert relinquished his entry and it was also subsequent in right.

Now that Ackermann has filed his final proof, other interested persons can institute whatever proceedings they consider proper to the presentation of their objections to Ackermann's claim or in support of their own claims to the land.

There remains the propriety of the action of the Division of Appeals holding that Young and Reams' homestead application was not allow-

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able. Since they admit that there is no provision in the homestead law for settlement or entry by more than one entryman, it was proper to vacate the allowance of the entry for this reason alone. Thus it is unnecessary to consider whether the other reason relied upon is sound.

It is not now necessary to dispose of other matters of fact or law which may be important to the resolution of the conflicting claims.

The effect of this decision, then, is that Ackermann's settlement, if otherwise valid, was effective immediately after Seifert filed his relinquishment, that he is under no obligation to institute contest proceedings against Young, and that the allowance of Young and Reams' application for homestead entry stands vacated.

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 appealed from is reversed in part and affirmed in part.

ERNEST F. HOM,  
*Assistant Solicitor.*

ROBERT L. SMART ET AL.

A-29677

*Decided July 26, 1963*

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Acquired Lands Leases**

Where a partial assignment of an acquired lands oil and gas lease is timely filed but is not accompanied by the statement of the assignee as to whether he is the sole party in interest in the assignment, as required by regulation, and such statement is not filed until after the expiration of the lease, approval of the assignment is properly refused.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Robert L. Smart and California Oil Company have appealed to the Secretary of the Interior from a decision dated May 29, 1962, by which the Division of Appeals affirmed a decision of the Eastern States land office denying their request for approval of a partial assignment of Smart's oil and gas lease, BLM-A 017162, to California Oil Company on the ground that the request for approval was not accompanied by the statement of the assignee's interest in the assignment required by departmental regulation 43 CFR 192.140.

The Smart lease was issued effective December 1, 1951, and was extended through November 30, 1961. Request for approval of Smart's

partial assignment to California Oil Company was filed October 26, 1961. The request was, admittedly, not accompanied by a statement describing the assignee's interest and that of any others in the assignment and none was filed until January 3, 1962. On December 11, 1961, the land office issued its decision stating that the assignment could not be recognized or approved and was therefore ineffective to segregate the parent lease and the assigned portion and extend them for two years and that, in the absence of such extension, the lease expired of its own limitation on November 30, 1961.

Section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 187a), provides in applicable part that:

\* \* \* 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 and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under [this Act], 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 and proof of the qualification under [this Act] of the assignee or sublessee to take or hold such lease or interest therein. \* \* \* The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: \* \* \*.

The applicable regulation, 43 CFR 192.140,<sup>1</sup> provides in pertinent part:

\* \* \* The assignment or sublease must be accompanied by a signed statement by the assignee or sublessee that he is the sole party in interest in the assignment or sublease; if not, he shall set forth the names \* \* \* of the other interested parties. [If there are other parties interested in the assignment or sublease, a separate statement must be signed by them and by the assignee or sublessee setting forth the nature and extent of the interest of each, the nature of the agreement between them, if oral, and a copy of such agreement if written. \* \* \* Such [separate] statement [and written agreement, if any], must be filed not later than 15 days after the filing of the assignment or sublease. Subject to final approval by the Bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the [late] date of filing in the proper land office of all the papers required by §§ 192.141 and 192.142. No assignment will be approved if the assignee or sublessee [or any other parties in interest] are not qualified to take and hold a lease or if their bond is insufficient or if they fail to file the statement required by this section. \* \* \*

The appellants contend that the regulation as a whole is vague and misleading and that as interpreted by the Bureau it exceeds the authority of the Secretary; that neither the statute nor the regulation imposes a penalty for failure to comply with the requirement for

<sup>1</sup> This regulation is one dealing with oil and gas leases on public lands but is incorporated by reference and made applicable to acquired lands leases. 43 CFR 200.3.

July 26, 1963.

filing the sole party in interest statement; and that their assignment should be approved effective as of the first day of the month following the filing of the assignment.

Section 32 of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 189) authorizes the Secretary of the Interior to prescribe necessary and proper rules and regulations and to do anything necessary to carry out the purposes of the act. This is clear authority to the Secretary to adopt regulations governing assignments of oil and gas leases, provided, of course, that any such regulation does not contravene a provision of the act.

Section 30(a) of the act provides that an assignment, upon approval, shall take effect as of the first day of the lease month following the filing of the assignment, together with any required bond and proof of the qualification of the assignee to take or hold a lease. It also provides that the Secretary shall disapprove an assignment for lack of qualification of an assignee. There seems to be no question then that the Secretary may properly adopt a regulation having for its purpose the ascertainment of facts establishing the qualifications of an assignee.

The regulation in question has that purpose. The experience of the Department has been in many instances that an applicant for a lease or a lessee may not be the real party in interest in the application or lease and that he is no more than a dummy or front for others who are the real parties in interest. The real party in interest is not disclosed because he is not qualified from the standpoint of acreage holdings or for some other reason to hold any interest in the lease. See, for example, *Antonio DiRocco, et al.*, A-26434 (July 11, 1952). The regulation is designed to ferret out such situations and to insure as far as possible that leases are assigned only to those who are qualified to hold them. Thus the regulation is necessary to establish the qualifications of the real parties in interest in assignments.

The appellants concede this, but they contend that the regulation is vague and misleading. It is difficult to follow their reasoning so far as the issue in this case is concerned. Section 30(a) of the statute provides that an assignment shall take effect the first of the lease month following the filing of the assignment together with proof of the assignee's qualifications and any required bond. The regulation states plainly that the assignment "must be accompanied by" the sole party in interest statement. There is no vagueness or uncertainty there. The appellants say that succeeding sentences in the regulation require the filing of a "separate statement" if parties other than the assignee have an interest and that "[s]uch separate statement" must

be filed within 15 days after the assignment is filed. The appellants say that it is not clear whether "such separate statement" refers to the "separate statement" required of parties other than the assignee or the statement required of the latter to be filed with the assignment. There seems to be no question at all, from the standpoint of normal grammatical construction and the context of the regulation, that "such separate statement" refers to its immediate antecedent, "separate statement," and not to the earlier "statement" required to be filed with the assignment. Thus only by labored construction can it be said that there is any confusion in the regulation as to when the sole party in interest statement is required to be filed. But even if there were any question, it would be simply whether the statement has to be filed with the assignment or within 15 days after the assignment is filed. Appellants did not file the statement until over two months later.

Appellants contend that the regulation is vague and confusing in another respect. They point to the provision in the regulation that assignments shall take effect as of the first day of the lease month following the date of filing "of all the papers required by §§ 192.141 and 192.142." Those sections do not specifically mention the sole party in interest statement; it is mentioned only in section 192.140.

At the outset it may be noted that section 192.141 provides that assignments may be made on Form 4-1175 or exact reproductions thereof. Form 4-1175 includes a sole party in interest statement to be answered by the assignee. Thus appellants' contention could not apply to assignments made on Form 4-1175.

The assignment in this case was not made on the form, and presumably all of the papers required by sections 192.141 and 192.142 were filed with the assignment. This leaves the question whether the provision in section 192.140 relied on by the appellants requires the approval of their assignment as of November 1, 1961, although the sole party in interest statement was not filed until January 3, 1962. This might be the literal interpretation of the provision but it would be an unreasonable one. Section 192.140 clearly requires the sole party in interest statement to be filed with the assignment. The section also provides that no assignment will be approved if the assignee or any other parties in interest fail to file the statement required by that section. It would be wholly illogical to say that the statements which are required to be filed with the assignment or within 15 days thereafter and which are a prerequisite to approval of the assignment are not required to be filed before the assignment can become effective. The history of the regulation shows that the provision referring to the

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filing of the papers required by sections 192.141 and 192.142 was in section 192.140 before that section was amended to include the requirement for filing the sole party in interest statement. 43 CFR, 1954 rev., 192.140. Prior to the amendment, section 192.140 did not require the filing of any papers. All such requirements were to be found in sections 192.141 and 192.142. It is evident that failure to amend the provision in section 192.140 to refer to the filing of papers required by that section was due to inadvertence and not to design.

This lack of clarity in section 192.140 does not, however, permit the appellants to invoke the benefits of the well-established rule that before a person can be deprived of a statutory right for failure to comply with a regulation the regulation must be so clear as to leave no room for disregarding the noncompliance. *Madison Oils, Inc., T. F. Hodge*, 62 I.D. 478 (1955). Section 192.140 plainly requires an assignment "to be accompanied by" a sole party in interest statement. There is no ambiguity or lack of clarity here, and compliance with it by the appellants would have preserved their right of assignment.

The appellants assert that no penalty is prescribed in the regulation for failure to file the statement, therefore, that to attempt to penalize them by refusing to approve the assignment is to go beyond the statute. As we have seen, the requirement for the statement has as its purpose the establishment of the qualifications of the assignee. Section 30(a) of the statute provides that an assignment becomes effective only after proof of qualification of the assignee is filed, other requirements being met. The appellants are not being subjected to any penalty over and above what the statute itself provides.

The fact is that the appellants are not being penalized simply because they did not file the sole party in interest statement with the assignment. They are suffering the consequences of not having filed it in time to permit the assignment to become effective during the life of the lease. If the assignment here had been filed at any time prior to October 1, 1961, without the sole party in interest statement and that statement had been filed in October 1961, the assignment would have been approved, all else being regular, because the assignment would have become effective on November 1, 1961, before the lease term expired (on November 30, 1961). In other words, the action taken by the land office here was the same as the action it would have taken if only one copy of the assignment had been filed on October 26, 1961, and the two remaining required copies had not been filed until January 3, 1962, or if a bond had been required but not filed until January 3,

1962.<sup>2</sup> Cf. *Donald K. Ladd et al.*, 68 I.D. 169 (1961); *Joe T. Juhan*, A-28667 (May 17, 1962). It is thus erroneous to characterize the refusal to approve the assignment as the imposition of a penalty simply for failure to file the statement with the assignment.

This is also the answer to appellants' argument that the statute limits the power of the Secretary to disapprove assignments and that the failure to file a sole party in interest statement is not one of the grounds enumerated in the statute.

In short, it is the position of the Department that the regulatory requirement for the filing of a sole party in interest statement is reasonable and proper, that the statement is clearly and plainly required to be filed with the assignment, and that if the statement is not filed prior to the beginning of the last month of the lease term approval of the assignment may be withheld since approval of the assignment would be ineffective. *Franco Western Oil Company et al.*, 65 I.D. 316 and 427 (1958); *Safarik et al. v. Udall*, 304 F. 2d 944 (1962), cert. denied, 371 U.S. 901.

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 appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

NEWELL A. JOHNSON ET AL.

A-29236

*Decided July 31, 1963*

Rules of Practice: Appeals: Standing to Appeal—Grazing Permits and Licenses: Appeals

A decision by a hearing examiner denying a motion to vacate a decision of a district manager of a grazing district on only one of the issues raised by an appeal from the district manager's decision and indicating that a hearing would be held on other issues raised by the appeal is not a final disposition of the appeal but is in the nature of an interlocutory decision which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the whole appeal, and an appeal from such a decision will be dismissed as premature.

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<sup>2</sup> Surely the appellants would not contend that if they had filed less than the three original counterparts of the assignment on October 26, 1961, and had not completed the filing of the remaining required counterparts until January 3, 1962, the Department could not refuse to approve the assignment. Yet section 30(a) does not say that the Secretary may disapprove an assignment because less than the three required copies are timely filed.



July 31, 1963

### Rules of Practice: Appeals: Standing to Appeal—Grazing Permits and Licenses: Appeals

Where a hearing examiner limits testimony to one of the issues raised by an appeal to him from a decision of a district manager of a grazing district, renders a decision thereon, and orders a hearing on the remaining issues raised by the appeal, an appeal to the Director, Bureau of Land Management, from the hearing examiner's decision on that phase of the appeal may be deferred until the hearing examiner renders his decision on the remaining issues.

#### APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On September 17, 1959, the district manager of the Fillmore Grazing District in Utah issued separate notices to Newell A. Johnson and Joy A. Johnson in her own behalf and in behalf of the Estate of Rachel C. Aagard, deceased, notifying them that their grazing permits dated August 27, 1957, for use within the House Range Unit of the district were subject to cancellation pursuant to the provisions of section 161.9 (d) and section 161.6(e) (14) of the Federal Range Code because of their failure to pay the portion of the cost of the division fence between sheep and cattle grazing in the House Range Unit assessed to them. On October 12, 1959, the district manager issued further notices of the cancellation of their grazing permits.

The persons so notified filed their appeals on November 2, 1959, alleging, among other things, that they should not be required to share in the cost of the fence because they were receiving no benefits from it. On November 27, 1959, the same persons filed a joint motion to vacate and set aside the decisions of the district manager from which they had appealed on the ground that because the matter of the division fence and the apportionment of the cost had not been presented to the advisory board of the grazing district for its advice and recommendations before commencement of the construction of the fence in February 1957, as required by section 161.13(e) (8) of the Federal Range Code, the manager acted illegally and without authority in canceling their permits because of their failure to pay assessments for contribution to the cost of the division fence. On December 2, 1959, the State Supervisor of the Bureau of Land Management filed a motion to dismiss the appellants' motion on the ground that the appellants were attempting to raise new grounds of appeal not indicated within the period allowed for taking an appeal. A prehearing conference was subsequently held and on December 17, 1959, the hearing examiner issued an order denying the Bureau's motion to dismiss and setting a hearing on the appellants' motion. The order recited that the motion to vacate was

based on an issue properly raised in the appeal and that this issue raised a procedural question which should be considered prior to a determination of the merits of the main issues raised in the appeal. The order further stated that testimony at the hearing would be limited to the issue of the district manager's compliance with the procedure set forth in the Federal Range Code.

At the hearing, the testimony was limited to the issue whether the district manager presented to the District Advisory Board the matter of, and obtained its advice and recommendation on, the construction of the division fence and the apportionment of the cost among the permittees within the unit before February 10, 1957, when construction was commenced.

In his decision dated October 31, 1960, the hearing examiner found that the evidence submitted at the hearing showed that the proposal to build the division fence and to apportion the part of the cost not borne by the Bureau among the permittees had been submitted at a meeting of the permittees of the House Range Unit on August 9, 1955, and had received their tacit acquiescence. He also found that the matter was never formally submitted to the District Advisory Board, although opinions of board members were expressed in board meetings from 1954 on and the board members fully understood how the cost of the fence was to be allocated among the range users in the House Range Unit. He concluded that because there was no showing that the board was not given sufficient opportunity to give advice he was unable to conclude that the action of the district manager was arbitrary and capricious. He therefore denied the appellants' motion to vacate and remanded the appeal to the district manager for the setting of a hearing "on the remaining issues raised in the appeal."

The appellants filed an appeal to the Director of the Bureau of Land Management.

In his decision of September 22, 1961, the Director held that the appellants had no standing to appeal because the decision of the examiner was interlocutory in nature and not a final order or decision contemplated by the rules as an appealable order. The decision dismissed the appeal. However, it also specifically affirmed the decision of the hearing examiner.

In their appeal to the Secretary, the appellants contend that the Director erred in failing to consider the issues of law regarding the procedure under the Federal Range Code raised by the appellants' appeal to him; in holding that the sole issue before him was the standing of the appellants to appeal at that time from the decision of the examiner; and in holding that the examiner's decision was interlocu-

*July 31, 1963*

tory and not subject to appeal. They point to the fact that the Director's decision affirmed the decision of the hearing examiner and express concern that if the Director's decision is permitted to stand they will have no opportunity to have the issue decided by the hearing examiner reviewed by way of appeal.

We can appreciate the dilemma of the appellants, which we believe is brought about in large measure by the wording of both the hearing examiner's decision and that of the Director. While holding that the appellants could not appeal at this time from the examiner's decision, at the same time the Director affirmed that decision instead of merely dismissing the appeal, thus leaving the appellants with the impression that the Director concurred in the holding of the examiner. Such obviously is not the case, since the Director did not concern himself with the merits of the appeal.

Presumably the hearing examiner, when faced with the motion to vacate the decisions from which the appeals were taken on the ground that the district manager lacked authority to cancel the appellants' permits, determined to hear evidence on this point alone and to defer hearing evidence on the other issues raised by the appeals on the premise that if he found for the appellants on the issue of the district manager's authority the other issues raised by the appeal would become moot. When he held against the appellants on this point, he ordered that another hearing be held at which the appellants could present their evidence as to the remaining issues raised in their appeals to him.

The hearing examiner could have permitted the taking of testimony on all issues raised by the appeals, including that which was the subject of the motion to vacate, at one hearing in which event he would have rendered one decision, from which there would be no question of the appellants' right to appeal to the Director. However, having chosen to confine himself to the single issue raised by the motion, he should have pointed out in his decision of October 31, 1960, that any appeal from his holding on that phase of the appellants' case should be deferred until his decision on the other issues raised by the appeals was rendered.

In the same manner, the Director, while properly refusing to entertain the appellants' appeal from the hearing examiner's decision, should have made clear to the appellants that their appeals from the hearing examiner's decision on one of the issues raised by their original appeals from the district manager's decisions would not be considered until after the hearing examiner had heard and disposed of, by way of a final decision, all of the other issues raised by those appeals. The

Director should not have affirmed the hearing examiner's decision but simply dismissed the appeals.

The Department looks with disfavor on appeals which are interlocutory in nature. Until a final decision on a matter is rendered by the officer authorized to decide an appeal initially, the Department is not disposed to interfere with the handling of the case by that officer. To do otherwise and to permit piecemeal appeals from decisions by that officer which are not dispositive of the whole controversy merely delays the matter and results in the Director and the Secretary having to consider the case several times rather than once. Cf. *United States v. William A. McCall and Olaf H. Nelson*, A-29161 (July 30, 1962), and *United States v. Reed H. Parkinson*, 65 I.D. 282 (1958).

The examiner's decision in this case was not a final disposition of the appeals. While it was rendered in response to a motion to vacate the district manager's decision, it, after a full hearing, disposed of, finally as far as the examiner was concerned, only one of the issues raised by the appeals to the examiner.

For the reasons indicated above, the Department is not disposed to consider the correctness of that decision until such time as the hearing examiner shall have decided the other issues raised by the appellants' appeals.

Therefore, in the circumstances of this case, the matter will be remanded in order that the appellants may be afforded the opportunity to present their case on the balance of the issues raised by their original appeals to the hearing examiner. Since the appellants have had full opportunity to present their case on the one issue already decided by the hearing examiner, no further evidence or argument may be presented at the forthcoming hearing on that issue.

The appellants may, following the hearing examiner's decision on the balance of the issues raised, appeal to the Director of the Bureau of Land Management from the decision of October 31, 1960, which will be considered, for the purposes of that appeal, as having been rendered on the same date as that of the hearing examiner's decision on the remaining issues.

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 September 22, 1961, is affirmed so far as it dismissed the appellants' appeal and reversed so far as it affirmed the hearing examiner's decision of October 31, 1960, and the case is remanded for further action consistent with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

SHELL OIL COMPANY ET AL.

A-29460

Decided August 2, 1963

Outer Continental Shelf Lands Act: Oil and Gas Leases

Barging costs are a relevant matter to be taken into account in computing the royalties due the United States where there is no bona fide established market at the field or area where the leases are situated. The Secretary has discretion to determine the method of establishing an allowance for barging costs.

APPEALS FROM DECISIONS OF THE GEOLOGICAL SURVEY

The companies<sup>1</sup> have filed timely appeals with the Director, Geological Survey, from determinations of the Oil and Gas Supervisor, Gulf Coast Region, New Orleans, Louisiana, that no deduction for barging costs from the lessor's royalty interest would be permitted in computing the royalty payments due the United States under the terms of certain leases issued pursuant to section 8 of the Outer Continental Shelf Lands Act, 43 U.S.C., sec. 1337. The leases involved as to each appellant, the dates of the Supervisor's determinations, and the dates of the filing of the appeals are shown in Appendix I, hereto.

The Secretary has exercised his supervisory jurisdiction over the appeals because of their importance to the interests of the United States and for the reason that they involve novel questions of fact and law vitally affecting the Department's administration of the highly valuable mineral resources in the submerged lands subject to its jurisdiction under the provisions of the Outer Continental Shelf Lands Act, 67 Stat. 462, hereinafter referred to as the Act. The appeals have been consolidated for decision since they involve substantially the same question of fact and law, and have been referred by the Secretary to the Solicitor for decision.

All the appellants have taken the position, in general, that under the law, the regulations, and the terms of their leases, it is required, or contemplated, that royalty payments be computed on the basis of the value of production at the wellhead or on the lease premises. They argue, further, that the value of such production for royalty computation should therefore be determined by deducting the cost of moving the crude oil from the lease premises to the onshore point of sale from the selling price at that point. Shell concludes it is entitled to deduct actual, reasonable transportation costs, but requests, in the alternative, that an allowance for such costs be "based upon a proper and fair formula of the cost of transportation." Sinclair, Forest, and Tenneco

<sup>1</sup> See Appendix I.

9

50¢	60¢	9 1/10
value at	transportation	onshore
lease	COST	price

take the position that they should be allowed the actual cost of such transportation from the area of production to the sale terminal on-shore. Gulf requests an allowance of "reasonable transportation costs." The appeals also involve the question of whether the Oil and Gas Supervisor was required to give notice and hearing to the lessees under section 2(d) (2) of their leases, prior to his determination.

Section 8(b) of the Act provides as follows:

An oil and gas lease issued by the Secretary pursuant to [the Act] shall "\* \* \* (3) require the payment of a royalty of not less than 12½ per centum, in the amount or value of the production saved, removed, or sold from the lease, and (4) contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease."² (Italics supplied.)

The Act also grants the Secretary discretionary authority to prescribe such rules and regulations as may be necessary to carry out the provisions thereof, and expressly provides sanctions for their violation.³ The applicable regulation of the Department relating to Outer Continental Shelf leasing provides that:

201.41 *Royalties.* Royalties shall be at the rate specified in the lease but in no event shall the royalty on oil and gas be less than 12½ percent of the amount or value of the production saved, removed or sold from the lease \* \* \*⁴

The Department's operating regulations governing oil and gas lease operations on the Outer Continental Shelf provide:

250.64 *Value basis for computing royalties.* The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production \* \* \* 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 paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.⁵

The leases involved in these appeals contain the following pertinent provisions:

Sec. 2. *Obligations of lessee.* In consideration of the foregoing, the lessee agrees: \* \* \* (d) *Rentals and Royalties* (1) To pay rentals and royalties as follows: \* \* \* *Royalty on production.* To pay lessor a royalty of 16⅔ percent in amount or value of production saved, removed, or sold from the leased area.

² 43 U.S.C., sec. 1337(b).

³ 43 U.S.C., sec. 1334(a).

⁴ 43 CFR 201.41.

⁵ 30 CFR 250.64.

August 2, 1963

(2) It is expressly agreed that the Secretary may establish reasonable minimum values for the purposes of computing royalty on products obtained from this lease, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, or area, to the price received by the lessee, to posted prices, and to other relevant matters. Each such determination shall be made only after due notice to the lessee and a reasonable opportunity has been afforded the lessee to be heard.

These provisions follow very closely the wording of the Mineral Leasing Act of 1920, as amended,<sup>6</sup> the regulations promulgated thereunder,<sup>7</sup> and the pertinent provisions of the public lands leases issued by the Department.<sup>8</sup>

The basic problem created by the necessity of barging a high percentage of the crude oil produced from offshore leases issued under the Outer Continental Shelf Lands Act to delivery points on shore has been under consideration in the Department for a number of years. In recognition of the problem the Geological Survey has conducted extensive long-range studies of barging operations from the Government's leases in the Gulf of Mexico to the lessee's several delivery points along the shore. In these studies they have received the full cooperation of the appellant lessees, and others, who have voluntarily supplied statistical information on their barging operations.

These studies reveal that there are numerous unusual and complex factors attendant to the barging of oil from Outer Continental Shelf leases. Among these are the unusually high costs involved in the purchase and maintenance of sea-going barges and tugs, channel depths, tides, weather, availability of terminal capacity, and production difficulties peculiar to offshore operations. Other factors affecting the cost of barging the production from these Outer Continental Shelf leases to onshore delivery points are the volume of crude available, the distances traversed, and the type of barging contract entered into by lessees.

<sup>6</sup> Cf. 30 U.S.C. sec. 226 (a) and (b); 30 U.S.C. sec. 189. Oil and gas leases executed pursuant to the Mineral Leasing Act have been construed to allow for the deduction of transportation costs in the computation of market values and royalty interests. See *United States v. General Petroleum Corporation of California*, 73 F. Supp. 225 (S.D. Calif. 1946), at 263. (The computation formula set forth therein was affirmed on appeal, *Continental Oil Company v. United States*, 184 F. 2d 802 (9th Cir. 1950), at 818-820. It is worthy of note that onshore pipeline transportation was involved in the *General Petroleum* case, whereas the instant facts relate to offshore barging, a distinguishable mode of transportation. For a review of State decisions which have allowed the deduction of onshore transportation costs in the computation of royalties, see 3A Summers, *The Law of Oil and Gas*, 144 (perm. ed. 1958). In this instance, Federal Regulations relating to the computation of royalties are applicable; therefore, as regards the applicability of State law under 43 U.S.C., sec. 1333 (2), it must be concluded that State case law is not controlling.

<sup>7</sup> Cf. 43 CFR 192.32(5) (d); 30 CFR 221.47.

<sup>8</sup> Cf. Public Lands Oil and Gas Lease, Form 4-1158, sec. 2(d) (2).

These factual studies and statistical analyses demonstrate the unusually complex transportation problems with which lessees are faced in the barging of the crude petroleum products from the Outer Continental Shelf leases in question. They will be of obvious relevance in determining reasonable barging costs in this case. They demonstrate that an allowance for barging costs is a relevant matter to be taken into account in computing the royalties due the United States here, where there is no bona fide established market at the field or area where the leases are situated. The precise factors affecting the barging allowance and the weight to be accorded any given element are matters within the discretion of the Secretary for determination as the public interest may require.

The decisions appealed from are therefore reversed and the cases remanded to the oil and gas supervisor with directions to determine a reasonable barging allowance and to consider the allowance so determined as one of the "other relevant matters" referred to in the regulations governing his determinations of the value of production for the purpose of computing royalties,<sup>9</sup> and to adjust the royalty accounts of the lessees accordingly.

The determinations of the supervisor pursuant to this directive shall be subject to the appeal provision of the regulations.<sup>10</sup>

EDWARD WEINBERG,  
*Acting Solicitor.*

## APPENDIX I

Appellant	O. C. S. leases	Supervisor's determination	Appeal filed
Shell Oil Co.-----	0442	Jan. 29, 1959	Feb. 17, 1959
	0443	Jan. 29, 1959	Feb. 17, 1959
	0478	Jan. 29, 1959	Feb. 17, 1959
Sinclair Oil & Gas Co.-----	0438	Mar. 24, 1958	Apr. 11, 1959
	0605	Mar. 24, 1958	Apr. 11, 1959
	0419	Mar. 17, 1958	Apr. 17, 1958
Gulf Oil Corp.-----	0420	Mar. 17, 1958	Apr. 17, 1958
	0453	Mar. 17, 1958	Apr. 17, 1958
	0462	Mar. 17, 1958	Apr. 17, 1958
	0498	Mar. 17, 1958	Apr. 17, 1958
Forest Oil Corp.-----	0434	Feb. 27, 1958	Mar. 20, 1958
Union Producing Co.-----	0480	Dec. 2, 1960	Dec. 21, 1960
Tenneco Oil Co.-----	0580	Aug. 25, 1961	Sept. 16, 1961
	0593-A	Sept. 8, 1961	Sept. 27, 1961
	0594-A	Sept. 8, 1961	Sept. 27, 1961

<sup>9</sup> 30 CFR 250.64.

<sup>10</sup> 30 CFR 250.81.



## CLAIM OF JOHN C. BROCK

TA-249 (Ir.)

*Decided August 12, 1963***Irrigation Claims: Generally**

Since the criteria for an award are the same (although the personnel of different bureaus are involved) under the Public Works Appropriation Acts and under the Act dealing with damage caused by Indian irrigation projects, determinations made under one of these acts may be used as precedents for determining claims arising under the other act.

**Irrigation Claims: Injury: Animals and Livestock**

The loss of cattle which fall or wander into irrigation canals or other irrigation facilities cannot be considered to be the direct result of nontortious activities of officers or employees of the United States.

**Torts: Animals and Livestock**

Under the laws of Montana, before a landowner can recover for damages caused by trespassing animals he is required to fence them out. This does not charge the landowner with the duty to keep animals lawfully at large from coming on his land, or make their entry rightful, so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, not wantonly or intentionally caused. Livestock wander at their own and their owner's risk of loss.

**ADMINISTRATIVE DETERMINATION**

Mr. John C. Brock, St. Ignatius, Montana, by and through his attorney, Mr. F. N. Hamman of Polson, Montana, has timely appealed from the administrative determination (T-D-B-59 (Supp.)) of January 16, 1963, of the Field Solicitor, Billings, Montana, denying his claim in the amount of \$428.44 for the loss of three eight-month-old calves. The loss occurred on August 4, 1962.

The claimant alleges that the calves were lost as a result of falling into an irrigation canal which is part of the Flathead Indian Irrigation Project of the Bureau of Indian Affairs.

Mr. Brock stated his claim as follows:<sup>1</sup>

The pasture which I graze my cattle being on the south side of Dry Creek Canal, approximately 2 miles below Tabor Reservoir. The Government fence being down 3 of my 8 month old calves fell into this canal which resulted in their death. This being a Government fence and concrete canal I assumed this fence was in good condition at all times. These calves were carried down stream in the canal approximately 4 miles which wore the hoofs completely off which resulted in their deaths.

<sup>1</sup> Standard Form 95, Claim for Damage or Injury, submitted by appellant.

In the original determination (T-D-B-59) of November 7, 1962, and in the supplementary determination (T-D-B-59 (Supp.)) of January 16, 1963, the Field Solicitor denied the claim because it "comes within the scope of *Molohon v. United States*, 206 F. Supp. 388 (1962) [D. Mont.] and cases cited therein."

The claimant, through his attorney, excepts to the original and the supplementary determinations, in summary, as follows:

1. The Government "constructed sort of a death trap." The Government should be held liable for damages caused by the "trap."
2. "Law is largely common sense, sensibly applied, and common sense independent of any law leaves me to believe that the Federal Government has done something wrong here and ought to pay for it."
3. "I am not sure the *Molohon* case is a solution to the matter. I don't understand it that way, and I don't think any of the decisions in Montana clarifies the situation on hand."

All three exceptions are adequately answered by the United States District Court for the District of Montana in *Molohon v. United States*.<sup>2</sup> The Court stated:

The question of the duty owed is one of Montana law. See 28 U.S.C.A. secs. 1346(b) and 2674, supra. The case nearest in point is *Beinhorn v. Griswold*, 1902, 27 Mont. 79, 69 P. 557, 59 L.R.A. 771, in which trespassing cattle belonging to the plaintiff wandered onto defendant's mine and mill site and there drank from vats containing poisonous chemicals consisting principally of cyanide of potassium. In appearance the solution resembled water. The Supreme Court recognized that before a landowner could recover damages caused by trespassing animals he is required by Montana law to fence them out, but held that this did not charge the landowner with the duty to keep cattle lawfully at large from coming on his land, or make their entry rightful, so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, but not wantonly or intentionally caused. In the more recent case of *Thompson v. Mattuschek*, 1959, 134 Mont. 500, 506, 333 P. 2d 1022, the court recognized *Beinhorn v. Griswold* as holding that livestock "wander at their own and their owner's risk of loss."

The canal constructed by the Government was an irrigation canal. It is not a "death trap." If the Government wished to recover for damages done by the trespassing cattle, the Government would have to fence them out. However, the existence of dangerous agencies on the land imposes no obligation upon the landowner to fence out trespassing cattle.

<sup>2</sup> 206 F. Supp. 388, 391 (D. Mont. 1962).

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Concerning the second exception, it is obvious that the law of Montana must govern the determination of this claim. That law appears quoted above. It does not militate against common sense to conclude that the owner of livestock who allows that livestock to "wander" does so at his own "risk of loss." Under Montana law, the owner of livestock cannot impose a duty upon his neighbor either to build or maintain a fence in order to protect the livestock.

The third exception questions whether or not *Molohon* furnishes the proper solution to the instant case. It is true that *Molohon* concerns a different factual situation. However, *Molohon* answers the basic issues in the instant case. Appellant has not cited any cases to the contrary. The quoted portion of *Molohon* makes it quite clear that a landowner is not liable to the owner of livestock for injuries to that livestock caused by dangerous agencies on his land simply because he did not fence the livestock out. Such livestock wander "at their own and their owner's risk of loss."

The Field Solicitor considered the claim only under the Federal Tort Claims Act.<sup>3</sup> The denial of the claim under that act is affirmed.

The claim was not considered by the Field Solicitor under the statute relating to claims for damage caused by Indian irrigation works,<sup>4</sup> and no reason was stated why it was not considered under that act. That act provides for the settlement of claims arising out of the survey, construction, operation, or maintenance of Indian irrigation projects. Since the canal in question is part of the Flathead Indian Irrigation Project, the claim will also be considered under that act.

To be compensable under that act the damage must be a direct result of some nontortious activity of officers or employees of the United States in the survey, construction, operation, or maintenance of Indian irrigation projects. This criterion for recovery is similar to the standard for recovery for damage under the Public Works Appropriation Acts.<sup>5</sup> These acts provide for recovery when the damage is the direct result of nontortious activity of employees of the Bureau of Reclamation.

No case in point seems to have arisen under the Indian irrigation projects act. However, similar cases have been decided under the Public Works Appropriation Acts. Since the criteria for an award are the same under both acts, except that personnel of different Depart-

<sup>3</sup> 28 U.S.C., 1958 ed. sec. 2671 *et seq.*

<sup>4</sup> Act of February 20, 1929, 45 Stat. 1252, 25 U.S.C., 1958 ed., sec. 388.

<sup>5</sup> The current act is 76 Stat. 1216.

ment of the Interior bureaus are involved, the determinations under the Public Works Appropriation Acts will be used as precedents. These determinations state the long-established rule of this Department that the loss of cattle which fall or wander into irrigation canals or other irrigation facilities cannot be considered to be the direct result of nontortious activities of Government employees.<sup>6</sup>

The same rule governs the instant case. The loss of the calves cannot be considered to be the direct result of nontortious activities of officers or employees of the United States.

Therefore, we affirm the administrative determination (T-D-B-59 (Supp.)) of January 16, 1963, of the Field Solicitor, Billings, Montana, denying this claim.

FRANK J. BARRY,  
*Solicitor.*

### APPEAL OF KORSHOJ CONSTRUCTION COMPANY

IBCA-321

*Decided August 27, 1963*

#### Contracts: Protests—Contracts: Waiver and Estoppel—Contracts: Notices

The right of a contractor to compensation is dependent upon timely compliance with a protest provision in the contract. This rule is not absolute but subject to exceptions. Under certain conditions failure to make timely protest may be waived by the contracting officer. The failure to waive is reviewable by the Board of Contract Appeals. One of the factors to be considered in such review is whether or not the lack of timeliness is prejudicial or injurious to the Government.

#### Contracts: Contracting Officer

Final delivery, final acceptance, and final payment do not operate to divest the contracting officer of his authority to act under the contract. Hence, these elements are not an absolute bar to allowance of a claim.

### BOARD OF CONTRACT APPEALS

This appeal concerns two claims which arose under the above-identified contract for the construction and completion of the earthwork, concrete lining and structures, Wellton-Mohawk Main Conveyance Channel (Stations 2377/05 to Station 3304/22.59), and Snyder Ranch Conveyance Channel for Wellton-Mohawk Drainage System, Wellton-Mohawk Division, Gila Project.

<sup>6</sup> See, e.g., *Dale Jones*, TA-185 (Ir.) (April 23, 1959); *Ray Strouf*, TA-180 (Ir.) (February 6, 1959); *A. L. Yelek*, TA-88 (Ir.) (December 7, 1953); *Alfred Koeltzow*, TA-18 (Ir.) (July 25, 1949).

August 27, 1963

*Claim No. 1*

Claim No. 1 is for additional compensation in the amount of \$2,014.59. It was denied by the contracting officer in findings of fact and decision of February 28, 1962. The contractor alleged that additional work was required for the construction of embankments at 42 pipe siphon ends in a form differing from that called for by the applicable drawings.

The contracting officer, in his findings of fact and decision of February 28, 1962, denied the claim on the following grounds:

- (1) The letter of October 26, 1961, was untimely since it was the "first notice" of the claim, whereas the work had been completed on July 3, 1961.
- (2) The contractor failed either to request written instructions or to file timely protest in accordance with paragraph 9 of the specifications.<sup>1</sup>
- (3) That even if the contractor had complied with these requirements, its claim would be without merit in any event.

Timely appeal was taken on April 16, 1962.

Department Counsel moved that the Board dismiss Claim No. 1 for failure to comply with paragraph 9, and in the alternative, moved for "summary judgment." Appellant's counsel opposed the motions.

*A. Lack of timely protest*

There is nothing in the findings of fact and decision of February 28, 1962, which would indicate that the consideration of the claim would be prejudicial to the interests of the Government. The consideration of the merits of the claim by the contracting officer in paragraph 7 of his decision does not amount to a waiver of the failure to request writ-

<sup>1</sup> Paragraph 9 of the specifications states: "Protests. If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within 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."

ten instructions or to make timely protest, since this failure is relied upon elsewhere in the decision.<sup>2</sup> Nevertheless, the circumstances of the claim, as described and analyzed by the contracting officer, afford a good indication that its merits are presently capable of determination without prejudice to the Government.

The rule that a failure to comply with a contractual protest or notice requirements prevents consideration of a claim by a Board<sup>3</sup> or a Court<sup>4</sup> is not absolute, but is subject to certain well-recognized exceptions. This Board and other appeal boards, in accordance with applicable court decisions, have held that a formal protest or notice is not necessary where:<sup>5</sup>

a. The records of the Government show that the contracting officer or his authorized representative in fact knew of the circumstances that form the basis of the alleged extra, change or changed condition.<sup>6</sup>

b. The contracting officer actually considered the contractor's claim on its merits without invoking the protest or notice requirement.<sup>7</sup>

c. The failure to protest or notify is not prejudicial or injurious to the interest of the Government.<sup>8</sup>

<sup>2</sup> *E. V. Lloyd & Company*, IBCA-143 (February 12, 1958), 58-1 BCA par. 1609.

<sup>3</sup> *C. C. Terry*, IBCA-330 (July 30, 1963); *Utility Construction Company*, IBCA Nos. 149 and 161 (June 19, 1958), 65 I.D. 278, 58-1 BCA par. 1804.

<sup>4</sup> *J. A. Ross and Company v. United States*, 126 Ct. Cl. 323, 328-30 (1953); *Palumbo Excavating Company v. United States*, 125 Ct. Cl. 678, 687-89 (1953).

<sup>5</sup> For an excellent discussion of the problems involved see Note in 5 *Govt. Contr.* 153.

<sup>6</sup> *Herman Groseclose*, IBCA-190 (December 22, 1960), 61-1 BCA par. 2885, 3 *Govt. Contr.* 63 (f); *Peter Kiewit Sons' Co.*, ASBCA No. 5600 (April 14, 1960), 60-1 BCA par. 2580, 2 *Govt. Contr.* 275. Oral testimony by interested or unauthorized persons was held not sufficient in *Flora Construction Company*, IBCA-101 (September 4, 1959), 66 I.D. 315, 59-2 BCA par. 2312.

<sup>7</sup> *Palumbo Excavating Company v. United States*, fn. 4 *supra*; *General Excavating Company*, IBCA-188 (September 21, 1960), 67 I.D. 344, 60-2 BCA par. 2771, 2 *Govt. Contr.* 539.

<sup>8</sup> In *Monarch Lumber Company*, IBCA-217 (May 18, 1960), 67 I.D. 198, 60-2 BCA par. 2674, 2 *Govt. Contr.* 290, the Board stated:

"With respect to the circumstances in which a waiver should be granted, we quote with approval, as furnishing a proper guide in contract administration, and as stating a principle that will be applied \* \* \*, the following language from the holding in *Sanders* [W.D. BCA No. 955, 3 CCF 862, 866 (1945)]:

"\* \* \* 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 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."

See also *C. C. Terry*, fn. 3 *supra* (held prejudicial); *Montgomery-Macri Company and Western Line Construction Company, Inc.*, IBCA Nos. 59 and 72 (June 28, 1963), 70 I.D. 242 (held unprejudicial); *Flora Construction Company*, fn. 6 *supra* (held prejudicial); *McWaters and Bartlett*, IBCA-56 (October 31, 1956), 56-2 BCA par. 1140 (held prejudicial).

August 27, 1963

A determination concerning the foregoing matters made by the contracting officer, like other determinations made by a contracting officer, is, of course, reviewable by the Board upon appeal.<sup>9</sup>

The allegations of the contractor, the findings of the contracting officer, and the data in the appeal file all indicate that the lack of timely notice or protest does not constitute an obstacle to fair and accurate evaluation. In these circumstances, the failure to notify or protest may be disregarded.

### *B. Summary Judgment*

Neither the rules governing the procedures before the Board<sup>10</sup> nor the procedures developed by the Board provide for summary judgment in favor of either party.

Hence, the motion to dismiss Claim No. 1 for failure to protest and the motion for summary judgment are denied.

### *Claim No. 2*

Claim No. 2 is in the amount of \$135,661.75. The contractor has alleged that representatives of the Government directed it to construct large portions of the drainage channels in a manner at variance with the plans and specifications. The claim was denied by the contracting officer in his letter decision of March 27, 1962, on the following grounds:

(1) Failure to ask for written instructions or failure to protest in accordance with paragraph 9.

(2) Late presentation of the claim.

The Department Counsel moved for the dismissal of Claim No. 2 on the same grounds. Appellant's counsel opposed the motion.

Concerning the failure to ask for instructions or to protest, the decisions cited with respect to Claim No. 1 are also applicable to Claim No. 2. The situation presented by the later claim is analogous to that described in the italicized portions of the following excerpt from one of those decisions:

\* \* \* where the record establishes, or where the contractor requests a hearing to prove, either substantial compliance with the notice requirement or circumstances justifying a waiver of lack of compliance, we follow the rule of declining to sustain motions for dismissal, based solely on the absence of formal notice. (Italics supplied.)<sup>11</sup>

<sup>9</sup> *Montgomery-Macri, et al.*, fn. 8 *supra*; *Monarch Lumber Company*, fn. 8 *supra*; *Todd Shipyards Corporation*, ASBCA Nos. 2911 and 2912 (January 25, 1957), 57-1 BCA par. 1185.

<sup>10</sup> 43 CFR 4.

<sup>11</sup> *Monarch Lumber Company*, fn. 8 *supra*; accord, *Todd Shipyards Corporation*, fn. 9 *supra*.

At this stage of the proceedings the record pertaining to Claim No. 2 is insufficient to show whether or not the interest of the Government would be prejudiced by a waiver of the contractual requirements for protests and notices. Denial of the motion to dismiss will afford both the contractor and the Government an opportunity to present evidence, either in written form or at a hearing, upon the issue of prejudice, and, thus, to make that issue ripe for determination by the Board.

With respect to the question of lateness as such, in *M. Benjamin Electric Co., Inc.*,<sup>12</sup> the Board concluded that "final delivery, final acceptance, and final payment do not operate to divest the contracting officer of his authority to act under the contract." It follows as a corollary, that the finality of delivery, acceptance, and payment does not necessarily bar the consideration of a claim. Whether it does or not has to be decided under the circumstances of each case, and, where warranted, on a factual determination made after a conference or hearing.

Hence, the motion to dismiss Claim No. 2 is denied.

#### *Request for Hearing*

Appellant has asked for a conference and a hearing. In the present stage of this appeal, the Board concludes that the holding of a conference for the purposes stated in 43 CFR 4.9 would simplify procedures and may provide for a speedier disposition of the appeals. Hence, the request to hold a conference is granted. A ruling on the request for a hearing is reserved.

The parties will be notified separately concerning the place and time of the conference.

#### *Summary*

1. The motions to dismiss Claim No. 1 and to enter summary judgment in favor of the Government are denied.
2. The motion to dismiss Claim No. 2 is denied.
3. The request to hold a conference (43 CFR 4.9) is granted.
4. Ruling is reserved concerning the granting of a hearing.

PAUL H. GANTT, *Chairman.*

WE CONCUR:

THOMAS M. DURSTON, *Member.*

HERBERT J. SLAUGHTER, *Member.*

<sup>12</sup> IBCA-280 (June 9, 1961), 61-1 BCA par. 3058, 3 Govt. Contr. 352.



## APPEAL OF THE CARDELL COMPANY

IBCA-384 *Decided September 3, 1963***Contracts: Appeals—Rules of Practice: Appeals: Timely Filing**

Under a Government contract that contains the usual form of "disputes" clause, an appeal from a findings of fact and decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days specified in the contract.

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

The timeliness of an appeal is governed by the time elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed by him to the contracting officer. The circumstance that the last day of the appeal period falls on a Saturday is immaterial and does not extend the appeal period.

**BOARD OF CONTRACT APPEALS**

On July 18, 1963, Department Counsel moved for the dismissal of the instant appeal on account of lack of timeliness. Appellant remained mute.

An examination of the appeal file establishes that the Contracting Officer issued the pertinent Findings of Fact and Decision<sup>1</sup> on May 9, 1963. It was mailed to the contractor-appellant on May 14, 1963, by registered mail. The return receipt shows that it was received by the contractor-appellant on May 16, 1963.

The appeal file further contains the notice of appeal dated June 14, 1963. But, according to the postmarks appearing on the envelope in which it was sent (Certified Mail No. 876992), it was not mailed until June 17, 1963.

The disposition of the motion follows the principles stated by the Board in *Wiscombe Painting Company*:<sup>2</sup>

[The "Disputes"] Clause \* \* \* fixes 30 days as the period of time within which an appeal may be taken; specifies that this period shall run from the date on which the contractor receives a copy of the decision; and further specifies that the appeal shall be mailed or otherwise furnished to the contracting officer within the 30 days. \* \* \* the documents of record clearly show that the notice of appeal was not mailed to the contracting officer until sometime after that date. Hence, the motion to dismiss is well taken \* \* \*.

In the present case the 30 days expired on June 15, 1963. This day was a Saturday. However, that fact did not extend the time for appealing.<sup>3</sup>

<sup>1</sup> The Findings of Fact and Decision contains a clear *caveat* informing the contractor of his appeal rights. *Earl B. Bates Nursery*, IBCA-368 (May 13, 1963), 70 I.D. 163.

<sup>2</sup> IBCA-78 (October 26, 1956), 56-2 BCA par. 1106.

<sup>3</sup> See *Bushman Construction Company*, IBCA-193 (April 23, 1959). 66 I.D. 156, 59-1 BCA par. 2148, 1 Gov. Contr. 312, 319, 324.

The Board finds that the instant appeal is untimely.<sup>4</sup>

The motion to dismiss is granted and the appeal is dismissed for lack of timeliness.

PAUL H. GANTT, *Chairman.*

I CONCUR:

HERBERT J. SLAUGHTER, *Member.*

### SOUTHERN UNION PRODUCTION COMPANY

A-29384

*Decided September 12, 1963*

#### Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Description of Land

An assignment of an oil and gas lease which describes land not covered by the parent lease is properly rejected even though the incorrect description was in error and the parties intended to assign lands in the parent lease.

#### Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Description of Land

Where an assignment of an oil and gas lease describes both land covered and land not covered by the parent lease, it is to be approved as to the land in the lease and rejected as to the land not in the lease.

#### Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Description of Land—Oil and Gas Leases: Extensions

Where an assignment of an oil and gas lease issued prior to September 2, 1960, covering all the lands in it, is approved as to only part of the lands described in the assignment, it constitutes a partial assignment and serves to extend the lease for not less than two years from the effective date of the assignment.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Southern Union Production Company has appealed to the Secretary of the Interior from a decision dated January 26, 1962, by which the Division of Appeals of the Bureau of Land Management affirmed a decision of the land office at Santa Fe, New Mexico, denying approval of the assignment of oil and gas lease Las Cruces 067979 from Southern Union Gas Company to Southern Union Production Company and also of the assignment of a portion of the same lease by Southern Union Production Company to Consolidated Oil & Gas,

<sup>4</sup> The Board is without jurisdiction to consider an untimely appeal. *Midland Constructors, Inc.*, IBCA-272 (May 3, 1961), 68 I.D. 124, 61-1 BCA par. 3012, 3 Gov. Contr. 358 (c).

September 12, 1963

Inc., on the ground that the assignments were indefinite for want of proper description of the land affected thereby.

The form furnished by the United States for assignments of oil and gas leases or interests in oil and gas leases covering land of the United States requires the insertion of both a reference to the serial number of the lease issued by the United States and also a legal description of the land affected thereby. The proper serial number, LC 067979, was listed in each of the assignments presented to the land office for approval, but, in the first assignment, the land affected was described as the NE $\frac{1}{4}$  of sec. 34 and the NW $\frac{1}{4}$  of sec. 25 whereas the lease included only the NE $\frac{1}{4}$  of sec. 34 and the NW $\frac{1}{4}$  of sec. 35. The second assignment described the land assigned, the NE $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 34, as being in township 23 north whereas all of the land included in the lease is in township 23 south.

The appellant contends on appeal that, because the assignment instruments identified the lease to be affected by the assignments, the land office could very easily refer to the lease to obtain the correct description of the land in each instance and should have approved the assignments, thus extending the term of the lease.

Lease Las Cruces 067979 contained two quarter sections of land, and the first assignment described two subdivisions. However, as we have seen, the description for one of the quarter sections did not cover land included in the lease. The Department has consistently held that descriptions must be read as presented and not interpreted or altered to conform with what may have been the intention of the applicant. Thus, a departmental employee cannot assume responsibility for preparing an acceptable description of land by ignoring any portion of the description submitted or by altering a description submitted to cause the document which contains it to become valid. The "NW $\frac{1}{4}$  SE $\frac{1}{4}$ " cannot be interpreted to mean the "NW $\frac{1}{4}$ NE $\frac{1}{4}$ " because the SE $\frac{1}{4}$  is also designated in the same oil and gas lease offer and the NW $\frac{1}{4}$ NE $\frac{1}{4}$  is the only tract of land available for leasing which is contiguous to other land described in the offer. *W. H. Burnett, William Weinberg*, A-28037 (August 20, 1959). The designation of section 22 cannot be regarded as a designation of the NW $\frac{1}{4}$  of section 22 merely because a homestead application is limited to 160 acres and a relinquishment of a homestead entry on the NW $\frac{1}{4}$  of section 22 had just been filed. *Orvil Ray Michelberry*, A-28432 (November 16, 1960). The "W $\frac{1}{2}$ SE $\frac{1}{4}$  and E $\frac{1}{2}$ SW $\frac{1}{4}$ " cannot be construed as the "W $\frac{1}{2}$  SE $\frac{1}{4}$ " and the "E $\frac{1}{2}$ SW $\frac{1}{4}$ " because there is some duplication in the

first description and the acreage is in excess of the maximum for homesteads. *Daniel H. Cruz*, A-28524 (February 28, 1961). The "N $\frac{1}{4}$ " of section 8 cannot be read as the "N $\frac{1}{2}$ N $\frac{1}{2}$ " of section 8 because the latter reading will avoid a violation of the 640-acre rule by an oil and gas lease offer. *Duncan Miller*, A-28767 (July 23, 1962). The "SE $\frac{1}{4}$ , NE $\frac{1}{4}$ " cannot be read as the "SE $\frac{1}{4}$ NE $\frac{1}{4}$ " because the rental submitted with an oil and gas lease offer is consistent with the latter reading and not with the former and because the second reading conforms to the description of land posted on the land office bulletin board as available for leasing. *Lendal R. Smith, Sr.*, A-28868 (August 10, 1962).

The duty of a land office employee extends only to a determination whether a document presented can be accepted, not to remedial action which will make it acceptable. Therefore, it was correct to reject the assignment insofar as it related to the quarter section not found in Las Cruces 067979. However, since the other quarter section (NE $\frac{1}{4}$ -sec. 34) was included in the lease, absent any other defects the assignment should have been approved as to it. The fact that the description in an offer is in part acceptable and in part erroneous does not require that the offer be rejected in its entirety. *Gulf Oil Corporation et al.*, 69 I.D. 30 (1962); *Duncan Miller*, A-28767 (July 23, 1962), A-28767 (Supp.) (October 10, 1962); *L. M. Schwartzkopf*, A-29072 (November 6, 1962). The rule is equally applicable to assignments.

Since the first assignment was in part good, we must examine the second assignment. It described only one parcel, and, since that parcel was not covered by the lease, it was properly rejected for the reasons given above.

This conclusion, however, does not dispose of the case. Under our view, the first assignment was, in effect, a partial assignment since it conveyed only a portion of the lands in Las Cruces 067979. As a partial assignment, upon approval, it segregated the original lease into two separate leases, one for the retained land and one for the assigned, and extended both the leases for not less than two years from the effective date of the assignment (section 30(a) of the Mineral Leasing Act, as amended by the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 187a)),<sup>1</sup> which, all else being regular, is July 1, 1961. Thus, the leases were extended to June 30, 1963.

<sup>1</sup> The further amendment of section 30(a) by section 6 of the act of September 2, 1960 (74 Stat. 790; 30 U.S.C., 1958 ed., Supp. IV, sec. 187a), was not effective as to leases issued prior to September 2, 1960.

September 16, 1963

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 Division of Appeals of the Bureau of Land Management is affirmed in part and reversed in part and remanded for further proceedings consistent herewith.

ERNEST F. HOM,  
*Assistant Solicitor.*

**BARNEY R. COLSON**

A-28617

*Decided September 16, 1963*

**Bureau of Land Management—Rules of Practice: Appeals: Generally**

The Director of the Bureau of Land Management is not limited in his consideration of an appeal from a land office decision to the particular question raised by that appeal. He may, even in the absence of an appeal, take up any matter pending in any land office and dispose of it without waiting for a decision by the local land office.

**Res Adjudicata**

The principle of *res judicata* or finality of administrative action will not be applied so as to prevent the Director of the Bureau of Land Management from reversing or correcting decisions of his subordinate officers where the matter remains within the jurisdiction of the Bureau.

**Scrip: Special Types of Scrip**

The right to locate Sioux Half-Breed scrip is a personal right, not subject to transfer. Such scrip may, however, be located by an attorney-in-fact with authority from the scribee to locate the land in the name of the scribee.

**Scrip: Special Types of Scrip**

It is proper to reject an application to locate Sioux Half-Breed scrip where the party seeking to make the selection of land has not shown that he has authority to locate the land in the name of the scribee.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

This is an appeal to the Secretary of the Interior by Barney R. Colson from a decision by the Director, Bureau of Land Management, dated July 27, 1960, holding that Colson has not submitted proper evidence of his authority to locate land under two certificates of Sioux Half-Breed scrip and holding further that, in order to exercise the rights conferred by the certificates, Colson must show, in

addition to his authority to locate the land, that his authority in this respect has not been revoked by the scribees.

Colson contends that the Director did not have jurisdiction to inquire into the validity of the documents presented in support of his application to locate the land; that the matter of the validity of the scrip is *res judicata*; that the Director erroneously concluded that the applicant could not locate the scrip with the documents presented; and that all of the lands applied for are available for the satisfaction of the scrip rights. He contends, further, that the Director's decision is a deviation from established law and policy in the matter of Sioux Half-Breed scrip rights and that the decision is a harsh act of discrimination against his rights.

The rights involved have their inception in a treaty concluded with the Sioux Indians in 1830 (7 Stat. 328) under which the Sioux and the United States agreed that the half-breeds of the Sioux Nation would be permitted to occupy a certain tract of country. Thereafter, by the act of July 17, 1854 (10 Stat. 304), the President was authorized to exchange with the half-breeds having an interest in the tract in the then Territory of Minnesota set aside for them by the 1830 treaty and for that purpose he was authorized—

to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the Commissioner of the General Land-Office, in and to said tract of land on reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants—which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed-bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by Government; upon which they have respectively made improvements: *Provided*, That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: *And provided further*, That no transfer or conveyance of any of said certificates or scrip shall be valid.

Among those receiving scrip under the 1854 act were Ellen Angie and Anthony Renville. It is Ellen Angie's Certificate No. 379-C for 80 acres and Anthony Renville's Certificate No. 398-D for 160 acres under which Colson now claims the right to locate 240 acres of public land.

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Colson filed his application to locate certain land in Florida with the scrip certificates on August 27, 1958,<sup>1</sup> after having been informed by the Bureau of Land Management on January 20, 1956, that the certificates were valid, not having been used for the acquisition of public lands, and that they might be used by an attorney-in-fact or a substitute attorney-in-fact. With his application he filed certain documents which he claims show a right in him to locate the land under the certificates. He thereafter twice amended his application by deleting certain land and substituting other land.

On February 26, 1959, the Eastern States land office found that the application contained an excess of 78.44 acres over the 240 acres authorized to be located under the certificates. The land office rejected the application as to so much thereof as covered lands which the office found not to be available for scrip location, leaving 144.42 acres under application. Colson was informed by that decision that his application must be amended to show that the land selected was being located in the name of the parties to whom the scrip had been issued or by their duly authorized agent on their behalf. He was further informed that he might, within 30 days, (1) offer for consideration an amendment of his application by selecting other land in place of that found not available for scrip location; (2) accept the partial rejection of his application and withdraw from the remaining lands in the application sufficient land so as to reduce the area applied for to an aggregate of 80 acres, in which event his application would be processed in connection with Certificate No. 379-C; or (3) file a withdrawal of his application, in which event his right to locate the scrip under a new application would not be prejudiced. Colson was informed that if he failed to take any of the three courses indicated his present application would be considered for processing in connection with Certificate No. 398-D and that upon acceptance of the certificate in satisfaction of the lands applied for (the 144.42 acres remaining in the application), any excess acreage remaining in that certificate would be considered as forfeited.

Colson requested reconsideration of that decision insofar as it rejected his selection of 39.91 acres in Escambia County, Florida, which the land office found had been withdrawn from all forms of disposition by Public Land Order No. 869, and stated that if this request were given favorable consideration he would substitute other acreage for

<sup>1</sup> The claims had been timely recorded under the act of August 5, 1955 (69 Stat. 534).

the balance of the rejected acreage. That request was denied on March 18, 1959.

Thereafter on March 25, 1959, Colson amended his application to show that the application was made by him as attorney-in-fact by substitution for Ellen Angie with respect to Certificate No. 379-C for 80 acres of land and as attorney-in-fact by substitution for Anthony Renville with respect to Certificate No. 398-D for 160 acres of land and requested that any patent or patents issued for the selected lands be issued to him in that fashion. He also substituted other land for some of the land which had been rejected out of his application. On the same day he appealed to the Director from that portion of the decision of February 26, 1959, which had rejected his application as to the 39.91-acre tract.

The Director found, as indicated above, that Colson had not submitted proper evidence of his authority to locate land in the names of the scripees.

Before considering whether the Director was correct in this respect, Colson's arguments that the Director did not have jurisdiction to make the decision appealed from and that the validity of the scrip is *res judicata* will be considered.

Colson contends that as his appeal to the Director was directed solely to the question of the availability of the 39.91 acres for satisfaction of scrip rights, the Director could not consider whether the documents which Colson submitted in support of this claim are sufficient to permit him to locate land.

The argument is not sound. The Director was not limited in his consideration of Colson's appeal to the particular question raised by that appeal. The Director is charged with the administration of the various public land laws, under the general supervision of the Secretary of the Interior. He has authority, and it is his duty, to determine whether the various requirements of those laws are complied with by applicants for the public lands. He does not function only by way of appeal. He may, in the absence of an appeal, take up any matter pending in any of the land offices and dispose of it without waiting for a decision by the local office. His action in this case in not limiting himself to the question of the availability of particular lands for location under the scrip and in passing upon the merits of Colson's amended application of March 25, 1959, was entirely proper and in the interest of good administration. *Cf. Knight v. United States Land Association*, 142 U.S. 161, 176 (1891).



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Colson's argument that the question of the validity of the scrip is *res judicata* encompasses not only his contention that the particular scrip certificates under which he made his application have been determined to be valid but also his contention that his credentials to exercise the rights conferred by such certificates have already been determined to be satisfactory.

As to the validity of the scrip certificates, the Director did not question them in any way. He has recognized that the certificates were issued to persons entitled to receive them under the 1854 act and that these particular certificates have not been used for the acquisition of public land. He has also recognized that the certificates may be used to locate public land by an attorney-in-fact or by a substitute attorney-in-fact of the scribees. Obviously, such recognition that the right to locate may be exercised by an attorney-in-fact cannot be considered as an adjudication of the effectiveness of powers of attorney presented to support particular certificates.

Colson's statement that the sufficiency of his credentials was reaffirmed by the decision of the Eastern States land office of February 26, 1959, is not borne out by the decision itself. At most, the decision stated that the application would be processed, if amended in the manner indicated. This meant nothing more than that the land office would take the application up for further consideration. However, even if the Eastern States land office had determined that the documents presented by Colson were such as to entitle him to locate public land thereunder, the Director would not have been estopped from reversing the Eastern States land office. The Department has a continuing jurisdiction with respect to public lands until a patent issues. The principle of *res judicata* or finality of administrative action will not be applied so as to estop the Director of the Bureau of Land Management from reversing or correcting decisions of his subordinate officers where, as here, the matter remains within the jurisdiction of the Bureau. See *United States v. United States Borax Company*, 58 I.D. 426 (1943).

We come then to the question whether Colson has established his asserted right to locate public land under the certificates.

The certificates give the scribees the right to locate designated amounts of public land. The statute itself provides that no transfer or conveyance of any Sioux Half-Breed certificate shall be valid. Because of this provision in the 1854 act, the Department has always held that the right to locate land thereunder is a personal right arising

in the scrip and not subject to transfer. While it has recognized that the location may be made under a power of attorney giving the attorney authority to locate the land in the name of the scribee (see *Allen et al. v. Merrill et al.*, 12 L.D. 138, 156 (1891)), it has in the past refused to recognize locations made under such powers of attorney when it felt that the transaction was, in fact, a transfer of the scrip. At a time when attempts were being made to locate under many of the certificates, prior to the beginning of the Twentieth Century, it refused to recognize locations under the certificates where it had evidence that the scribee had sold his certificate under an arrangement whereby the certificate was delivered to a purchaser together with two other documents, one a power of attorney to locate land under the scrip certificate and do whatever might be necessary to get a patent, and the other a power of attorney to sell and convey any land which the half-breed might thereafter acquire from the United States. Under this apparently frequently used arrangement, both powers would be signed by the scribee in blank, with spaces left in the documents for the later insertion of the names of the attorneys and the description of the land. When the Department had knowledge of the use of this device, it refused to recognize the validity of a location made under a power of attorney to locate land. *Allen et al. v. Merrill et al.*, 8 L.D. 207 (1889). That decision was upheld on review (12 L.D. 138) and followed by the Department in other cases. The Department held in *Strong v. Pettijohn et al.*, 21 L.D. 111 (1895), that where the scrip had been, in fact, assigned by a double power of attorney, as described above, the location of the land under the scrip certificate must be canceled. See also *John W. Poe*, 29 L.D. 309 (1899).

However, the Supreme Court of Minnesota, in which State a great many of the locations were made, took a different view of these so-called double powers of attorney. When a question of title to land within the State was presented to it, the one party claiming title under a conveyance from the scribee and the other party claiming under a prior conveyance by the attorney-in-fact of the scribee whose authority was shown to include the authority to sell and convey the land, the court upheld the prior conveyance by the attorney-in-fact. The court held that the power of attorney to sell and convey could not be defeated by parol evidence that the parties intended to effect a transfer of the scrip. It held that no restraint is imposed upon the right of property in the land "after it is acquired by location of the

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scrip" and that a simple power to sell would extend to land subsequently acquired by means of scrip. There the land had apparently been located by one Foster under a separate power of attorney from the scribee. *Gilbert v. Thompson*, 14 Minn. 544 (1869).

In *Thompson v. Myrick*, 20 Minn. 205 (1873), affirmed on appeal, 99 U.S. 291 (1878), Myrick was shown to have had a power to locate on behalf of the scribees which he transferred to Thompson "with a view to the location thereof for the benefit of" the scribees. Myrick and Thompson made an agreement whereby Myrick would "upon the location of the said scrip, secure the title to the land, whereon the same may be located, to be lawfully vested in the said Benjamin Thompson." Thompson located the scrip in the name of the scribees and Myrick procured deeds from the scribees to his (Myrick's) wife. The suit was concerned with the validity of the agreement between Myrick and Thompson that Myrick would secure title to the land, after location, to Thompson. The court decreed specific performance of the contract to convey the land. With respect to the location, the court said:

As the scrip was made non-assignable by the act of Congress, (10 Stat. at Large, 304,) and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scribees was that of an attorney in fact, duly authorized to locate the scrip for them. So far as the location is concerned, there is no ground for supposing that it was not made prudently, and for the best interests of Myrick's (the attorney's) principals. So far as appears in this case, Myrick's duty in his fiduciary relation to the scribees was at an end when the location was complete. As this relation was at an end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (enuring from the location,) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's interests and his duty to locate the scrip to the best advantage of his principals.

In 1902, the Supreme Court of the United States, in *Midway Company v. Eaton*, 183 U.S. 602, 607, reviewed not only these decisions of the Minnesota Supreme Court but also certain decisions of the Department involving such double powers of attorney, including the *Allen* cases, *supra*. In the *Midway* case a scrip certificate had been located on land in Minnesota by Eaton, who was shown to be the scribee's attorney-in-fact for the purpose of locating the land. The Department later refused to recognize the validity of the location because the scribee had at the same time executed a power of attorney

to another authorizing him to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota which he then owned or might thereafter acquire or become interested in, by virtue of the location of the scrip in question, and to convey the land. The Department held this to be an assignment of the scrip, in violation of the statute (*Hyde et al. v. Eaton et al.* (On review), 12 L.D. 157 (1891)), and issued a patent to the land covered by the location to another. Title to the land under the scrip location had, by mesne conveyances, become vested in Eaton. The Supreme Court of Minnesota upheld Eaton's title to the land over that of the subsequent patentee of the United States, holding that the scribee, or her successors in interest, could not be deprived of their rights in the land by the assumption of a supervisory power by the officials of the land department (82 N.W. 861 (1900)).

When the case came before the United States Supreme Court, it said that the controversy turned upon the validity of the scrip locations and found that the locations were valid. It held that it was error for the Department to have held that the locations made by Eaton were invalid and to have canceled the entries. It held that title to the land passed to the scribees by virtue of the locations.

As we understand the decision of the United States Supreme Court, it held, in effect, that this Department should not refuse to recognize locations made under powers of attorney even though it had evidence that the Indian had by another document either conveyed the land prior to location or vested in another the right to convey the located land. In other words, where the location was shown to have been made under a valid power of attorney to locate given by the scribee the fact that the scribee may have also conveyed the land to another by means of a blank quitclaim deed prior to location or given another (without naming him) a power of attorney to convey the land upon its location did not make the transaction a transfer of scrip within the prohibition of the 1854 act. In all of the cases which the court reviewed, however, there was a valid location of the land, or, at least, as the court said with respect to its decision in *Felix v. Patrick*, 145 U.S. 317 (1892), no question as to the validity of the location was raised.

The Director held that the documents presented by Colson do not show authority vested in him to locate land for either of the scribees.

We have examined the documents and agree that Colson has not presented any evidence of a power vested in him to locate land in the name of either of the scribees under the scrip certificates.

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The so-called Guarantees whereby the W. E. Moses Land Scrip and Realty Company guaranteed the validity of the certificates and sold the Ellen Angie scrip Certificate No. 379-C to Colson for \$6,000 and the Anthony Renville Certificate No. 398-D for \$13,600 are, of course, ineffective as transfers of any rights to locate covered by the certificates in view of the prohibition against the transfer or conveyance of the scrip.

The quitclaim deed dated May 19, 1915, signed by Ellen Angie Williams does nothing more than to convey to Colson any title which she might have or thereafter acquire *by location* of her certificate. It does not vest in Colson any authority to locate land in the scribee's name.

The power of attorney by substitution which Colson holds from Jesse L. Linn with relation to the Ellen Angie scrip shows nothing more than that Ellen Angie by power of attorney dated February 21, 1910, authorized Linn to enter upon and take possession of any and all lands in which she might be interested *by virtue of the location* of her scrip and further authorized Linn to sell and convey—

any and all lands already located with said scrip, or any part or parts thereof; and any and all lands which she would thereafter acquire or become seized of and which she should thereafter become interested in *by virtue of the location* of said scrip \* \* \*. [Italics supplied.]

The power of attorney by substitution which Colson has presented further recites that the original power of attorney was by its terms made irrevocable and authorized Linn to appoint a substitute or substitutes to do and perform on behalf of and in the name, place, and stead of Ellen Angie Williams, formerly Ellen Angie,

any and all of the acts which the said attorney in fact was, by said instrument, authorized to perform; as more fully appears by the said instrument, which is hereto attached and made a part hereof.

No power of attorney from Ellen Angie Williams was attached to this document when it was presented by Colson in support of his application. As the Director pointed out, Colson has presented nothing, except the statement contained in the power of attorney by substitution, to show that Jesse L. Linn had, in fact, been appointed to act in any capacity for Ellen Angie in relation to the scrip. Further, the power of attorney by substitution authorizes only the management and sale of land to be obtained by location of the scrip.

On appeal, Colson states that Certificate No. 379-C was accepted by the Department when Jesse L. Linn, as attorney-in-fact, filed an

application for the location of the scrip on specific lands in Wyoming. He states that, for reasons not involving the validity of the scrip or the credentials under which it was presented to the Department, the application to locate the Ellen Angie scrip was rejected since the Governor of Wyoming had applied for the same land under another act of Congress some three months earlier, and that, having been informed of that fact by the General Land Office, Linn thereupon waived his right to prosecute the location. Thereafter, on March 12, 1912, the General Land Office, after making reference to the fact that Linn had waived his right to prosecute the application, canceled the location and ordered the scrip delivered to the party entitled to receive it. The scrip was mailed to E. E. Lonabaugh at the direction of Linn (Appellant's Supplemental Brief, pp. 16-18). Colson seems to argue from this that as Linn was recognized by the Department in 1911 as attorney-in-fact for Ellen Angie with authority to locate land under the scrip the substitute power of attorney which Linn gave to Colson must be recognized as vesting in Colson the authority to locate land under the scrip. This does not follow. Linn apparently had a power of attorney from Ellen Angie to locate the scrip (see Appellant's Exhibit I) in addition to any authority which he may have had from her to deal with the land and convey it after location. In any event, the Department did not, with respect to that attempt to locate land not then available for location, adjudicate Linn's right to act for Ellen Angie in the matter of the location of her scrip.

Nor do the documents which Colson has presented in support of his asserted right to locate land under the Anthony Renville certificate place him in any better position with respect to the 160 acres covered by Certificate No. 398-D.

He has the "Guarantee" which, as pointed out above, is meaningless insofar as showing any authority in Colson to locate land in the name of Anthony Renville.

He also has a document, dated June 10, 1914, signed by Anna R. Kean, which recites that—

Anthony Renville or the heirs and legal representatives of Anthony Renville, by Anna R. Kean, a Commissioner of Court, duly appointed for the purpose, have made, constituted and appointed, and by these presents do make, constitute and appoint Barney R. Colson \* \* \* our true and lawful attorney, for us, or each of us individually, and in our name, place and stead, to enter upon, and take possession of any and all pieces and parcels of land or the timber or other materials thereon in the State of ----- which we own, or which we may hereafter acquire or become seized of, or in which we may now or hereafter be in any way interested; under and by virtue of location of Sioux Half Breed Script No. 398 Letter D, for 160 acres, issued to the said Anthony Renville under the Act of July 17, 1854, \* \* \*.

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The further recitations in this document are much like those contained in the substitute power of attorney presented in connection with the Ellen Angie scrip. While the document (obviously executed in blank as was the quitclaim deed from Ellen Angie) authorizes Colson to enter upon and take possession of any land which Renville or his heirs or legal representatives may own or thereafter acquire or become seized of or in which they may be interested under and by virtue of the location of Sioux Half-Breed Certificate No. 398-D and to sell such land and give conveyance in their names, it does not contain any authority to locate land under the scrip certificate.

On appeal, Colson contends that this document must be recognized as vesting in him the right to locate under the Anthony Renville certificate because Anna R. Kean obtained title to certain lands within the beds of dried-up lakes by location of Sioux Half-Breed scrip through powers of attorney authorizing John S. Newman as attorney-in-fact to locate said scrip and to convey the lands located to Anna R. Kean. Colson states that patents were issued to the scribees, including Anthony Renville, but that the patents were subsequently canceled as the result of a suit which went to the United States Supreme Court.<sup>2</sup> He states that upon cancellation of the patents under which Kean claimed and as a result of a decree issued by an Indiana court Anna R. Kean was appointed a commissioner of the court to execute duplicate powers of attorney to locate the scrip in the names of the scribees and to receive patents therefor as well as to convey the same when located and patented. He states further that in a decision dated April 29, 1914, the First Assistant Secretary of the Interior held that any new locations would have to be made in the names of the scribees but that the person who bought the lands should be recognized as having the equitable right to control the locations. This latter concession was on the supposition that the scribees had sold or attempted to sell the lands embraced in the former locations. He also refers to what he terms a similar situation in which, he says, the scrip of Elizabeth Conklin (No. 10-C) was located through Anna R. Kean as attorney-in-fact. He states that in locating the Elizabeth Conklin scrip Anna R. Kean, through a substitute power of attorney, appointed one Perez as the substitute attorney-in-fact to do the actual location and to re-

<sup>2</sup> *Kean v. Calumet Canal and Improvement Company*, 190 U.S. 452 (1903). There the court held that the canal company's title to the beds of the lakes, derived through the State of Indiana under the Swamp Land Act of September 28, 1850 (43 U.S.C., 1958 ed., sec. 981 *et seq.*), was superior to that of Kean, because the United States, having conveyed the land to the State, had no jurisdiction to make a second survey, upon which the Kean title rested.

ceive the patent on the lands so located, and that the power of attorney by which that location was made is identical to the power of attorney submitted by him as substitute attorney-in-fact for Anthony Renville (Appellant's Supplemental Brief, pp. 18-21; Exhibits J, K, L, and M; and the additional exhibit referred to in fn. 4 (p. 20) of Appellant's Supplemental Brief).

The decision of April 29, 1914 (*Anna R. Kean*, D-29200), was the result of an application made by Anna R. Kean for the delivery to her of nine pieces of Sioux Half-Breed scrip. The decision sets forth Kean's argument that inasmuch as she had paid valuable consideration for the lands, title to which failed, she was entitled to have possession of the scrip for purposes of relocation. While that decision does not recognize the decree of the Indiana court, under which Anna R. Kean was decreed to be entitled to relocate this scrip, as binding on this Department, it nevertheless held—

\* \* \* where a person has purchased land so located and patented under this class of scrip, and the title has failed because the Government had already disposed of the land, such purchaser should be permitted to govern the use of the scrip for the purpose of making a new selection. Of course, the new selection would have to be in the name of the scribee, as was the former one.

Following that decision the nine pieces of scrip, including that of Elizabeth Conklin, were returned to the attorney for Anna R. Kean.

However, the record of the Department with respect to the second location of the Elizabeth Conklin Scrip No. 10-C does not bear out Colson's contention that the power of attorney under which that location was made is identical with the power of attorney which Colson has submitted. That record<sup>3</sup> contains a power of attorney reading in pertinent part:

THAT Elizabeth Conklin, or the heirs, devisees and legal representatives of Elizabeth Conklin, by Anna R. Kean, a Commissioner of Court, duly appointed for the purposes hereinafter set forth, have made, constituted and appointed, and by these presents do make, constitute and appoint E. A. Perez of Austin, Nevada ----- true and lawful attorney for her or them and in her or their name, place and stead to *select and locate*, at any Land office in the United States, the lands to which she or they may be entitled by reason of ----- "Sioux Half-Breed Lake Pepin Reserve Scrip," to-wit: Number Ten (10) C for 80 acres. Said scrip being granted and issued to said Elizabeth Conklin, in accordance with the provisions of an act of Congress approved July 17, 1854, \* \* \* and *on such location* to ask for and receive the Patent therefor; hereby declaring all lawful acts of her or their said Attorney in the premises, of the same valid and binding force as if done personally by her or them. And she or they further ordains and declares that the said E. A. Perez is hereby irrevocably vested with all such power and authority as she or they might or

<sup>3</sup> Colson submitted certified copies of selected documents from that record.



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could exercise personally if present and acting; hereby ratifying and confirming whatsoever ----- said Attorney may lawfully do in the premises. [Italics supplied.]

The power of attorney submitted in support of the right to locate the Elizabeth Conklin scrip is thus vastly different from the power of attorney submitted by Colson. It vests Perez with the authority to select and to locate the land to which Elizabeth Conklin may be entitled by virtue of Certificate No. 10-C. No such authority is vested in Colson by the power of attorney which he holds from Anna R. Kean.

Because of Colson's insistence that powers of attorney such as he holds have been recognized as vesting in the holder authority to locate under a scrip certificate, Colson was, by letter of May 17, 1963, to his attorneys, given a further opportunity to support his contention. Colson's response to this invitation, in the form of a further supplemental brief, is not helpful to his position.

He points to the fact that the use of powers was not the only way in which scrip claims were satisfied and that many scrip claims were exercised by guardians whose appointment, it appears, was for the sole purpose of making the claim. Obviously powers of attorney were not used in exercising some of the rights granted by the 1854 act, as many of the scribees exercised the right to locate the land themselves. As to the use of guardians, it is sufficient to point out that many of the scribees were minors, incapable of acting for themselves in the matter.<sup>4</sup>

Colson contends with respect to the Anthony Renville scrip that Anna R. Kean, following the departmental decision of April 29, 1914, transferred her complete rights arising under or flowing by reason of Certificate No. 398-D and the Department's decision to him, that the document which he has submitted is inclusive of all of Kean's rights to control the new location, and that no adverse documents, powers, or conveyances as to this certificate exist. The fact that Colson may not be able to produce such a document does not, of course, prove that such a document may not have existed at one time. The fact that Kean, in the *Conklin* case discussed above, did specifically appoint another to make the location for her suggests at least the possibility that she did so in this instance.

Colson also contends that the Department in three other *Kean* cases recognized that no authority other than the Department's 1914 de-

<sup>4</sup> Scrip Certificate No. 582A to E, issued to Philamon Provençal and referred to by Colson in his supplemental brief, shows on its face that the scribee was "of about the age of seven years." Two other certificates, also referred to by Colson, show the scribees to have been of an age of about four months (scrip Certificate No. 10A to E, Elizabeth Conklin) and six months (scrip Certificate No. 416 A-E, Eliza Laframboise).

cision need exist so long as the application is for a patent to be issued in the name of the Indian and/or his heirs. This contention, too, fails when the records referred to by Colson are examined.

Thus in Gainesville 016950, involving the Philamon Provencial scrip, and in Phoenix 042691, involving the Elizabeth Conklin scrip No. 10-E, applications to locate were signed by Anna R. Kean. Also in Gainesville 016949, involving an attempted second location of the Eliza Laframboise scrip, Anna R. Kean herself signed the application to locate. However, no patent has been issued on the basis of that application.

It is clear that Colson has not shown any right in himself to locate public lands under either of the scrip certificates.<sup>5</sup>

In view of the fact that Colson has not established his right to locate public lands under the certificates, it becomes unnecessary to consider the Director's additional holding or Colson's arguments that certain of the lands which he applied to select are available for selection in satisfaction of the outstanding scrip rights.

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.

ERNEST F. HOM,  
*Assistant Solicitor.*

## STANDARD OIL COMPANY OF CALIFORNIA

A-29400

*Decided September 17, 1963*

**Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Patented or Entered Land—Oil and Gas Leases: 640-acre Limitation**

Although land is included within a homestead entry for which acceptable final proof has been filed and for which the entryman has met all the other

<sup>5</sup> Colson's arguments in his latest brief that he is not a "Johnny-come lately" or "speculator" in his claims is not impressive. He admits that he bought the claims in 1925—after the rights granted by the certificates had been outstanding for almost seventy years—for \$19,600 and asserts that on the basis of today's dollar plus the cumulative value of interest in terms of today's dollar this would result in a total value applicable to the consideration he paid for the claims in terms of today's dollar value of not less than \$250,000.

He asserts that if his claims are denied, he will be the only one to suffer, to the extent of \$250,000, and that the Department has no right to inject itself into the matter as an adverse party. What Colson overlooks is the obligation of the Department to see that the public lands are disposed of only in the manner prescribed by Congress.

His reference to the Department's proposed legislation "To provide for the satisfaction of claims arising out of scrip, lieu selection, and similar rights" (S. 975, 88th Cong., 1st Session) overlooks the fact that the proposal would permit the Secretary of the Interior to "convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid."

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requirements, it is to be considered as available for oil and gas leasing within the meaning of the 640-acre rule.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Standard Oil Company of California has appealed to the Secretary of the Interior from a decision dated January 8, 1962, by which the Division of Appeals, Bureau of Land Management, affirmed a decision of the land office at Anchorage, Alaska, rejecting its noncompetitive oil and gas lease offer on the ground that the land was included in an existing oil and gas lease issued to Floyd D. Smith pursuant to his prior offer Anchorage 042177.

On appeal, Standard does not dispute that the land described in its offer was included in Smith's earlier offer at the time its offer was filed and that its offer was rejected after a lease had been issued to Smith. It contends, however, that Smith's offer was defective and should have been rejected in its entirety because it did not include 640 acres of land and there was land adjoining that applied for which was available for oil and gas leasing. 43 CFR 192.42(d).

The adjoining land that Standard refers to is the E $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 13, T. 1 N., R. 13 W., Seward Meridian. This land had been included in a still earlier offer, Anchorage 024399, filed June 22, 1953. Standard claims that the land was available for leasing when Smith filed his offer for the reason that, although the land office decided by decision dated November 30, 1957, that the land should be leased along with other lands described in offer Anchorage 024399, the lease that was issued omitted the E $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 13. It was not until April 16, 1959, following an appeal by the offeror, that the lease was amended to include the E $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 13. Therefore, Standard concludes, the land was available for leasing, since it was only covered by an offer, when Smith filed his offer on March 4, 1958.

This contention is material only if Smith's offer did not otherwise describe 640 acres of available land when it was filed. An examination of the offer shows that it listed several parcels totaling 977.65 acres. In a decision dated September 3, 1959, the manager rejected the offer as to 341.24 acres on the ground that they had either been patented without a reservation of oil and gas or leased for oil and gas prior to the filing of Smith's offer. He also rejected it as to lot 3, sec. 7, T. 1 N., R. 12 W., S.M., on the ground that that lot had been patented on March 13, 1959, without a reservation of oil and gas. He suspended the offer for the 598.21 acres remaining pending the disposition of conflicting rights. He later, on June 27, 1961, issued a lease covering lots 3 and 4, section 18, same township and range, amounting to 77.30 acres and

rejected the offer for the remaining lands. Lots 3 and 4, section 18, comprise the land that Standard desires.

There is no dispute that 341.24 acres were not available for leasing within the meaning of the regulation, 43 CFR 192.42(d), and that 598.21 acres were available when Smith filed his offer. The question is whether the 38.12 acres in lot 3, sec. 7, were or were not.

If they were, the Smith offer described 636.41 acres, an amount sufficient to bring it within the 640-acre requirement as modified by the rule of approximation. *Natalie Z. Shell*, 62 I.D. 417 (1955). Otherwise, the offer covering only 598.21 acres would have been defective unless the land was isolated.

At the time Smith filed, lot 3 was part of Frank Edward Rusk's homestead entry Anchorage 022492, allowed October 20, 1952. Final proof was filed on September 17, 1956 (fees paid on December 7, 1956), and proof of publication filed on September 18, 1957. Final certificate issued on March 3, 1959, and patent on March 13, 1959, without a reservation of oil and gas.

In its appeal to the Director, Standard contended that Rusk had earned equitable title to lot 3 no later than September 17, 1957, the date he filed proof of publication; that thereafter lot 3 could not be considered available for leasing; that the subsequent issuance of the final certificate is prima facie evidence of such vesting of title; that after the date of submission of final proof, the Government cannot maintain a contest of the entry, based on any subsequent discovery of mineral in the lands or based on after-acquired knowledge that the lands are mineral in character.

All these assertions may be so, but they do not mean the land is not available for leasing. Until patent is issued, the legal title is in the United States and the Government may initiate a contest against the entry on any appropriate ground then existing. See *State of Wisconsin et al.*, 65 I.D. 265 (1958). That it may not use subsequent discovery of minerals or other knowledge of mineral character acquired after the completion of final proof does not prevent the United States from imposing a mineral reservation or even canceling an entry in proper circumstances. (*Id.*)

The pertinent regulation explicitly recognizes that land in an outstanding entry not subject to a reservation of oil and gas is available for oil and gas leasing. It provides:

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.

September 17, 1963

\* \* \* 43 CFR 192.71(a); applied in *Joseph S. Rose, Jr., Thomas C. Moran*, A-27929 (August 10, 1959).

The question, then, is whether availability persists past the submission of acceptable final proof. While the oil and gas regulation does not speak to this situation, the general regulation on agricultural entries on mineral lands plainly provides that the United States may impose an oil and gas reservation in a patent even though acceptable final proof has been filed. 43 CFR 102.22.<sup>1</sup> The entry is essentially in the same posture before and after submission of acceptable final proof. In each case it may be subjected to a mineral reservation, although after proof the United States, if it determines to attempt to impose a reservation, has a much more onerous burden than before. This has been the rule since the passage of the Mineral Leasing Act (47 L.D. 463, 471), and it has often been restated. *L. E. Grammer*, 66 I.D. 201 (1959); *Fred Axford*, A-27933 (June 29, 1959); Solicitor's opinion, 65 I.D. 39 (1958).

It has never been stated, so far as we are aware, that an oil and gas lease offer must be rejected for the reason that it was filed after acceptable final proof has been submitted, nor does there seem to be any reason so to rule. Just as in the case of an entry prior to the submission of acceptable final proof, there is the possibility that the United States may still be able to establish a right to the oil and gas

<sup>1</sup> The regulation provides:

"(a) Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be notified thereof and allowed a reasonable time to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied, or to appeal. He must be advised that, if a hearing is ordered, the burden of proof will be upon him, and also that, if he shall fail to take one of the actions indicated, his entry or claim and any patent issued pursuant thereto will be impressed with a reservation of oil and gas to the United States.

"(b) In a case where acceptable final proof has been submitted, or a claim has been perfected, and the Geological Survey thereafter makes report, as in the above or similar form, such report will not be relied upon as basis for a mineral reservation unless the Government is prepared to assume the burden of proving, prima facie, that the land was known to be of mineral character, at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from non-mineral lands, among which may be those recognized by the Supreme Court in the case of *United States v. Southern Pacific Company et al.* (251 U.S. 1, 64 L. ed. 97). If the Government is thus prepared to assume such burden of proof, the Bureau of Land Management will notify the entryman of the mineral classification and that a hearing will be ordered if he manifests disagreement with the classification within a reasonable period. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Government; also, that, if he shall fail to make answer within the time allowed, the entry or claim and any patent issued pursuant thereto will be impressed with a reservation of oil or gas to the United States." 43 CFR 102.22 (a) and (b).

deposits in the land.<sup>2</sup> The only difference, as we have seen, is that it may be more difficult for the United States to do so and it is limited as to the date on which the pertinent facts must be established.

Accordingly, it is concluded that lot 3, sec. 7, was available for oil and gas leasing on the date Smith filed his offer and that the offer was not subject to rejection for violation of the 640-acre rule.

This makes it unnecessary to consider the Division of Appeals' ruling that the E $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 13 was not available for leasing when Smith's offer was filed. That ruling was predicated on the assumption that Smith's offer was for less than 640 acres and that it could be sustained only if it was for land surrounded by land not available for leasing. To the extent that the Bureau's decision implied that Smith's offer was for less than 640 acres because lot 3, sec. 7, was not available for leasing, the decision is erroneous.

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 Division of Appeals, Bureau of Land Management, is affirmed, as modified.

ERNEST F. HOM,  
*Assistant Solicitor.*

## APPEAL OF BALDWIN-LIMA-HAMILTON CORPORATION

IBCA-329

*Decided September 20, 1963*

### Contracts: Appeals—Rules of Practice: Hearings

When a contract appeal involves a disputed issue of fact, each party is entitled to a hearing for the purpose of offering evidence upon such issue, and, if either party does request a hearing, a decision upon the merits of the appeal without holding the requested hearing would be premature. The rules and procedures of the Board of Contract Appeals do not provide for summary judgment in favor of either party.

### Contracts: Interpretation—Rules of Practice: Evidence

The parol evidence rule does not preclude the introduction of parol evidence for the purpose of showing whether a particular document was or was not adopted as an integration of the contract between the parties. Nor does it preclude the introduction of parol evidence for the purpose of showing that prior to the date borne by the integration a contract had

<sup>2</sup> See *Heirs of Robert H. Corder*, 50 L.D. 185 (1923), in which a mineral reservation was imposed in final certificate and patent although the entryman had filed acceptable proof on November 25, 1919, before the passage of the Mineral Leasing Act, because the entryman had filed an application for an oil and gas prospecting permit after filing final proof. See also *Wyman v. Clark*, 50 L.D. 664 (1924).

September 20, 1963

actually been made, which was subsequently merged into or discharged by the integration.

#### BOARD OF CONTRACT APPEALS

The Government has filed a motion for "summary judgment" with respect to this timely appeal, also requesting that no hearing be set, for the principal alleged reasons that issue has been joined and that no question of fact exists, because of the inadmissibility of parol evidence concerning a claimed preliminary subcontract, or negotiations preceding the formal subcontract, on which appellant relies. Neither the rules of this Board (43 CFR 4) nor the procedures developed by the Board provide for summary judgment in favor of either party.<sup>1</sup> Appeals may be considered by the Board "on the record" without a hearing, if no request for a hearing has been made by either party.

In this case, request has been made by appellant that a hearing be held. The Board's rules (43 CFR 4.10) provide that "If the appeal involves disputed questions of fact, the Board shall, at the request of either party, grant a hearing."

On the present record it appears that there is a disputed question of fact concerning the time when a major subcontractor of appellant first became a "subcontractor" within the meaning of the contract provisions relating to excusable causes of delay. It is the position of the Government that the date borne by a purchase order which appellant sent to the subcontractor is determinative of this question, on the theory that the purchase order was an integration. But the purchase order does not have any acceptance by the subcontractor endorsed on it, and, hence, in order for it to have the status of an integration, the assent of the subcontractor to the purchase order as a final and complete expression of the terms of the subcontract would need to be proved by parol evidence. To quote the *Restatement*: "That a document was or was not adopted as an integration may be proved by any relevant evidence."<sup>2</sup>

Furthermore, in the event the purchase order is shown to be an integration, the date borne by it might still turn out to be inconclusive of the issue before the Board. That issue is not: What are the terms of the present contract between appellant and the subcontractor? It is: Was there a contract between appellant and the subcontractor when the alleged excusable cause of delay occurred? The parol evidence rule has to do with the first of these questions only; it would not preclude the use of parol evidence to establish that prior to the date borne by the purchase order a subcontract had actually been made,

<sup>1</sup> *Korshoj Construction Company, IBCA-321* (August 27, 1963), 70 I.D. 400.

<sup>2</sup> *Restatement, Contracts*, sec. 228, Comment a.

which was subsequently merged into or discharged by the purchase order.<sup>3</sup>

It also appears from the present record that there is a dispute between the parties as to whether the alleged cause of delay would be excusable, irrespective of whether it occurred before or after the date when a contract was first consummated between appellant and the subcontractor. Resolution of this dispute would require consideration, not only of the intent of the provisions relating to excusable causes of delay in the contract between appellant and the Government, but also of the facts bearing upon such matters as the origin, avoidability and consequences of the claimed delay.

As it is apparent that the appeal does involve factual issues, it is plain that a decision upon its merits without holding the hearing requested by appellant would be premature.<sup>4</sup> Appellant is entitled "to be heard and to offer evidence in support of its appeal" with respect to "any dispute concerning a question of fact arising under this contract."<sup>5</sup>

Even if provisions for summary judgment had been made in the rules or procedures of the Board, the granting of the Government's motion for summary judgment would be improper, since, as the foregoing discussion shows, genuine issues as to material facts do exist. The presence of such an issue precludes summary judgment<sup>6</sup>

Accordingly, the Government's motion is denied. A hearing will be scheduled in due course.

THOMAS M. DURSTON, *Member.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

I CONCUR:

HERBERT J. SLAUGHTER, *Member.*

<sup>3</sup> See 3 *Corbin, Contracts* (2d ed.) sec. 576; 4 *Williston, Contracts* (3d ed.) sec. 631.

<sup>4</sup> The Board is in accord with *H. Dreiger Machinery Company, ASBCA No. 7879* (March 23, 1962), 1962 BCA par. 3340, 4 Gov. Contr. 391(d), wherein the Armed Services Board of Contract Appeals stated: "Additional evidence may be and usually is brought out at a hearing. This additional evidence may change the factual situation. If we adjudicate the case solely on the basis of the facts which appellant sets out in his complaint we deprive an appellant of his right to a hearing and to present evidence. We think this should be avoided unless it is clearly apparent that no useful purpose could be served by a hearing."

<sup>5</sup> Clause 12, Disputes, of Standard Form 32 (October 1957 Edition), which is a part of the instant contract. See *Morgan Construction Company, IBCA-253* (September 20, 1960), 67 I.D. 342, 60-2 BCA par. 2737, 2 Gov. Contr. 500; cf. *Parker-Schram Company, IBCA-96* (April 7, 1959), 66 I.D. 142, 59-1 BCA par. 2123, 1 Gov. Contr. 289.

<sup>6</sup> Rule 56 of the Rules of Civil Procedure for the United States District Courts states that summary judgment is to be granted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The report of the Advisory Committee on Rules that initially framed and proposed Rule 56 says: "Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact."



**VALIDITY OF LEASE NO. 14-20-600-5511, OCTOBER 21, 1959, BE-  
TWEEN THE BUREAU OF INDIAN AFFAIRS, LESSOR, AND FLAG-  
STAFF FOUNDATION FOR INDUSTRIAL DEVELOPMENT, LESSEE****Executive Orders and Proclamations—President of the United States—  
Withdrawals and Reservations—Secretary of the Interior**

Although the Secretary of the Interior is by Executive Order No. 10355 authorized to exercise the power of the President to withdraw and reserve public domain and other lands owned or controlled by the United States, including the authority to modify or revoke past or future withdrawals or reservations, such power cannot be exercised over lands in a national forest without the approval or concurrence of the Secretary of Agriculture as required by section 1(c) of the Executive Order.

**Public Lands: Jurisdiction Over—Public Lands: Leases and Permits—Bureau  
of Indian Affairs**

In the absence of the approval or concurrence of the Secretary of Agriculture a Public Land Order purporting to exclude certain lands from a national forest and reserve them under the jurisdiction of the Bureau of Indian Affairs is ineffective to remove such lands from the jurisdiction of the Secretary of Agriculture, and a purported lease of such lands approved by the Assistant Secretary of the Interior pursuant to the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44; 25 U.S.C. sec. 631 *et seq.*), is invalid.

M-36659

*September 23, 1963*

TO: THE SECRETARY OF THE INTERIOR

SUBJECT: Validity of Lease No. 14-20-600-5511, October 21, 1959, between the Bureau of Indian Affairs, Lessor, and Flagstaff Foundation for Industrial Development, Lessee.

In accordance with your request we have examined the records and files pertaining to Lease No. 14-20-600-5511, between the Bureau of Indian Affairs, as lessor, and the Flagstaff Foundation for Industrial Development, Flagstaff, Arizona, as lessee, in order to express our opinion on the validity of the lease. A somewhat extensive recital of the administrative history is necessary for that purpose.

The lease was entered into and signed by the Commissioner of Indian Affairs on behalf of the lessor on October 21, 1959, and recites that it was made in accordance with the Act of April 19, 1950 (64 Stat. 44; 25 U.S.C. sec. 631 *et seq.*). The Commissioner's action was approved and ratified by Assistant Secretary of the Interior Roger Ernst on November 6, 1959. The lease covers 75 acres of land in Sec. 23, T. 21 N., R. 7 E. (presumably of the Gila and Salt River

Meridian), Coconino County, Arizona. The land is part of an 80-acre tract of land which was a part of the Coconino National Forest, under the jurisdiction of the Secretary of Agriculture, but which was isolated and separated from the main body of the forest by privately owned lands.

On September 27, 1956, the Bureau of Indian Affairs filed with the Manager of the Land Office, Bureau of Land Management, Phoenix, Arizona, an application (Arizona 012770) for withdrawal of the 80-acre tract for a construction site for use by the Navajo Tribe or its lessees. The Manager, by letter of October 5, 1956, inquired of the Regional Forester of the U.S. Forest Service, Department of Agriculture, Albuquerque, New Mexico, for the views of that agency with respect to the application. The Regional Forester replied on December 11, 1956, that the "Forest Service will offer no objection to the withdrawal of this tract subject to existing uses and permits."

A Notice of Proposed Withdrawal and Reservation of the lands was published in the Federal Register on January 25, 1957 (22 F.R. 505). On January 31, 1957, the Regional Forester again wrote to the Land Officer Manager, saying that the Notice did not state that the withdrawal was to be made subject to existing rights, and that the Forest Service was "anxious to make sure that continued use of the area by the Coconino County Humane Association, Inc., under the special use permit which they now hold will not be interrupted or otherwise affected by the withdrawal." The Arizona State Supervisor of the Bureau of Land Management replied on February 11, 1957, that it appeared that the Bureau of Indian Affairs would need exclusive administration of the lands for its intended purpose and that it would be necessary to exclude the lands from the National Forest, which "would have the effect of cancelling the use permit" issued to the Humane Association. At the same time, the State Supervisor wrote to the Area Director of the Bureau of Indian Affairs, Gallup, New Mexico, urging that he negotiate with representatives of the Forest Service and the Humane Association to work out a mutually satisfactory arrangement for continued use of a part of the tract by the Association.

The Acting Assistant Area Director replied on February 15, 1957, saying that in an effort to cooperate fully with the Humane Association they wished to amend the request for withdrawal to exclude a described 5-acre tract from the 80-acre parcel. The Regional Forester replied on February 20, 1957, as follows:

The Forest Service will not interpose an objection to this withdrawal providing a satisfactory arrangement is worked out by the Bureau of Indian Affairs regarding use of the special use tract by the Coconino County Humane Association in

September 23, 1963

accordance with the privileges they now hold. The approval of the Forest Service is contingent upon a satisfactory arrangement in this respect. We would prefer that the Bureau of Indian Affairs take over the entire 80 acre tract and issue one of their own permits to the Humane Association that is satisfactory to that Society.

The State Supervisor forwarded the case file on the application to the Director of the Bureau of Land Management on February 25, 1957, alluding to the Bureau of Indian Affairs' letter of February 15 and the Regional Forester's letters of December 11, 1956 and January 31, 1957, but not referring to the Regional Forester's letter of February 20, which was, however, in the case file. The State Supervisor recommended withdrawal of the lands, excluding the 5-acre tract.

By Public Land Order 1434, signed by the Under Secretary on June 17, 1957, and published in the Federal Register on June 22, 1957. (22 F.R. 4417), the 75-acre tract was "excluded from the area now within the Coconino National Forest" and "withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Indian Affairs for use in the establishment of an industrial program to provide off-reservation employment for Navajo Indians in furtherance of the purposes and objectives of the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 631, *et seq.*)"

The authority for the action taken is cited in the Public Land Order as "the act of June 4, 1897 (30 Stat. 34, 36; 16 U.S.C. 473), and otherwise, and pursuant to Executive Order No. 10355 of May 26, 1952." The act of June 4, 1897, authorizes the President "to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof" which created any national forest, and to "reduce the area or change the boundary lines" of such forests. By Section 1(a) of Executive Order No. 10355 the President delegated to the Secretary of the Interior the authority vested in him—

\* \* \* by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.

Section 1 (c) of Executive Order No. 10355 reads as follows:

No order affecting land under the administrative jurisdiction of any executive department or agency of the Government other than the Department of the Interior shall be issued by the Secretary of the Interior under the authority of this order without the prior approval or concurrence, so far as the order affects

such land, of the head of the department or agency concerned, or of such officer of the department or agency concerned as the head thereof may designate for such purpose: *Provided*, that such officer is required to be appointed by the President by and with the advice and consent of the Senate.

The statutory authority to the President to delegate the powers covered in Executive Order No. 10355 is Section 10 of the act of October 3, 1951 (65 Stat. 712; 3 U.S.C. 301-303), which authorizes the President to “\* \* \* designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification or other action by the President (1) any function which is vested in the President by law \* \* \*.”

From the record, it is apparent that the Public Land Order 1434 was not only at variance with the position of the Regional Forester, who wanted the entire 80 acres excluded from the forest and a permit issued by the Commissioner of Indian Affairs for the 5 acres occupied by the Humane Association, but further that it was not supported by the approval or concurrence of the Secretary of Agriculture or his Presidentially-appointed designee. Absent such approval or concurrence, we can only conclude that Public Land Order 1434 was never effective to remove the lands from the jurisdiction of the Secretary of Agriculture. That being so, it necessarily follows that the purported lease of October 21, 1953 to the Flagstaff Foundation for Industrial Development was made without legal authority and was void from its inception.

The purported lease was for a term of 50 years with an option to renew for an additional 50 years. The annual rental was to be \$75 unless the land were subleased, in which case the rental was to be \$750 per year commencing with the date of occupancy by the subtenant. The lessee was obligated, without limitation as to time, to “install necessary utilities, plat and subdivide as required in accordance with” local zoning ordinances, “and eventually to include streets, alleys and other accesses as required by sublessees.” Other than the usual agreement to pay rent, deliver the premises upon termination, carry liability insurance, maintain the premises in good repair, pay taxes and utilities, etc., there was no other affirmative obligation on the lessee except the following:

12. *Employees Preference.*—Lessee agrees that any sublease made with an industrial concern will carry a clause giving first preference to enrolled members of the Navajo and Hopi tribes so long as they are available, qualified and willing to work.

*September 23, 1963*

As of this date, there has been no development of the area by the Flagstaff Foundation, and no subleases or assignments have been negotiated. We were informed in recent meetings with officials of the Foundation that several industrial firms had been invited to consider the site as a location for manufacturing or other industrial use in keeping with the hope of the Bureau of Indian Affairs in negotiating the lease, but no suitable commitment had been obtained.

The file contains a letter dated November 8, 1962, from the General Counsel of the Bureau of Public Roads to the Commissioner of Indian Affairs, in which it is stated that that Bureau has been requested by the Arizona State Highway Engineer to assist the State in attempting to secure a right-of-way across the 75-acre tract covered by the purported lease in connection with construction of a portion of Interstate Project I-40-4(20).

It is said that the Forest Service was notified of the intended need of the right-of-way before the tract was attempted to be transferred by Public Land Order 1434. The file also contains a copy of a letter dated October 16, 1962, from the Chief Right of Way Agent of the Arizona State Highway Department to the Division Engineer of the Bureau of Public Roads, in which it is said that an official of the Flagstaff Foundation has indicated its expectation of the payment of compensation for damages to its leasehold interest for that portion of the land which is needed for the interstate highway right-of-way. The letter makes a "rough estimate" of the total value of the Flagstaff Foundation's interest in the land, if the lease were valid, at \$94,766.77, and compensation for the taking of 22.5 acres and severance damages for the right-of-way at \$28,432.50.

Although we can give this factor no consideration in reaching the conclusion that the Public Land Order 1434 was ineffective and the purported lease to the Flagstaff Foundation was invalid, it is certainly proper to keep it in mind when considering whether, at this late date, the Secretary of Agriculture should be asked to concur in or approve the action of the Assistant Secretary of the Interior in signing Public Land Order 1434. The purpose of the order was to make land available for industrial activity which would employ Indians. The use of the land for a highway would prevent the fulfillment of that purpose. To revive the lease at this date would not, as to the land needed for the right-of-way, fulfill the purpose for which the lease was conceived; it would merely result in a windfall to the lessee.

In view of the foregoing, we recommend that the Flagstaff Foundation for Industrial Development be notified that Lease No. 14-20-600-

5511 is invalid and that it should vacate the premises forthwith. We are informed that the rentals thus far paid have been deposited in the Treasury in Receipt Account No. 141810, "Rental of Land," and can be taken out of the Treasury as erroneous deposits and refunded to the Foundation.

In order to clear the records, we also recommend the issuance of a public land order revoking Public Land Order No. 1434, thereby formally restoring the land to the jurisdiction of the Secretary of Agriculture.

FRANK J. BARRY,  
*Solicitor.*

### APPEAL OF KORSHOJ CONSTRUCTION COMPANY

IBCA-321

*Decided September 27, 1963*

#### Contracts: Appeals—Rules of Practice: Appeals: Hearings

An interlocutory decision upon a contract appeal denying a motion to dismiss the appeal for lack of timely notice or protest, or denying a motion for summary judgment, leaves the appeal open for the presentation of evidence upon all disputed questions of material fact, including such a question as whether the Government was prejudiced by lack of timely notice or protest.

#### BOARD OF CONTRACT APPEALS

In an interlocutory decision, dated August 27, 1963, upon this appeal, the Board denied the Government's motions (1) to dismiss Claim No. 1 for lack of timely notice or protest, (2) for summary judgment on Claim No. 1, and (3) to dismiss Claim No. 2 for lack of timely notice or protest.

The Government has requested reconsideration of that portion of the Board's decision upon the first of these motions which reads as follows:

The allegations of the contractor, the findings of the contracting officer, and the data in the appeal file all indicate that the lack of timely notice or protest does not constitute an obstacle to fair and accurate evaluation. In these circumstances, the failure to notify or protest may be disregarded.

The relief sought through the request for reconsideration is that the Board "allow the Government to present evidence either written or oral which will tend to establish that the Government's rights will be in fact prejudiced by any waiver of the protest provision of Paragraph 9 by the Board as to Claim No. 1."

September 27, 1963

The Board's decision of August 27, 1963, purported to do no more than deny certain motions of the Government which, if allowed, would have resulted in a disposition of the appeal without the holding of a hearing. The denial of these motions leaves the appeal open for the presentation of evidence, either oral or written, upon all disputed questions of material fact. The statements of the parties disclose that the question of whether the Government was prejudiced by lack of timely notice or protest with respect to Claim No. 1 is a disputed question of material fact.

In the passage quoted above, we expressed the view that certain parts of the record then before us, that is, "the allegations of the contractor, the findings of the contracting officer, and the data in the appeal file" set forth circumstances that would justify deciding the question of prejudice in favor of appellant. But we did not say, nor did we mean to imply, that these allegations, findings, and data could not be overcome through the presentation of contrary evidence, or would be sufficient, even if left uncontroverted, to prove the existence of the circumstances set out in them. Our intent was to ascertain whether the appeal involved issues of fact that would preclude its disposition upon motion, rather than to determine the merits of those issues. As the Board has repeatedly held, allegations cannot be accepted as true in the absence of proof sufficient to support them,<sup>1</sup> finding of a contracting officer may be shown to be incorrect,<sup>2</sup> and evidentiary data is subject to be rebutted by other evidentiary data.<sup>3</sup>

The relief sought through the request for reconsideration is, therefore, relief that was not denied by, and that is entirely consistent with, our decision of August 27, 1963.

This being so, there is no occasion for reconsidering that decision. Nor is there occasion for determining whether reconsideration of

<sup>1</sup> *Cecil Schweighardt*, IBCA-293 (March 4, 1963), 70 I.D. 85, 1963 BCA par. 3671, 5 Gov. Contr. par. 183(g); *Weldfab, Incorporated*, IBCA-268 (August 11, 1961), 68 I.D. 241, 61-2 BCA par. 3121, 3 Gov. Contr. par. 500; *Pioneer Electric Company, Inc.*, IBCA-222 (June 23, 1960), 67 I.D. 267, 60-2 BCA par. 2675, 2 Gov. Contr. 368.

<sup>2</sup> *Montgomery-Macri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 5 Gov. Contr. par. 419; *Allied Contractors, Inc.*, IBCA-265 (September 26, 1962), 69 I.D. 147, 1962 BCA par. 3501, 4 Gov. Contr. par. 512; *Merritt-Chapman & Scott Corporation*, IBCA-240 (January 4, 1961), 68 I.D. 1, 61-2 BCA par. 3193, 2 Gov. Contr. par. 230.

<sup>3</sup> *Erhardt Dahl Andersen*, IBCA-223 and IBCA-229 (July 17, 1961), 68 I.D. 201, 61-1 BCA par. 3082, 3 Gov. Contr. par. 505; *Production Tool Corporation*, IBCA-262 (April 17, 1961), 68 I.D. 109, 61-1 BCA par. 3007, 3 Gov. Contr. par. 324; *Henly Construction Company*, IBCA-185 (February 23, 1960), 67 I.D. 44, 61-2 BCA par. 3239, 2 Gov. Contr. pars. 198, 208.

such a decision, solely interlocutory in character, is permissible under the applicable rule (43 CFR 4.15).

The request for reconsideration, therefore, is denied.

HERBERT J. SLAUGHTER, *Acting Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

*Chairman* PAUL H. GANTT, being absent on official leave, did not participate in the determination of this request for reconsideration.

### APPEAL OF PAUL A. TEEGARDEN

IBCA-382

*Decided September 27, 1963*

#### Contracts: Contracting Officer—Contracts: Delays of Contractor

When a claim for a time extension under a contract is presented to the contracting officer, it is the duty of the latter to make an impartial and objective determination of all questions that are directly relevant to the extent of the delays upon which such claim is founded.

#### BOARD OF CONTRACT APPEALS

The Board, in a decision dated September 11, 1963, remanded this appeal to the contracting officer for the preparation and issuance of a new or supplemental findings of fact and decision, with respect to a dispute over the extent of the time extension to be allowed for delays in performance by the contractor. The reason for this remand was that the original findings of fact and decision did not cover all of the matters essential for a proper resolution of the dispute as presented initially to the contracting officer for determination. In particular, the original findings of fact and decision left unanswered such key questions as (1) whether working time was lost on days when the weather was not unusually severe as a result of adverse conditions created by unusually severe weather on preceding days; (2) whether working time so lost would constitute a proper basis for the allowance of an extension of time; (3) what amount of working time, if any, was so lost, and what extension of time, if any, should be allowed therefor; (4) whether any working time was lost because of weather "unfavorable for the suitable prosecution of the work" within the meaning of the suspension of work provision of the contract, but not "unusually severe" within the meaning of the excusable causes of delay provision of the contract; (5) whether working time so lost would constitute a



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proper basis for the allowance of an extension of time; and (6) what amount of working time, if any, was so lost and what extension of time, if any, should be allowed therefor.

We also considered that it would be proper for the contracting officer's findings to include a tabulation covering, on a day-by-day basis, such pertinent matters as the state of the weather, whether it was normal or abnormal for the season of the year, the condition of the ground, the work done, the reasons for any loss of time as advanced by the contractor, and the reasons as ascertained by the contracting officer. A tabulation of this type appeared to be essential for proper resolution of the dispute, not only because of the day-by-day basis on which appellant had presented its claim, but also because of the voluminous weather and job records involved.

The Government has now requested reconsideration of the remand on the ground that "to include the information and analyses, ordered by the decision and opinion in question to be included, in a new or supplemental Findings of Fact and Determination would force the Finding of Fact to perform the office and fulfill the function of an adversary pleading, simultaneously with the performance of its true function as an impartial and objective determination of the merits of appellant's claim." The request for reconsideration then goes on to state that "the information desired by the Board may more properly, quickly, and easily be made available to the Board in a supplemental pleading which the appellee stands ready, willing and able to file with the Board immediately upon order or request for such by the Board."

We are unable to agree with this position. Clause 5 of the General Provisions of the contract here involved expressly states that when a claim for a time extension is received, the contracting officer "shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension." The various matters which we have called upon the contracting officer to decide are matters that are directly relevant to appellant's claim, and that are within the scope of the duty to "ascertain the facts and the extent of the delay" imposed upon the contracting officer by Clause 5. Hence, the remand was proper.

The function of the contracting officer with respect to a dispute committed to his determination by the contract is, as Department Counsel aptly say, to make an "impartial and objective determination" of the merits of the dispute. A supplemental pleading by Department Counsel, whose function with respect to such a dispute is to serve as advocates rather than as adjudicators, obviously would not constitute an "impartial and objective determination" by the contracting officer.

Hence, the filing of a supplemental pleading would not be a legally acceptable substitute for the remand.

The basic fallacy inherent in the request for reconsideration lies in assuming that the purpose of the remand is merely to obtain "information desired by the Board." The truth of the matter is that the Board does not desire information as such, but desires the contracting officer to determine all, and not just some, of the questions that are material to the pending dispute. If information alone were desired, the holding of a hearing would be the most appropriate method for obtaining it. Furthermore, when findings have been made by the contracting officer with respect to all of the material facts, it is conceivable that the contractor may decide against taking a new appeal, in which event the Board would never need information about the matters now in controversy.

The request for reconsideration, therefore, is denied.

HERBERT J. SLAUGHTER, *Acting Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

*Chairman.* PAUL H. GANTT, being absent on official leave, did not participate in the determination of this request for reconsideration.

### PLACID OIL COMPANY

A-29577

*Decided September 30, 1963*

#### Oil and Gas Leases: Royalties

Royalties on production from land acquired for military purposes and leased protectively for oil and gas purposes are properly computed in accordance with the express terms of the leases without deductions for extraction or processing of liquid products and residue gas and of gathering, dehydration, and compression costs of gas; it is immaterial that the lessee does not do the extracting or processing and that it is performed by a contractor under an agreement whereby title to the liquid products passes to the contractor upon delivery of the well gas to the processing plant.

#### APPEAL FROM THE GEOLOGICAL SURVEY

Placid Oil Company has appealed from a decision dated May 4, 1962, by which the Acting Director of the Geological Survey affirmed decisions of the regional oil and gas supervisor disallowing deductions for the cost of extraction or processing of liquid products and residue gas and of gathering and dehydration costs on high pressure gas and gathering and compression costs on low pressure gas in the computation of royalties on production from its wells under three separate leases in the Franks Field in Texas.

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The wells are located on land acquired by the United States for military purposes which is not leasable for oil and gas purposes under the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*) or the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., sec. 351 *et seq.*). The leases were issued as protective measures after competitive bidding under authority of section 441, Revised Statutes (5 U.S.C., 1958 ed., sec. 485). The leases require the lessee to pay a royalty of 16 $\frac{2}{3}$  percent of the amount or value of production obtained from the leases and that—

In computing such royalty on gasoline or other products extracted from gas or on gas remaining after extraction of such products, no allowance will be made for the cost of extraction or processing. (Sec. 2(d)(2).)

Placid repeats on its appeal to the Secretary the several contentions that it presented on its appeal to the Director. These contentions were substantially answered by the Acting Director's decision; however, some additional comments may appropriately be made in refutation of Placid's arguments.

Placid's principal assertion with respect to the disallowance of extraction or processing costs in computing the royalties on the liquid products extracted from the well gas and on the residue dry gas is that the language quoted from section 2(d)(2) of its leases applies only where the lessee performs the extraction or processing. It asserts that in fact the extraction and processing are done by the Margaret Hunt Trust Estate under a purchase agreement entered into by Placid on July 11, 1960. It stresses the fact that the agreement provides that Placid sells the liquid products to the Estate (called Plant Owner in the contract) and that title to the products pass to the Plant Owner at the time of entry into the plant. The extraction and processing occur thereafter.

Section 2(d)(2) does not specify who is to do the extracting or processing. It does not say that the costs of extraction or processing will be disallowed only where the lessee performs the work. Thus there is no basis in the language of the leases for the position asserted by Placid. On the contrary, the language of section 2(d)(2) literally sustains the conclusion of the Acting Director.

Aside from this, Placid's argument based upon the agreement with the Estate does not appear to be well-founded when all pertinent circumstances are considered. Prior to entering the agreement, Placid executed a contract on May 15, 1959, to sell the gas from its leases to the Peoples Gulf Coast Natural Gas Pipe Line Company. This contract obligated Placid to deliver the gas to Peoples' line at a central point in the Franks Field (where the leases are situated) at a pressure not exceeding 1,000 p.s.i. and in accordance with certain quality

specifications. To fulfill this contract, it was essential that Placid's gas be processed to remove liquid products, compressed, dehydrated, and otherwise be put in condition for delivery to the pipeline. Placid entered into the agreement with the Estate for this purpose. That agreement provides that title to all residue gas shall remain in Placid (Article IV, 4.2). In other words, Placid has merely contracted out to the Estate the work necessary to put in marketable condition the gas to be sold to Peoples. This cannot operate to permit Placid to deduct costs that it could not deduct if it did the processing itself.

The agreement between Placid and the Estate for transferring title to the liquid products prior to extraction or processing does not alter the situation. The fact is that Placid delivers only one commodity from its leases to the Estate's plant. At that point, although title to the liquid hydrocarbons passes to the Estate while title to the residue gas remains in Placid, physically there is no separation of the well gas into these two components until the gas is processed and the liquid products extracted. It is only then that the liquid products to which the Estate's title vested can be identified. Meanwhile title to what ultimately becomes the residue gas remains in Placid at all times.

To turn Placid's argument around, that extraction and processing costs are deductible with respect to the liquid products because such costs are incurred after title passes, such costs are clearly not deductible with respect to residue gas because they are incurred while title remains in Placid. The fact, however, is that section 2(d)(2) of Placid's leases clearly provides that in computing royalty on either the gasoline or other products extracted from the gas or on the gas remaining after such extraction, no allowance will be made for the cost of extraction or processing. It would completely nullify this provision to say that such cost may be deducted in computing royalties on the liquid products.

As for the costs of gathering, dehydration, and compression, they are not deductible in the computation of royalties on the gas. *The Texas Company*, 64 I.D. 76 (1957); *The California Company*, 66 I.D. 54 (1959), affirmed 296 F. 2d 384 (D.C. Cir. 1961).

A careful review of the record indicates clearly that the leases in question were intended to require the result enunciated 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 appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

*September 18, 1963*

**EDWIN P. KNAPP**

**KENNETH M. CROCKETT**

**A-29913**

*Decided September 18, 1963*

**Alaska: Homesteads—Homesteads (Ordinary): Residence**

This Department has no authority to relieve homesteaders of the residence requirements of the homestead laws.

**Alaska: Homesteads—Homesteads (Ordinary): Residence**

A leave of absence from a settlement claim in Alaska may be granted only if the applicant has established his residence on the claim.

**Alaska: Homesteads—Homesteads (Ordinary): Residence—Homesteads (Ordinary): Final Proof**

Final proof under a settlement claim in Alaska is not acceptable where it does not show that the homesteader established his residence on the claim within six months after filing his notice of settlement.

**Alaska: Homesteads—Homesteads (Ordinary): Applications—Homesteads (Ordinary): Lands Subject to**

Land embraced in a recorded settlement claim in Alaska is not available for homestead entry and an application to make homestead entry on such land must be rejected.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Edwin P. Knapp has appealed to the Secretary of the Interior from a decision by the Division of Appeals, Bureau of Land Management, dated January 10, 1963, which held that Knapp's final proof, submitted in connection with his settlement claim, was not sufficient to show that Knapp had complied with the residence requirement of the homestead law. The decision informed Knapp that he had not shown that he had established residence on the claim within the time prescribed by law and, as supplemented and clarified by a letter to Knapp dated February 20, 1963, informed Knapp that he might submit new final proof at any time before the five-year statutory life of his claim expired if he could show establishment of residence within six months from the date of filing of his notice of settlement and continuous occupancy of the land for a period of seven months.

Knapp appealed from the decision of January 10, 1963, stating that he was misled by the Fairbanks land office into believing that a leave of absence for which he had applied would be granted and stating that if it were necessary to submit new final proof he believed he could make a satisfactory showing.

By letter dated June 5, 1963, Knapp was advised that an appeal to the Secretary from the decision of January 10, 1963, was not nec-

essary to protect his settlement claim if Knapp intended to take advantage of the opportunity given to him to submit proof that he established residence on the claim within six months of his notice of location and maintained that residence for the required time.

By letter dated June 20, 1963, Knapp replied that he intended to stand on the showing previously made "rather than attempting to show establishment of residence six months after filing." However, he stated that he "definitely established residence on the homestead the same day" he filed his notice but that he "left for the school of Ministry one month sooner than I should have." He stated that he "requested a years [sic] leave of absence believing that the leave would be granted from the time I requested it rather than from the time of my filing." He requests that an exception to the rule of residence be made in his favor.

This Department has no authority to relieve Knapp from the requirements of the homestead laws with respect to residence. However, a consideration of the entire record, including Knapp's statements in his present appeal, leads to the conclusion that Knapp does not understand what he is required to prove with respect to the establishment of residence on the claim or wherein he has failed, in the past, in presenting his proof. Therefore, in an effort to assist Knapp to prove, if he can, that he has complied with the requirements of the homestead laws, this decision will attempt to clarify for Knapp the deficiency of the proof which he has already submitted and point out the inconsistent position which he is taking in asserting that he will not attempt to show establishment of residence within six months after filing his notice of settlement claim, and at the same time asserting that he established residence on the same day he filed his notice of settlement claim.

Knapp filed his notice of a settlement claim on unsurveyed land in Alaska on March 10, 1959, under the homestead laws (43 U.S.C., 1958 ed., sec. 161 *et seq.*) as extended to Alaska (48 U.S.C., 1958 ed., sec. 371 *et seq.*). His notice stated that there was a house on the claim (16 x 24) and that 100 acres were cleared. His final proof stated that he did not establish actual residence on the claim until June 1, 1960. His proof showed further that he built a two-bedroom house on the land in 1959 and that also in 1959 he brushed, cleared, and disked 155 acres. He now says that he established residence on the claim on the same day that he filed his notice. If he did establish residence on the claim on the date of his notice or at any time within six months after March 10, 1959, then his statement in his final proof that he established residence on June 1, 1960, is obviously incorrect and must be overcome by competent evidence that he established his residence at an earlier date.

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If, on the other hand, Knapp did not establish his residence until June 1, 1960, then he has not complied with the requirements of the homestead laws which provide that failure to establish residence on the land within six months after initiation of the claim causes the land to revert to the Government. While an extension of six months within which to establish residence may be granted in certain circumstances (43 U.S.C., 1958 ed., sec. 169), there is no indication in the present record that Knapp applied for such an extension. In any event the extension could not have extended beyond March 10, 1960.

If Knapp established residence within the six-months period, he was then entitled to apply for a leave of absence for one year or less if failure of crops, sickness, or other unavoidable casualty had prevented him from supporting himself and those dependent upon him by cultivation of the land (43 CFR 65.16). This leave of absence is not to be confused with the extension of time for establishing residence (43 CFR 65.15).

The record shows that Knapp did apply for a leave of absence but it is not clear as to whether he had established his residence on the claim before he made such application. If he had not already established his residence, then the leave of absence could not have been granted to him.

The letter signed by Knapp applying for the leave of absence is dated July 15, 1959. However, Knapp apparently did not file the letter with the land office but, instead, left it with another who did not file it in the land office until January 7, 1960. The letter did not give sufficient information for the land office to act on and by letter dated January 22, 1960, Knapp was requested to furnish additional information, including a statement as to the date on which he established his residence and how long he had remained on the land. Knapp replied on March 20, 1960, without stating when he established residence on the land or how long he maintained that residence. He stated merely that he was unable to make enough from the homestead to support himself and his family so that he had decided to finish his education in the ministry then return and "complete my time required for patent on the land." He stated "we have all the homestead (160) cleared and a home on it also logs cut for our other buildings." On June 20, 1960, Knapp informed the land office that as of June 1 of that year he had returned to the homestead, had certain acreage in cultivation, and "we are in process of building on to our home." Thereafter, by letter dated January 2, 1961, he informed the land office that as of January 1, 1961, he had lived on his homestead the required seven consecutive months.

Apparently Knapp is under the impression that all he has to prove is that he lived on the claim for seven consecutive months.<sup>1</sup>

This is not the case. He must prove that he established his residence during the first six months of his claim, left the claim for not more than one year because he could not support himself and his family from the claim, and then returned to the claim and spent at least seven months in residence.

The residence which Knapp must prove he established during the first six months of his claim does not have to be of the character necessary for final proof. *Boyd L. Hulse v. William H. Griggs*, 67 I.D. 212 (1960). For instance, the house already on the land on March 10, 1959, does not have to be shown to have been habitable when he established his residence. If he went on the land, on the date of his settlement notice, or at any time thereafter within six months of March 10, 1959, with the intent to make a home on the land for himself and his family and thereafter continued to occupy the land and improve it until he found it necessary to leave the land to support his family, he established residence on the land sufficient to satisfy the requirement of the law with respect to the establishment of residence. That he may have done so is indicated by the fact that his final proof shows that he built a two-bedroom house on the land in 1959 (although he states the house was not habitable until June 1, 1960) and started his cultivation.

A letter by Knapp dated January 5, 1962, but not received in the land office until February 13, 1962, after his final proof had been rejected by the land office on January 30, 1962, states that he first filed on the homestead on March 10, 1959, and established residence immediately following (without giving any specific date or indicating what he did to establish that residence). The letter was accompanied by an affidavit dated January 5, 1962, executed by Knapp in Florida, that he filed on the claim "on March 10, 1959, and established residence." That affidavit carries two signatures of persons giving their addresses in Fairbanks as witnesses. The witnesses signed before a notary public in Fairbanks on February 13, 1962. This affidavit is not explicit enough to meet the requirements of final proof because it does not show when or how residence was established.

To summarize: If Knapp can prove by himself and two credible witnesses that he actually went on the land within six months following the filing of his notice with the intent to make the land his home and that he thereafter returned to the land and resided thereon with his family for at least seven months, then he should take advantage of the opportunity given to him to submit new final proof, establishing

<sup>1</sup> Knapp is an honorably discharged veteran with over four years of military service. He may apply not to exceed two years of that service against his three years of required residence under the homestead laws. All homesteaders are permitted two absences of not to exceed five months in the aggregate in any one residence year.



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these facts. Such proof must be submitted by March 9, 1964, which is the date on which the statutory life of his claim will expire.

One other aspect with relation to the land embraced in Knapp's claim remains to be considered.

As noted above, Knapp filed his notice of a settlement claim on March 10, 1959, and the statutory life of his entry dates from that time. By decision dated August 28, 1959, the filing of his location notice was "approved as of the date of its filing" and Knapp was informed that he might "continue to perfect" his claim in accordance with the applicable regulations. On December 19, 1961, after Knapp had submitted his final proof in April of that year, he was called on to file a homestead application covering the then unsurveyed land within his claim. Knapp filed such an application on December 29, 1961.

The plat of survey covering the land on which Knapp's claim is located was filed on September 21, 1962. Thereafter, on September 26, 1962, while Knapp's appeal from the rejection of his final proof was pending in the Bureau of Land Management, Kenneth M. Crockett filed a notice of location of a claim on the SW $\frac{1}{4}$  sec. 14, T. 1 N., R. 2 W., F.M., Alaska, the same land as that included in Knapp's claim. Crockett gave the date of his settlement as September 25, 1962. On September 26, 1962, Crockett also filed an application to make homestead entry on the land embraced in his settlement claim (Fairbanks 030445).

Under date of May 21, 1963, Crockett was informed that his rights in the land were subordinate to those of Knapp but at the same time that he, Crockett, must establish residence on the claim not later than twelve months after September 26, 1962, in order to protect any rights he might have in the land. Crockett apparently attempted to establish residence but was met by the opposition of a person purporting to act on behalf of Knapp.

Thereafter, by decision dated August 1, 1963, Crockett was informed that the land covered by his homestead entry application and his notice of location was embraced in Knapp's homestead entry application which had been rejected and was then on appeal and that until a final decision was reached on the Knapp application no action could be taken on Crockett's or other subsequent applications for the same land. Crockett was informed that Knapp was the senior applicant for the land, having filed his application on December 29, 1961, when the land was open to filing, and that Knapp's application was the equivalent to an entry. Crockett's notice of location of his settlement claim was rejected but his homestead application was suspended.

Knapp's rights, if any, dated from his notice of settlement, March 10, 1959, and not from the date he filed his homestead application.

Knapp and Crockett were not, therefore, in the position of senior and junior applicants for the same land. Knapp had a recorded claim to the land when Crockett filed his notice and application. As the land was, on September 26, 1962, embraced in Knapp's settlement claim, obviously the land was not open to settlement or occupancy by Crockett on that date and it was proper to have rejected his notice of settlement.

However, for the same reason Crockett's homestead application also should have been rejected under the well established rule that an entry on public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until that entry is finally canceled and removed. See *R. B. Whitaker et al.*, 63 I.D. 124 (1956), and cases cited therein. In such a situation, where there is a prima facie valid entry on the land a subsequent application for the same land must be rejected and not suspended to await the determination as to the validity of the entry of record. To do otherwise in this instance would be to give Crockett an unfair advantage in the event Knapp's claim is finally 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), the decision of the Division of Appeals, Bureau of Land Management, rejecting Knapp's final proof but allowing him a further opportunity to submit acceptable final proof by March 9, 1964, is affirmed, and Crockett's application to make homestead entry on the same land is rejected without prejudice to his making a new application for the land in the event Knapp does not finally establish his right to the land.

ERNEST F. HOM,  
*Assistant Solicitor.*

JOHN W. MECOM ET AL.

A-29548

*Decided September 19, 1963*

**Rules of Practice: Appeals: Generally—Practice Before the Department:  
Persons Qualified To Practice**

While an appeal to the Director of the Bureau of Land Management is properly dismissed when it is prosecuted by an agent of the appellants who has not shown that he is authorized to practice before the Department, if the agent on appeal to the Secretary of the Interior states that he is a practicing attorney at law and the Director has also ruled on the merits of the appeal, the appeal may be considered on its merits.

**Color or Claim of Title: Applications**

An application for a patent based on color of title must be signed by the applicant for patent and an application signed by an agent is properly rejected.

September 19, 1963

### Color or Claim of Title: Generally—Patents of Public Lands: Generally

A patent issued pursuant to a color or claim of title must be in the name of all those claiming an interest in the land, or in the name of a person designated by all claiming an interest in the land.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John W. Mecom, San Jacinto Oil and Gas Company, and Gas Royalties Corporation have appealed to the Secretary of the Interior from a decision dated March 9, 1962, by which the Division of Appeals dismissed an appeal to the Director of the Bureau of Land Management brought in their behalf by G. E. Gotschall, their agent, on the ground that there was no evidence that Gotschall was authorized to practice before the Department.

On appeal to the Secretary, Gotschall has stated that he is an attorney at law admitted to practice in the State of Louisiana and in the District of Columbia. Since there is no question of the qualification of an attorney at law to practice before the Department under the applicable regulation, 43 CFR 1.3(a)(2), the case may now be considered on its merits. See *E. H. Hamlet, Dr. Erwood George Edgar*, A-29516 (August 19, 1963).

The decision of March 9, 1962, also rejected the color of title application filed on behalf of the appellants because it was not signed by the applicant for patent as required by the pertinent regulation. 43 CFR 140.6(b). The application was properly rejected for this reason.

The Division of Appeals stated that its decision did not prejudice the right of the appellants to file a new application, but that if they did it must be filed on the prescribed form and all the parties claiming an undivided interest in the land must assent to the application.

The appellants point out that several people own undivided interests in the land and ask that an application be considered even if not assented to by all of them and that a patent issue to their common grantor, his heirs, or assigns.

There is nothing in the Color of Title Act (43 U.S.C., 1958 ed., secs. 1068-1068b) or the regulations (43 CFR, Part 140) which would authorize such action. There is no provision for issuing a patent to less than all of those claiming an undivided interest in the land, nor can a patent be issued to the common grantor, for there would then be no assurance that all those who would benefit from the grant would have been qualified to assert a color of title claim on their own. Thus if the appellants file a new application, they must follow the instructions set out in the decision of the Division of Appeals.

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 Division of Appeals is

reversed insofar as it dismissed the appeal and affirmed insofar as it rejected the color of title application.

ERNEST F. HOM,  
*Assistant Solicitor.*

CLAIM OF RALPH MORDEN WILDER

T-1230

*Decided October 3, 1963*

**Torts: Motor Vehicles**

The operator of a motor vehicle is liable for damage or injury resulting from the casting of stones from the surface of the highway by such vehicle only when the damage or injury was caused by the negligent or wrongful operation of the vehicle.

MR. RALPH MORDEN WILDER  
*301 Lilly Chapel Road  
West Jefferson, Ohio*

DEAR MR. WILDER:

We have considered your claim (T-1230) in the amount of \$107.52 for damage to the windshield of your car allegedly resulting from a stone being cast by the wheel of a Government-owned jeep operated by an employee of the Bureau of Mines. The accident occurred on June 17, 1963, on Highway 60, between Victor and Ansted, West Virginia.

The investigation report shows that the rear of the Government-owned jeep was equipped with mud guards which extended within 5 inches of the road surface, that the vehicle was being operated at a lawful and reasonable speed, that it was in the proper lane on the highway where it had a right to be, that the road surface was concrete, and that no loose materials on the surface of the highway were observed.

Under the Federal Tort Claims Act (28 U.S.C., 1958 ed., sec. 2671 *et seq.*), the United States is liable for any damage caused by the negligent or wrongful act or omission of an employee while acting within the scope of his employment if a private person would be liable in the same circumstances. The general rule of law is that the operator of a private vehicle is liable for damage or injury resulting from the casting or precipitation of stones from the surface of a highway by such vehicle only when such damage or injury was caused by the negligent or wrongful operation of the vehicle. 25 Am. Jur. *Highways*, sec. 238, at 532 (1940). West Virginia follows this general rule of law. *Miller v. Bolyard*, 142 W. Va. 580, 97 S.E. 2d 58 (1957).

October 8, 1963

The facts surrounding this accident, as shown in the investigation report, do not support a conclusion that the Government operator was driving the Government vehicle in a negligent or unlawful manner. Nor do the accounts of the accident submitted by you and Mrs. Wilder point to any fact that would suggest faulty driving by the Government operator. In the circumstances, the Government driver could not have foreseen that damage might or would result from the operation of the jeep in the manner in which it was being operated. We find that the damage to your car is not attributable to any negligent or wrongful act or omission on the part of the Government operator.

Therefore, your claim is denied.

Sincerely yours,

EDWARD WEINBERG,  
*Deputy Solicitor.*

#### MAGNOLIA LUMBER SALES COMPANY

A-29575

*Decided October 8, 1963*

#### Timber Sales and Disposals—Trespass: Generally

A partnership is properly required to post a bond in the sum of unsettled trespass liability incurred by closely tied corporations which will directly benefit from a timber sale to the partnership as a condition precedent to the execution by the United States of a timber sales contract to the partnership.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Magnolia Lumber Sales Company has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated April 10, 1962, which affirmed a decision of the district manager, Medford, Oregon, dated October 19, 1961, as amended by a decision dated November 8, 1961. The decision of the district manager, as amended, required appellant to submit bonds to cover unsettled trespass liability in the amounts of \$108,099.98, \$6,972.10, and \$77.25 in accordance with the provisions of 43 CFR 288.12(b)(2), prior to obtaining a timber sale contract for which it was the successful bidder. Prior to the decision of the Division of Appeals, the trespass case for \$77.25 was closed and one of the two cases making the amount of \$6,972.10 was closed, leaving an outstanding amount of apparently \$2,192.20. The Bureau decision affirmed the district manager's decision. It specifically held that \$108,100 bond be submitted, but made no specific comment as to the filing of other bonds.

The appellant contends that the Bureau decision has for the first time alleged that appellant participated in the trespass from which arose the request that the \$108,100 bond be filed. It alleges also that the Bureau failed to rule on the question of the requirement that it post a bond for the alleged trespasses committed by two corporations, Magnolia Motor and Logging Company and Magnolia Lumber Corporation, Inc. The appellant's first contention is only technically correct.<sup>1</sup> However, to decide this appeal, it is not necessary to rule on the alleged participation by appellant in the trespass from which arose the request that the \$108,100 bond be filed. It is necessary to consider the propriety of requiring appellant to assume responsibility for the trespasses of the two corporations.

Magnolia Motor and Logging Company has outstanding alleged trespass liability, in California TT No. 11892, in the sum of \$108,099.98. Magnolia Lumber Corporation, Inc., has outstanding alleged trespass liability, in Oregon TM-382, in the sum of \$2,192.20.

Magnolia Lumber Sales Company is a partnership in which R. Drew Lamb and Zelma C. Lamb each controls a 25 percent interest and Richard Carrol Lamb a 20 percent interest. A timber sale to appellant would result in a positive benefit being derived by Magnolia Lumber Corporation, Inc., and Magnolia Motor and Logging Company, two closely tied corporations (see *Magnolia Lumber Corporation, Inc.*, 67 I.D. 245 (1960)) of both of which R. Drew Lamb is president. Appellant has at no time denied the interlocking interests between the partnership and the two corporations. The requirement set forth in 43 CFR 288.12(b)(2) cannot, therefore, be fulfilled in the absence of the filing of a bond in the sum of unsettled trespass liability against a closely tied corporation. In the instant case, thus, the corporate veils must be pierced to the extent of requiring that appellant, a partnership, file bonds in the sums of \$108,100 and \$2,200 for the unsettled liability of the two corporations which would directly benefit from the timber sale.

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 appealed from is affirmed as modified herein.

ERNEST F. HOM,  
Assistant Solicitor.

<sup>1</sup> The record shows that on January 15, 1960, a demand was served on appellant for unjust enrichment in the \$108,099.98 trespass.

**CRIPPLE CREEK COAL COMPANY**

A-29564

*Decided October 11, 1963***Alaska: Land Grants and Selections—Alaska: Coal Leases and Permits—  
Coal Leases and Permits: Applications—Alaska: Mineral Leases and  
Permits—Mineral Leasing Act: Applicability**

An application for a coal prospecting permit under regulations issued pursuant to the act of October 20, 1914, filed after the repeal of that act by the act of September 9, 1959, is subject to rejection because of the cessation of authority of this Department to issue permits under the 1914 act; and, even though the 1959 act extended the provisions of the Mineral Leasing Act of February 25, 1920, to Alaska, the land office did not have any duty or authority to consider the application as one under the 1920 act until some action was taken by the appellant to amend the application to come within that act.

**Alaska: Land Grants and Selections**

An application by the State to select lands under the Mental Health Act is not defective because it does not contain a showing as to the situation and potential uses of the selected lands.

**Alaska: Land Grants and Selections—Alaska: Coal Leases and Permits—  
Coal Leases and Permits: Applications**

A coal prospecting permit application which conflicts with an approved selection made by the State of Alaska under the Alaska Mental Health Act is properly rejected in favor of the State selection, regardless of which application was first filed.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

The Cripple Creek Coal Company has appealed to the Secretary of the Interior from a decision of the Legal Assistant, Division of Appeals, Bureau of Land Management, dated March 8, 1962, affirming a Fairbanks land office decision rejecting its application for a coal prospecting permit because it conflicted with an approved selection filed by the State of Alaska pursuant to the Mental Health Act of July 28, 1956 (48 U.S.C., 1958 ed., sec. 46), as confirmed by the Statehood Act of July 7, 1958 (72 Stat. 339, 343).

The appellant has presented many contentions to support its position that the permit should be granted. All have been considered but only the more relevant will be discussed. Appellant points to the fact that its application for a quarter section was filed on October 5, 1959, and was amended to include additional lands on November 4, 1959, for a total of 2,240 acres, whereas the State selection was filed on October 14, 1959. The appellant makes much of the fact that its application was filed first, although the amendment covering most of the lands was filed after the selection application. It contends that the application segregated the land and that the land was no longer

vacant, unappropriated, and unreserved for any purpose so as to be subject to selection. This argument can be directed only to the 160 acres covered by the appellant's original application; but even as to that it is not valid.

Appellant's application for the coal prospecting permit stated that it was made "in accordance with Sections 70.20 through 70.24 of C.F.R. 43." Those regulations were issued pursuant to the Alaska Coal Act of October 20, 1914 (48 U.S.C., 1958 ed., sec. 432), which was repealed by the act of September 9, 1959 (73 Stat. 490). Appellant states that the regulations, however, continued in force and effect until they were revoked by Circular No. 2034 approved January 15, 1960 (25 F.R. 500). The date of the revocation of the regulations is irrelevant since the act of September 9, 1959, stated that the 1914 act "is repealed." Therefore, the authority of this Department to issue a prospecting permit under the 1914 act ceased when the 1959 act was approved and the regulations could have no effect as to applications pending at the time of the approval or filed thereafter. The revocation of the regulations was simply to remove them from the public record. It is clear that any applications for prospecting permits pending when the act of September 9, 1959, was passed or filed thereafter pursuant to the 1914 act should have been rejected because of the repeal of that act. See *Gladys E. Dunkele, Executor of the Estate of W. E. Dunkele*, A-28177 (March 28, 1960); *H. A. Faroe*, A-28836 (September 17, 1962). Thus appellant's application should have been rejected for that reason.

Section 2 of the act of September 9, 1959, by eliminating the restriction of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1958 ed., sec. 201), to lands outside of Alaska so far as coal prospecting permits and leases are concerned, did extend those provisions to Alaska. Since the land office failed to take action to reject the appellant's application under the 1914 act, it was still pending when on May 14, 1960, and June 3, 1960, the appellant, by letter, informed the land office that it assumed the application would be considered under the act of February 25, 1920, and the regulations, 43 CFR Part 193, which were issued pursuant to that act relative to coal prospecting permits and leases. It is unnecessary to determine whether or not the land office properly should have considered the application as being under the Mineral Leasing Act without further action by the applicant, including the submission of a new filing fee. For the purpose of discussion only, we shall assume, *arguendo*, that the land office could properly do so. However, under this assumption, at the most, the application would be considered as amended at the time the applicant manifested to the land office its desire to have the application considered under the Mineral Leasing Act. Therefore, the State selection application was prior in filing to the appellant's



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application as to all of the lands, if the application is considered as amended to come within the Mineral Leasing Act.

The appellant is assuming too much by inferring that its application filed under one part of the regulations and the act under which they were issued could be considered as filed automatically under regulations issued pursuant to another act, by virtue of the extension of that act to Alaska by the act of September 9, 1959. That statute made no provision regarding pending applications or those which might erroneously be made under the repealed act. The land office employees had no duty or authority to alter or modify the application so as to bring it under a different act or regulation from the one stated by the applicant; therefore, in such a situation where an application is filed under the wrong statute it must be rejected. Cf. *Ruth G. Strom, Administratrix of the Estate of Ted R. Strom, T. Miller Gordon*, A-29120, A-29179 (March 21, 1963), and cases cited therein.

Recognizing that the State selection is prior in time of filing to appellant's amended application, appellant attacks the validity of the State's selection on two grounds. Appellant contends that the selection by the State is invalid because the Alaska Mental Health Act provides that "all selections shall be made in reasonably compact tracts taking into account the situation and potential uses of the lands involved" (48 U.S.C., 1958 ed., sec. 46-3(b)) and that no consideration was given here to the situation and potential uses of the selected lands. It also discusses the preference provided for in that act and contends that the State should not be given preference as there has been no formal revocation of a withdrawal of the area for coal purposes.

The revocation of the withdrawal has been discussed in Solicitor's Opinion M-36572 (August 20, 1959), which points out the deliberate concern of Congress that the State be permitted to obtain coal lands, and no further discussion of this point is necessary.

The provision relating to the situation and potential uses of the lands is in connection with the requirement that the selection be for lands which are compact. This provision in no way limits the State or makes mandatory any action by this Department in otherwise considering whether the lands may be used by another applicant for their coal value. That is, the statute provides only that the situation and potential uses of selected lands are to be taken into account in determining whether the selections have been made in reasonably compact tracts. There is nothing in the statute or the Department's regulations (43 CFR 76.9) which requires the State to make a showing as to the situation and potential uses of the land. The only showing required is specified in paragraph (a) of section 76.9. Paragraph (c) of that section contains the only reference to situation and potential use and

it merely repeats the statute. It may well be that a State selection could be rejected on the ground that the selection was not for reasonably compact tracts, considering the situation and potential uses of the land, but this is far different from rejecting a selection on the ground that the selection did not contain a showing that the selection was made of reasonably compact tracts. Thus the State selection was not defective and invalid when filed because it did not contain a showing as to the situation and potential uses of the selected land.

Even if appellant's application is considered as filed prior to the State selection application, we find no basis for overturning the Bureau's action in rejecting it. The appellant contends that it was improper and unlawful for the Bureau to take the position that, as the applicant acquired no vested right by his application, the application could be summarily rejected in favor of the conveyance of the fee simple title to the State.

The issuance of permits or leases under the Mineral Leasing Act is discretionary with the Secretary of the Interior (see *D. O. McGoon, Jr.*, A-28892 (July 12, 1962), as to coal prospecting permits) and their issuance may be denied in favor of a grant to the State of Alaska. See *J. L. McCarrey, Jr., Juliana D. Wilson*, A-28436 (November 14, 1960); *H. T. Birr, III*, A-28678 (November 1, 1961); *Violet Goresen et al.*, A-29268 (April 24, 1963). In its appeal the appellant is correct in one respect and that is that the Bureau erroneously cited regulation 43 CFR 76.12 as its authority for rejecting the appellant's application. This error does not necessitate any change in the conclusion of the Bureau's decisions since it is obvious from what has been discussed before and from the governing regulation, 43 CFR 76.8, that the appellant's application was properly rejected. We do not agree with the appellant that this regulation is beyond the authority of the Secretary of the Interior or usurps a legislative function, but, rather, that it is in line with the manifested intent of Congress to facilitate the transfer of lands, regardless of their mineral character, to the State of Alaska under the appropriate act here, and that it is well within the Secretary's discretionary authority granted by the Mineral Leasing Act, and facilitates an orderly administration of the applicable statutes.

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 appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## UNITED STATES OF AMERICA

v.

PEARL CLARKE, ET AL.

A-29639

*Decided October 17, 1963***Mining Claims: Discovery**

A mining claim is properly declared null and void when the evidence supports a finding that a valuable discovery has not been made within the limits of the claim.

**Mining Claims: Hearings—Administrative Procedure Act: Hearings**

A notice of hearing in a mining contest case which, in effect, incorporates the charges in the complaint that the land within the claim 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 sufficiently complies with the requirement in section 5 of the Administrative Procedure Act that a notice of hearing state the matters of fact and law asserted.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Pearl Clarke, Haydon C. Clarke, Norman E. Shannon, Kelly Shannon, Josephine M. Shannon and Avalon Bain have appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated April 25, 1962, which affirmed a decision of a hearing examiner, dated October 25, 1961, declaring null and void for lack of discovery the Clay Pigeon Placer Mining Claim situated in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$  of sec. 2, T. 11 N., R. 9 W., S.B.M., California.

The claim was located in 1957. A contest was initiated against it by a complaint which charged that the land embraced within the claim 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.

A hearing was held on September 26, 1960, and the evidence produced has been carefully reviewed. Only one witness appeared for each side, a mining engineer for the Government, and one of the claimants, Kelly Shannon, for the contestees. Shannon is not a mining or chemical engineer and worked on the claims on weekends, days off, and vacations. The testimony of the two witnesses is adequately summarized in the decision of the hearing examiner and need not be repeated. Outside of Shannon's bare statement that clay and bentonite were discovered on the claim—no samples were taken or assays made—there is no evidence of any discovery on the claim. The Government witness testified that on six separate examinations of the claim and the workings thereon he found no mineralization.

Appellants' counsel on the appeal to the Director and again on this appeal has vigorously assailed the Department's rulings as to what

is necessary to constitute a discovery and who has the burden of proof, and the Department's procedures in contesting mining claims generally. Practically all the points were raised by him in the case of *United States v. Kelly Shannon et al.*, A-29166 (April 12, 1963), involving adjacent claims on which clay and bentonite were also claimed to have been discovered and as to which Kelly Shannon and Josephine M. Shannon were also claimants. The *Shannon* decision, as well as the examiner's and Bureau's decision in the immediate case, adequately and fully answers appellants' contentions.

One contention that requires additional consideration is appellant's assertion that the charges set out in the complaint initiating this case do not conform to the requirement of the Administrative Procedure Act that there be alleged "the matters of fact and law asserted" because they do not allege any facts nor do they state any law supporting any charge.<sup>1</sup>

In an administrative proceeding, it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled. *Cella v. United States*, 208 F. 2d 783 (7th Cir. 1953); see *Garber v. Civil Aeronautics Board*, 276 F. 2d 321 (2d Cir. 1960).

The charges in this case were—

- (1) The land embraced within the claim is non-mineral in character.
- (2) Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

These are standard charges that have long been used in mining contest cases. They indicate clearly that the issues at the hearing will be whether the land is mineral land at all or whether, if there be minerals in the land, they are present in sufficient quantities to constitute a valid discovery. They thus serve to apprise the contestee of the factual issues that will be raised and, of course, by referring to "valid discovery" clearly evidence that the issue of law involved is the sufficiency of the discovery under the mining laws.

Moreover, the Department's rules of practice provide that a party may move the hearing examiner for a prehearing conference to consider "(1) The simplification of the issues, (2) the necessity of amendments to the pleadings, (3) the possibility of obtaining stipulations, admissions of fact \* \* \*, and (5) such other matters as may aid in the disposition of the proceedings." 43 CFR 221.69. The appellant did not take advantage of this opportunity to clarify any alleged confusion or uncertainty engendered by the notice of hearing or com-

<sup>1</sup> The Administrative Procedure Act does not contain any provisions respecting the contents of a complaint. What the appellant refers to is the requirement in section 5 of the act that parties entitled to notice of a hearing shall be timely informed of "the matters of fact and law involved" (5 U.S.C., 1958 ed., sec. 1004(a)). However, the notice of hearing in this case referred to the complaint for the matters of fact and law asserted.

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plaint. It is obvious that the appellant was quite able to present his defense to the allegations of the complaint at the hearing and thus was not misled by the complaint.

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 appealed from is affirmed.

ERNEST F. HOM,  
Assistant Solicitor.

### CLAIM OF RICHARD M. STEVENSON

T-1225

*Decided October 22, 1963*

**Torts: Parks—Torts: Licensees and Invitees—Torts: Trespass**

A child who while visiting a National Park Service area in Maryland enters a building which, because of conditions such as the darkness and dilapidation of its interior, a child of his age would realize was a place that visitors were not supposed to enter is not an invitee while inside the building, but is merely a licensee or trespasser to whom, under Maryland law, no duty is owed by the proprietor except that of avoiding wilfull injury or entrapment.

**Torts: Parks—Torts: Licensees and Invitees—Torts: Trespass**

A child who while visiting a National Park Service area in Maryland falls through an unguarded opening in the floor of a building, where the child has only the status of a licensee or trespasser, where conditions such as darkness and dilapidation exist to a degree that a child of his age would recognize as a warning of the possible presence of concealed hazards, and where the opening would have been visible to the child if he had used a flashlight or lantern, is not entitled to recover damages for the fall, since the "attractive nuisance" doctrine is not followed in Maryland, and since the concept of "entrapment" is narrowly applied in that State.

#### ADMINISTRATIVE DETERMINATION

A claim in the name of Richard M. Stevenson for the amount of \$1,000 on account of personal injury, sustained while he was a minor, has been filed by his father, Millard A. Stevenson, of 6-01 122d Street, College Point 56, New York.<sup>1</sup> The accident which is alleged to have caused the personal injury occurred at Fort Washington, Maryland, an area which is under the jurisdiction of the National Capital Region (formerly National Capital Parks) of the National Park Service, Department of the Interior. The alleged accident occurred on August 14, 1955, and the claim was filed on February 7, 1956.

<sup>1</sup> From the administrative record it would appear that Richard M. Stevenson has since reached the age of 21 years, and presumably now has the legal capacity to act for himself in this matter.

The claim has been left unadjudicated for so long a time partly because of misunderstanding and inaction on both sides which led to an erroneous belief that it had been dropped, and partly because of efforts to obtain needed information. These efforts culminated in proposals for a meeting at the site of the accident during which Richard M. Stevenson could explain exactly how and why it occurred, or for the submission of affidavits by him and any other eye-witness, that were made by us on July 30 and August 22 of this year, but that were not accepted by the Stevensons.

Authority for administrative determination of the claim is contained in the applicable provisions of the Federal Tort Claims Act, 28 U.S.C., 1958 ed., Supp. IV, secs. 2671-80. That act authorizes the consideration and settlement of claims for personal injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The law to be followed in this case is that of the State of Maryland.

The only eye-witness accounts of the accident that have been submitted are those contained in letters from Millard A. Stevenson. According to these account, Mr. Stevenson, his wife, his son James, aged 15, and his son Richard, aged 13, went to Fort Washington for a picnic. During the early part of the afternoon, James and Richard started to explore an abandoned gun battery, and while both were there Richard suffered a fall within an interior stairwell of the old battery. Mr. Stevenson's description of what happened is as follows:

\* \* \* We drove close to the gun battery, at which time the two boys got out of the car and proceeded towards the battery while my wife and I drove away to find a parking place for the car. About five minutes later my wife and I walked back towards the battery and the boys were apparently inside. Upon reaching a point approximately 20 feet from the ground floor of the battery, I heard Richard scream "Daddy, Daddy." I ran inside the ground floor of the battery which was covered with pools of slimy water and almost completely dark. From his screams, I was able to see a dim outline of Richard in the dark open stairwell holding on to a rusted broken piece of iron railing and with his feet and body suspended in air. It was so dark in the stairwell that I was unable to tell whether there was a floor or a hole in the area. By that time James had reached the second level and was able to assist Richard back up to the floor from which he had slipped and fell. \* \* \*

To the best of my knowledge, this was the first time Richard had ever been in this particular gun battery. I had visited the park on one or two previous occasions with my two sons and had accompanied them on sightseeing tours through various buildings. However, to my recollection we had never been in this particular building prior to August 14, 1955.

The factual grounds for the claim, as summarized by Mr. Stevenson, are that "Richard fell into an unprotected opening in the dark-

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ened interior of the old gun battery," that "the stairway and railings had rotted away," and that "the open stairwell was a definite hazard with no warning signs of any kind on or near the premises.

A photographer employed by the National Capital Parks took a series of photographs of the gun battery, including flashlight photographs of the interior, on or before September 20, 1955. They were taken at a time when Mr. Stevenson was present, but when both of his sons were absent. These photographs reveal that the interior of the battery was in a thoroughly dilapidated condition, that the floors of entrances and other passageways were littered with debris, and that this debris included such major obstructions as broken doors and fallen timbering or metal work.

The correctness of the accounts of the accident given by Mr. Stevenson is not an issue here, since, assuming them to be factually accurate, they are, for reasons that will be explained, legally insufficient to establish liability on the part of the United States.

Under the law of Maryland, the duty owed by a proprietor of land to persons whom he has invited to use, free of charge, accommodations provided for such guests is a duty "to take precautions against their injury on the accommodations provided, from a danger known to the proprietor, but which, as he should realize, a visitor exercising ordinary care might not perceive, and by which he might be caught unaware."<sup>2</sup> On the other hand, the rule applicable to licensees—that is, persons who enter on the land by the consent of the proprietor but without any express or implied invitation—is that "a licensor owes no duty to a licensee, except that, if aware of his presence, the licensor must not injure him wilfully or entrap him."<sup>3</sup> The duty owed to licensees is frequently characterized as being the same as that owed to trespassers.<sup>4</sup>

The Maryland courts, moreover, have not followed the so-called "attractive nuisance" doctrine, under which a special duty of protection is owed in some circumstances to child trespassers or child licensees.<sup>5</sup> The Maryland law with respect to such persons is summarized in a leading decision, as follows:

Whether the child be there as a trespasser or by mere permission, but not as an invitee, he must take the premises as he finds them, and the owner or occupant undertakes no duty to him except that after becoming aware of his

<sup>2</sup> *Recreation Centre Corporation v. Zimmerman*, 172 Md. 309, 191 A. 233, 234 (1937).

<sup>3</sup> *Crown Cork and Seal Company v. Kane*, 213 Md. 152, 131 A. 2d 470, 472 (1957).

<sup>4</sup> *Carróll v. Spencer*, 204 Md. 387, 104 A. 2d 628 (1954); *State ex rel. Lorenz v. Machen*, 164 Md. 579, 165 A. 695 (1933); *Benson v. Baltimore Traction Company*, 77 Md. 535, 26 A. 973 (1893).

<sup>5</sup> *Conrad v. City of Takoma Park*, 208 Md. 363, 118 A. 2d 497 (1955); *State ex rel. Alston v. Baltimore Fidelity Warehouse Company*, 176 Md. 341, 4 A. 2d 739 (1939); *State ex rel. Lorenz v. Machen*, *supra*, note 4; see *State ex rel. Potter v. Longeley*, 161 Md. 563, 158 A. 66 (1925); *State ex rel. Lease v. Bealmear*, 149 Md. 10, 130 A. 66 (1925); *City of Baltimore v. De Palma*, 137 Md. 179, 112 A. 277 (1920).

presence he must not injure him wilfully or, after notice to the child's peril, entrap him by a concealed danger known to the occupier but unknown and not obvious to an inexperienced child.<sup>6</sup>

The authorities just cited make it apparent that the first question which must be determined in this case is whether Richard was an invitee of the United States while he was inside the abandoned gun battery where he fell. It need not, and will not, be determined whether he was an invitee on the remainder of the premises of Fort Washington, for an invitee loses his status as such while he is within a portion of the premises which he knows, or has reason to believe, is not held open for visitation by him.<sup>7</sup> To quote a recent Maryland decision:

One may be an invitee or business visitor as to one portion of the premises, or for a limited time, and be a licensee or trespasser as to another portion of the same premises or, without changing location, undergo the same change in status by the lapse of time.<sup>8</sup>

The facts of the instant case, as related by Mr. Stevenson and revealed by the photographs, plainly negative any possibility of a finding that the interior of the gun battery was a place which the United States expressly or impliedly held open for visitation by the public, or was a place which Richard could reasonably believe was held open for such visitation. The deep darkness, the pools of slimy water, the quantities of debris, the broken doors, and the general state of dilapidation were quite sufficient to tell a reasonable person that here was an area he was not supposed to enter. Some of these circumstances were visible from outside the battery; exploration did not have to be pushed as far as the point where Richard fell in order to reveal all classes of them. They were, moreover, circumstances whose warning against entry would be comprehensible by a 13-year old boy. While "keep out" or "no trespassing" signs were lacking, the facts conveyed the same message as such signs would have done.

Among the Maryland decisions on this subject is a case where recovery was denied for the death of an 11-year old boy who drowned while playing on a raft which he had reached by climbing over a 2-foot high stone wall that separated the place where the raft was moored from a public street. The court said:

Any child would have known not only that he had no right to make this venture but also that it was dangerous. The stone wall was a guard and a warning and an obstacle places in the way to prevent unrestricted access to the water.<sup>9</sup>

Recovery was denied in another case for an injury to a boy only 6 years old who fell through an open trap door in the floor behind the

<sup>6</sup> *State ex rel. Alston v. Baltimore Fidelity Warehouse Company*, *supra*, note 5, at 743. *Accord*, *Levine v. Miller*, 218 Md. 74, 145 A. 2d 418 (1958).

<sup>7</sup> *Gordon Sleeprite Corporation v. Waters*, 165 Md. 354, 168 A. 840 (1933); *Hyde v. Blumenihal*, 136 Md. 445, 110 A. 862 (1920); see *Crown Cork and Seal Company v. Kane*, *supra*, note 3.

<sup>8</sup> *Levine v. Miller*, *supra*, note 6, at 421.

<sup>9</sup> *State ex rel. Alston v. Baltimore Fidelity Warehouse Company*, *supra* note 5, at 741.



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counter of a grocery store, while he was looking for cakes and while his mother was making purchases. The court commented:

It is manifest that this boy and his mother were invited to come into the store by the proprietor, but it cannot in reason be said that he expressly or by implication invited them behind the counters. \* \* \* And where there is no custom permitting customers behind counters, as in this case, those who wander behind counters, whether adults or infants, are not invitees and at best are mere licensees to whom the shopkeeper owes no duty for their protection, and we think the child should have known he was not permitted to go behind the counter.<sup>10</sup>

In the light of the Maryland law, as revealed by these decisions, it is clear that Richard, when inside the battery, was not an invitee, but was either a licensee or a trespasser.

This brings us to the second question which needs to be determined in this case, that is, whether the circumstances under which Richard fell are sufficient to bring his fall within the application of the Maryland "entrapment" rule, which has already been mentioned and quoted.<sup>11</sup> One essential for the application of this rule is that the proprietor of the land knows, or has reason to be aware, of the presence of the child.<sup>12</sup> Another is that he knows, or has reason to be aware, of the presence of a concealed peril, which is not within the capacity of the child to perceive and appreciate.<sup>13</sup>

The narrow scope of the Maryland concept of a trap is illustrated by a case where an 11-year old boy, who was watching a baseball game from a pile of pipes, was injured when some of the pipes in the pile shifted their position and rolled upon him. Recovery was denied even though the proprietor knew that members of the public frequently used the pile of pipes as a grandstand, and even though he had posted no sign warning them of the instability of the pile. The court said:

There was an inherent possibility of danger in climbing upon such a pile of metal forms as the declaration described. In view of that possibility, it could be reasonably supposed by the defendant that those who used the pile as a post of observation would take precautions to ascertain whether it was sufficiently stable to be safe for such use.<sup>14</sup>

Another illustration is afforded by a case where an 8-year old boy, while playing in an unfinished house, fell through a hole in the floor that was obscured by shadows. Recovery was denied notwithstanding that the proprietor knew the boy was in the house, and notwithstanding that the attention of the boy was distracted from the hole by a sham

<sup>10</sup> *Pellicot v. Keene*, 181 Md. 135, 28 A. 2d 826, 828 (1942).

<sup>11</sup> *Supra* notes 3 and 6.

<sup>12</sup> *State ex rel. Alston v. Baltimore Fidelity Warehouse Company*, *supra* note 5; *State ex rel. Lorenz v. Machen*, *supra* note 4.

<sup>13</sup> *State ex rel. Alston v. Baltimore Fidelity Warehouse Company*, *supra* note 5; *Brinkmeyer v. United Iron & Metal Company*, 168 Md. 149, 177 A. 171 (1935).

<sup>14</sup> *Brinkmeyer v. United Iron & Metal Company*, *supra* note 13, at 173.

battle which he and three companions were waging. The court commented.

There are innumerable potential dangers in a half finished house, and the hole into which the appellant fell was only one of the many. \* \* \* The appellees are not liable because they did not act in anticipation that, as a fact, the appellant, by his own lack of care, would bring about injury to himself, merely because he was in a position where that could occur.<sup>15</sup>

Also illustrative is the previously mentioned decision where recovery was refused for an injury to a 6-year-old boy who fell through an open trap door behind the counter of a grocery store.<sup>16</sup>

In the instant case there is not so much as a suggestion that any employee of the United States was aware that Richard had ventured into the gun battery. Other persons seem to have entered the battery with considerable frequency, even when to do so necessitated the breaking of doors or barricades installed for the purpose of keeping out visitors, but whether these intrusions were sufficient to put the United States on notice of the peril that Richard subsequently encountered is not here material. This is because the stairwell did not in any event meet the Maryland concept of a trap.

The darkness and dilapidation of the interior of the battery were obvious conditions that gave unmistakable warning of the possible presence of concealed hazards. These conditions and these hazards were well within the capacity of a 13-year-old boy to observe and to appreciate. Mr. Stevenson's statements indicate that neither Richard nor James had ever been in the battery before, and they seem to have taken with them no source of artificial light to dispel the darkness. Exploration of the battery under such circumstances was so careless a proceeding that it was not reasonably to be anticipated. Had a flashlight or lantern been used, the condition of the stairwell would have been visible. These facts, as the cited cases show, necessarily preclude application of the "entrapment" rule.

In the circumstances we find that the personal injury here in question was not caused by the negligent or wrongful act or omission of any employee of the United States.

The claim of Richard M. Stevenson, therefore, is denied.

EDWARD WEINBERG,  
Deputy Solicitor.

<sup>15</sup> *Carroll v. Spencer*, *supra* note 4, at 632.

<sup>16</sup> *Pellicot v. Keene*, *supra* note 10. See also *Levine v. Miller*, *supra* note 6 (unattached radiator that fell on 10-year-old girl was not a trap); *Conrad v. City of Takoma Park*, *supra* note 5 (street excavation flares that burnt 6-year-old boy were not traps); *State ex rel. Lorenz v. Machen*, *supra* note 4 (cavity in bank of earth that, after it had been enlarged by children at play, caved in on 10-year-old boy, was not a trap); *Benson v. Baltimore Traction Company*, *supra* note 4 (vat of boiling water that had sides which were flush with the floor of the insufficiently lighted room where the vat was located, and into which a boy of about 16 or 17 fell, was not a trap).

## CLAIM OF JOHN C. BROCK

TA-249 (Ir.)

*Decided October 25, 1963***Rules of Practice: Appeals: Generally—Solicitor, Department of the Interior**

Since Field Solicitors do not have authority to determine either Reclamation or Indian irrigation claims under the annual Public Works Appropriation Acts, claims which may involve administrative determinations under both the Federal Tort Claims Act and under annual Public Works Appropriation Acts should be referred to the appropriate Regional Solicitors. They have full authority concerning both types of claims. The purpose of this holding is to prevent the fragmentary consideration of claims.

**ADMINISTRATIVE DETERMINATION**

Additions, changes and deletion to be made in the Administrative Determination of August 12, 1963.

The following footnote is added on page 399, Paragraph 4 after the words "Field Solicitor":

<sup>4</sup>Amendment 1 of Solicitor's Regulation 5 of March 9, 1959, gives the Field Solicitor authority to determine claims pursuant to the Federal Tort Claims Act, but does not give him authority (1) to determine under the annual Public Works Appropriation Act claims for damage to or loss of property, personal injury, or death arising out of activities of the Bureau of Reclamation, nor (2) to determine, under 25 U.S.C., sec. 388, claims for damages arising out of the survey, construction, operation, or maintenance of irrigation works on Indian irrigation projects. Hence, in a situation, such as the one presented here, in order to avoid the fragmentary consideration of claims, the entire matter should be referred by the Field Solicitor to the Regional Solicitor for determination of both tort and irrigation claims. Regional Solicitors have authority to determine the two types of irrigation claims described above if the claimed amounts do not exceed \$5,000.

The following should be added on page 399, Paragraph 4, lines 2 and 3: A period after the words "Indian irrigation works."

The following change should be made: Renumber footnotes 4, 5, and 6 as follows: 5, 6, and 7, respectively.

The following deletion should be made: On page 399, paragraph 4, lines 3 and 4, delete the words "and no reason was stated why it was not considered under that act."

FRANK J. BARRY,  
*Solicitor.*

## KERR-McGEE OIL INDUSTRIES, INC., ET. AL.

A-29894

*Decided October 31, 1963*

## Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Generally—Outer Continental Shelf Lands Act: Oil and Gas Leases—Outer Continental Shelf Lands Act: State Leases

The Secretary of the Interior in computing the basic royalty due the United States under a lease recognized and maintained under section 6 of the Outer Continental Shelf Lands Act, where it is to receive royalty on the value of gas produced rather than in kind, may properly look to the actual consideration to be received by its lessee-seller under gas sales contracts with a buyer in order to determine the proper value basis for the royalty; and a determination by the Geological Survey that a reimbursement to the seller for an amount due the United States by it as an additional royalty pursuant to section 6(a) (9) of that act constitutes part of the contract sales price for the gas and should be included in the total value basis for the basic royalty computation is proper, regardless of whether the reimbursement is specifically stated as separate from the contract price or is stated as being included in the total price in a settlement agreement approved by the Federal Power Commission.

## APPEAL FROM THE GEOLOGICAL SURVEY

Kerr-McGee Oil Industries, Inc., Phillips Petroleum Company, and Southern Natural Gas Company have appealed to the Secretary of the Interior from a decision by the Director of the Geological Survey, dated November 28, 1962, affirming a determination by the Oil and Gas Supervisor for the Gulf Coast Region at New Orleans, Louisiana, that certain reimbursement payments to be made to the companies, as sellers, pursuant to gas sales contracts entered into by the companies with the Transcontinental Gas Pipe Line Corp. (hereafter called "Transco"), as the buyer, should be included in the value basis to be used in computing royalty due the United States under leases held by these companies. The leases, which cover Blocks 28 and 32 Units in the Ship Shoal area in the Gulf of Mexico, offshore from the State of Louisiana, have been maintained by the appellants and recognized by the United States pursuant to section 6 of the Outer Continental Shelf Lands Act of August 7, 1953 (43 U.S.C., 1958 ed., sec. 1335).

Kerr-McGee Oil Industries, Inc., and Southern Natural Gas Company, as the Manager of the Southern Natural Gas Company-Phillips Petroleum Company Joint Venture, have also appealed as to the royalty value basis relative to a Settlement Agreement regarding the Block 28 Unit in the Ship Shoal area, which was approved by the Federal Power Commission.

There is no factual dispute involved in these cases. The leases in question had originally been issued by the State of Louisiana but were validated and recognized by the United States under section 6 of the Outer Continental Shelf Lands Act, *supra*. The appellants submitted copies of their gas sales contracts with Transco to the Oil and Gas

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Supervisor for approval pursuant to 30 CFR 250.46(c). The first question raised by this appeal is whether or not the Geological Survey correctly interpreted these contracts insofar as determining the contract price or value for the gas for the purposes of computing the  $\frac{1}{8}$  royalty due the United States in accordance with the lease terms and in accordance with section 6(a)(8) of the act, *supra*. That provision requires in effect that in order for a lease to be recognized by the United States it must provide for a royalty to the lessor on the oil and gas of not less than  $12\frac{1}{2}$  per centum ( $\frac{1}{8}$ ) "in amount or value of the production saved, removed, or sold from the lease", or the holder of the lease must consent to such a minimum royalty. Another provision of the act relevant here, section 6(a)(9), requires further payment to the United States by the holder of the lease as follows:

\* \* \* as an additional royalty on the production from the lease, less the United States' royalty interest in such production, a sum of money equal to the amount of the severance, gross production, or occupation taxes which would have been payable on such production to the State issuing the lease under its laws as they existed on the effective date of this Act. 43 U.S.C., 1958 ed., sec. 1335(a)(9).

The gas sales contracts all have similar provisions as to the price for the gas. In paragraph 1 of Article X (bearing the heading "Price") of the contracts the price is set forth per Mcf<sup>1</sup> starting at 22 cents per Mcf for the first four years. In determining the value basis for the  $\frac{1}{8}$  royalty the Geological Survey considered another provision of the appellants' sales contracts, paragraph 2 of Article X, which deals with reimbursements the buyer shall make to the seller. Paragraph (a) of paragraph 2 provides for reimbursement for certain State taxes. Paragraph (b) of paragraph 2 reads as follows:

Buyer shall also reimburse Seller, on the same basis as set forth in Paragraph (a) above, for any payments made by Seller subsequent to the date hereof of any sums due the Federal Government on the gas delivered to Buyer pursuant to this agreement, under section 6(a)(9) of the Outer Continental Shelf Lands Act, 67 Stat. 462, or other valid Federal law, in lieu of any of the taxes specified in said paragraph (a).

The Geological Survey concluded, in effect, that since the buyer under the quoted provision agreed to pay the amount which would be the additional royalty that the lessee is obligated to pay under section 6(a)(9) of the act, such agreed payment should be considered as part of the price received for the gas and should be included as part of the value for the computation of the  $\frac{1}{8}$  royalty.<sup>2</sup> Therefore, it was noted

<sup>1</sup> As defined in the contracts the term "Mcf" means one thousand (1,000) cubic feet of natural gas as determined on a measurement basis therein provided. See Article 1, paragraph 1(f), of the contracts.

<sup>2</sup> There is provision for certain oil payments due the United States which would be considered as royalties, but the Director and the appellants in discussing the royalty computations under these leases have assumed that the royalty interest is a uniform  $\frac{1}{8}$  and the working interest a uniform  $\frac{7}{8}$ . This assumption will also be made in this decision for the same reason.

that as of the effective date of the act the Louisiana severance tax was 0.3 cents per Mcf and that, for a lease having a basic royalty rate of  $\frac{1}{8}$ , the additional royalty payable under section 6(a) (9) is  $\frac{7}{8}$  of 0.3 cents per Mcf, or 0.2625 cents per Mcf. Thus, the 0.2625 cents, representing the amount to be reimbursed to the lessee-seller under paragraph (b) would be added to the 22 cents stated contract price, making a total basic value of 22.2625 cents per Mcf received by the seller on which the  $\frac{1}{8}$  royalty under section 6(a) (8) would be computed.

The appellants contend that the Geological Survey's method of computing the basic  $\frac{1}{8}$  royalty is erroneous because it includes in the value of the gas the amount of reimbursement by the buyer to the seller for the additional royalty owed by the seller to the United States under section 6(a) (9) of the act. They assert that the additional royalty required under section 6(a) (9) is in effect a tax or at least measured by the State of Louisiana's severance tax and thus the reimbursement to them from the buyer for it should be considered apart from the 22 cent "Basic Contract Price." They state that the practical and unfair result of the Director's decision is to require them to pay more than the additional royalty required by section 6(a) (9) and the basic  $\frac{1}{8}$  royalty and that they, the working interest owners, are penalized. They state that the Director's position is based on the erroneous premise that the United States would not otherwise receive its share of the benefits under the "Tax Reimbursement Obligation." Thus they claim that under their leases they may pay the  $\frac{1}{8}$  royalty in kind or by the value of the amount of gas produced and that if the United States were to take the  $\frac{1}{8}$  of the gas in kind it would receive the full and total payment of the basic lease royalty and there could be no basis for a claim that the United States was additionally entitled to receive  $\frac{1}{8}$ th of the reimbursement received by them for the additional royalty. Therefore, they argue that the return which they should receive as working interest holders should be the same regardless of the manner in which the basic lease royalty is paid, but that under the Director's method of computation it will not be since they would not be entitled to an additional reimbursement from the buyers of the  $\frac{1}{8}$  royalty on the amount they receive as reimbursement for the additional section 6(a) (9) royalty.<sup>3</sup>

One error with this latter contention is that if the  $\frac{1}{8}$  royalty were to be paid in kind, the United States would not be concerned with the return which the lessee receives for its gas except as it might indicate what return the United States might expect for the sale of its royalty gas. As the Director pointed out, if a buyer is willing to pay ap-

<sup>3</sup> As the Director's decision noted, when the Oil and Gas Supervisor notified appellants in 1959 that the  $\frac{1}{8}$  royalty would be computed in accordance with the method later sustained in the Director's decision and asked appellants' concurrence in the method, Phillips Petroleum Co. and Southern Natural Gas Co. first, by letters dated August 3, 1959, and August 18, 1959, stated their unqualified concurrence. Later, the two appellants notified the supervisor that they reserved the right to retract such concurrence.

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pellants 22 cents per Mcf plus  $\frac{7}{8}$  of 0.3 cents per Mcf, totaling 22.2625 cents, it would be assumed that the Government could also expect a like return for the sale of the royalty gas. However, in computing the royalty on the basis of the value of the production, then, of course, there must be some measurement and criteria for determining the value. The Director looked to the value that the lessee would receive for the gas, i.e., 22.2625 cents per Mcf.

Appellants contend that they are penalized also merely because the lessor, the United States, is tax-exempt. They state that the Director refused to recognize the fact that the so-called "Tax Reimbursement Obligation" applies to the royalty gas as well as the working interest gas and that the failure of the United States, as lessor, to receive an actual payment thereunder arises solely because it fails to qualify thereunder by its tax-exempt status and not from any failure of the lessor to participate to the full extent of its royalty interest in such obligation.

This rather obscure contention does not show that there was any error in the Director's determination and overlooks what should be the essential inquiry here as to what the value of the gas is as represented by the gas sales contract. The tax-exempt status of the United States here has no relevancy to that inquiry. It must be remembered that the maintenance and recognition of the appellants' leasehold rights is simply by virtue of the enactment of the Outer Continental Shelf Lands Act and that all determinations made with respect to their lease rights and obligations must be governed by the provisions of that act. 43 U.S.C., 1958 ed., sec. 1333; Acting Solicitor's opinion, 62 I.D. 44 (1955).

Appellants contend further that the Director's method of computing the basic lease royalty overreaches the requirements of section 6(a)(9) of the act and the results that Congress intended by that provision. They state that the intent of Congress in enacting that provision was to prevent the lessees from receiving a windfall by virtue of their being released from their obligation to pay the State severance taxes when the act was passed. They contend that under the express language of the act and the intent of Congress revealed by the legislative history they are only required to pay a basic lease royalty of  $\frac{1}{8}$  of the stated contract price plus the 0.2625 cents in lieu of the severance tax which would have been payable to the State of Louisiana if the leases were inside its territorial limits, and not the excess  $\frac{1}{8}$  of the additional royalty in lieu of the taxes which is reimbursed to them. This, they state, is inconsistent with the act and with the lease terms as it results in a reduction of the  $\frac{7}{8}$  working interest by 0.0328 cents per Mcf and increases the  $\frac{1}{8}$  basic lease royalty per Mcf by that amount. They also state that if the State of Louisiana had continued as the lessor there would be no question that the

basic lease royalty would have been  $\frac{1}{8}$  of the basic stated contract price without any charge upon the tax reimbursement received by the lessee pursuant to the tax reimbursement obligation of Transco.

Appellants, however, have not cited any specific examples or court decisions which would show that the State of Louisiana would disregard any provision in a gas sales contract for reimbursement of taxes due it in determining the contract sales price value for the gas in computing the royalty due it on a value basis. The fact that Congress chose to relate the amount which would be due as an additional royalty or payment to the United States under section 6(a) (9) to the amount which would have been due to the State at the time of the enactment is relevant simply in determining the amount of that additional payment or royalty. Under that provision of the act the obligation to make the additional royalty payments is expressly upon the holder of the lease. This is unlike the situation in the State of Louisiana where the severance taxes are to be paid proportionately by the owners of the natural resources at the time of severance. See *Texas Co. v. Fontenot*, 8 So. 2d 689 (La. 1942). Thus, in Louisiana, lessors owning fractional interests reserved as royalty must pay the severance tax in proportion to their royalty interests, but, of course, if the State was the lessor it was exempt from the tax. *Id.* However, regardless of how the State would treat a tax reimbursement provision, the determination as to the  $\frac{1}{8}$  royalty due to the United States must be based upon the jurisdiction which the United States has assumed over these leases, and not upon any hypothetical consideration as to what the State might receive if it had jurisdiction over the lands.

Appellants argue that if the provisions of their leases did not require payment to the State of royalty based on their reimbursement from buyers of the taxes, then they are exempted from making any such payment because of the "savings clause" embodied in section 6(b)(1) of the act. That "savings clause" provides as follows:

(b) Any person holding a mineral lease, which as determined by the Secretary meets the requirements of subsection (a) of this section, may continue to maintain such lease, and may conduct operations thereunder, in accordance with (1) its provision as to the area, the minerals covered, rentals and, subject to the provisions of paragraphs (8), (9) and (10) of subsection (a) of this section, as to royalties and as to the term thereof \* \* \* and (2) such regulations as the Secretary may under section 5 of this Act prescribe within ninety days after making his determination that such lease meets the requirements of subsection (a) of this section \* \* \*. 43 U.S.C., 1958 ed., sec. 1335(b).

Section 5 of the act (*id.*, sec. 1334) authorizes the Secretary of the Interior to administer the provisions of the act relating to the leasing of the outer continental shelf and to "prescribe such rules and regulations as may be necessary to carry out such provisions." The "savings clause," therefore, made the terms of the lease subject to the provisions of the act pertaining to royalties and also prescribed that they



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should be maintained under regulations issued by the Secretary. We see, therefore, no basis for the appellants' contention that the lease would have had to prescribe for a royalty on a reimbursement in order for such reimbursement to be considered as the Director did, nor for their contention that his interpretation flouts the intent and purpose of the "savings clause."

Appellants also refer to regulation 30 CFR 250.100(a) and contend that it also saves the lease terms as to royalties and that any interpretation of that regulation to the contrary would be in excess of delegated authority under the act. That regulation (see also 43 CFR 201.110(a) to the same effect) simply makes it clear that the regulations under the act take precedence over any lease terms in conflict with them except for those terms expressly mentioned in section 6(b)(1) quoted above, which take precedence over any regulations. Appellants allege that as the lease here involved did prescribe a  $\frac{1}{8}$  royalty they met the requirements of the act and the only other requirement would be for the lessee to pay the additional royalty. They state that the provision for the additional royalty should be limited to that and nothing more as there is nothing which says that section 6(a)(9) overrides all other provisions of the lease as to royalties or that such an "in lieu of tax royalty" is added to the value of the gas for royalty purposes.

We agree that the additional royalty provision should be considered apart from the provision for the  $\frac{1}{8}$  royalty and should not affect that royalty. However, we cannot accept the assumption upon which appellants have based all of their contentions, namely, that the value received for the gas is limited to the amount which they stipulated in their contracts with the buyers to be the contract price, and that this Department can look no further to ascertain whether other payments to be made to the seller actually represent consideration for the gas also. This assumption also is reflected in the sample computations they have included with their appeal. Appellants have not denied that the reimbursement they are to receive from the buyer is part of the consideration for the gas, other than by calling it an "in lieu of tax reimbursement."

This is the crux of the case. Appellants want to sell their gas to Transco at the highest price that they can obtain. Transco wants to buy the gas for the lowest price that is possible. The result of their bargaining is that they have agreed on a price of 22.2625 cents per Mcf. This price obviously represents the fair value of the gas to both parties. Twenty-two cents per Mcf is not the fair value of the gas, for appellants presumably are unwilling to sell at that price even though Transco would undoubtedly be delighted to buy at that price. Appellants are willing to sell only if they will receive a total return

of 22.2625 cents per Mcf. In the circumstances, it is impossible to escape the conclusion that 22.2625 cents per Mcf represents the value of the gas for royalty computation purposes.

It is immaterial that .2625 cent of the value is separately identified as a reimbursement to the seller for the additional or in lieu of tax royalty. If this simple bookkeeping device could have the effect contended for by the appellants, it would be possible for them to break down the so-called basic contract price of 22 cents per Mcf into other elements designated as reimbursements to the sellers for other items of costs or expense that the sellers must bear. Carried to an extreme, but a logical extreme under appellants' rationale, the basic contract price could be reduced simply to the profit that appellants would make per Mcf of gas sold, with all other payments to appellants being designated as reimbursements to them for various items of cost or expense.

At the time this Department gave approval to the continuation of appellants' leases there were regulations issued relating to the value basis for computing royalties under the act. The determination by the Geological Survey was made pursuant to such regulations. The pertinent regulation, 30 CFR 250.64, provides as follows:

The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. *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 paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value. (Italics added.)*

In making their negotiations for their sales contracts the appellants were or should have been aware of this regulation expressly providing that the value basis must be at least as much as the gross proceeds which the lessee would obtain from the sale of the gas here. To say that the reimbursement for the additional royalty is not part of the "gross proceeds" to be received under their contracts would not be realistic, for if there were no reimbursement provision the lessees would still have to pay the additional royalty, taking it out of their working interest share of the production. With the reimbursement provision they are receiving an additional compensation for the production from their leases. The practical result of appellants' contentions would be that they, rather than the United States, could determine the value of production simply by allocating the value they will receive under different categories designated as being other than the "price," yet all relating to the production. There is nothing in the act or its legislative history which would suggest that this was intended.

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It may be noted that in applying for continuation of the leases under the act the appellants agreed to comply with all "reasonable requirements the Secretary of the Interior may deem necessary to protect the interest of the United States." (See paragraph 11 of Certificate of Compliance.) Certainly, assuring that a proper return under the royalties provided for by the act under the leases maintained pursuant to it is a matter of interest to the United States. In this respect, discussion by the court in *California Company v. Udall*, 296 F. 2d 384 (D.C. Cir. 1961), is relevant here although the case arose under section 17 of the Mineral Leasing Act of 1920, as amended (30 U.S.C., 1958 ed., sec. 226(c)), providing that oil and gas leases "shall be conditioned upon the payment by the lessee of a royalty of 12½ per centum in amount or value of the production removed or sold from the lease." In upholding the determination by the Secretary of the Interior as to the value of gas for the royalty base, the court made the following comments which seem as applicable to the situation here under the Outer Continental Shelf Lands Act as to that under the Mineral Leasing Act:

The purpose of the Mineral Leasing Act was not to obtain sales for the gas from these reserves on Government land at any price. The Act was intended to promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that "belong" to the public. The Secretary of the Interior is the statutory guardian of this public interest \* \* \*.

To protect the public's royalty interest he may determine that minerals are being sold at less than reasonable value \* \* \*. He may also establish "reasonable values" for royalty purposes. \* \* \*.

An administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute \* \* \*. We are of opinion that the Secretary has authority to define for administrative purposes the "production" to be valued, and we are unable to find that he has abused his discretion in this case. 296 F. 2d 388.

Also of interest is an earlier case upholding the Secretary of the Interior's authority to determine the value of royalty oil in lieu of receiving it in kind due under a lease issued and extended under the Mineral Leasing Act of 1920 (30 U.S.C., 1958 ed., secs. 181 *et seq.*), *United States v. Ohio Oil Co.*, 163 F. 2d 633 (10th Cir. 1947), *cert. denied*, 333 U.S. 833, *rehearing denied*, 333 U.S. 865. In that case the Secretary designated a minimum value of royalty oil in excess of the contract price at which the oil was sold by the lessee.

Both of these cases illustrate the Secretary's authority to determine the value of the mineral products for purposes of computing the specific royalties prescribed by statute. The fact that the leases here were issued by the State and then recognized by the United States under a specific enactment does not reflect any difference in this case since the provisions of the act govern the lease, and the regulations with respect to the royalties must be held to apply to the determination as to those royalties. Consequently, with respect to the first question raised by this appeal, we find that the determination

by the Geological Survey that the reimbursement for the additional royalty is part of the gross proceeds for the sale of the gas is reasonable and proper.

The second question raised by this appeal may be disposed of briefly since much of the foregoing discussion relates to issues which are also determinative to it. This question involves the "Settlement Agreement," approved by the Federal Power Commission, between Transco and the appellants as to gas sales for a moratorium period from July 1, 1962, to June 30, 1967, while a dispute as to the State and Federal jurisdictional boundaries is being settled. As to gas not subject to the taxing jurisdiction of the State of Louisiana, the agreement provides that—

\* \* \* the total amount per Mcf paid by Transco for gas delivered from such properties shall be 19.0 cents per Mcf, inclusive of reimbursement of payments required under Section 6(a) (9) of the Outer Continental Shelf Lands Act.

The Geological Survey held that the royalties to the United States under this agreement were to be computed on the 19.0 cents per Mcf to be received by appellants. They contend, however, that the "Basic Contract Price" is 18.7375 cents per Mcf with an "In Lieu of Tax Royalty Obligation" reimbursement by Transco of the 0.2625 cents. Their contentions are based on the assumption that their contentions on the first question are correct and that regardless of the fact that the price is stated in one amount it was the intent of the parties to that agreement to establish, and that they did establish, a total "Settlement Price" which comprehended both the basic price and the reimbursement. Therefore, they contend that the language of the agreement actually shows the dual nature of the value received and should so be considered in computing the royalty.

We agree with the Geological Survey that the total amount of 19.0 cents should be used and that no deduction should be made for any reimbursement to the seller for the additional royalty due under section 6(a) (9) for the same reasons as stated concerning the first question.

The appellants have requested an oral hearing on their appeal. In view of the fact that they have filed an extensive brief in support of their appeal and that they have exhaustively argued their position before the Director and in a voluminous exchange of correspondence with the supervisor, it is not apparent that oral argument would add anything new to the consideration of this case.

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 request for oral argument is denied and the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

May 15, 1963

**CONTINENTAL OIL COMPANY\****Reversal Approved by Secretary May 15, 1963***Oil and Gas Leases: Unit and Cooperative Agreements—Oil and Gas Leases: Production**

Elimination of a portion of a lease committed to a producing unit plan from that unit does not cause or permit a segregation of the eliminated portion into a new and distinct lease. The eliminated portion of the lease and the portion which remains unitized continue to form one lease. Consequently, the term of the eliminated portion will continue coextensively with the term of the portion still committed to the unit plan so long as there is production anywhere on the lease. It is not material that the production is constructive with respect to the lease and not actually within the leasehold.

**Oil and Gas Leases: Unit and Cooperative Agreements**

Section 17(j) (formerly section 17b) of the Mineral Leasing Act of 1920, as amended, contains no authority for the Department to segregate a unitized lease into separate leases upon its partial elimination from a unit plan by reason of contraction of the unit area.

**Oil and Gas Leases: Generally—Regulations: Validity**

When a Departmental regulation is inconsistent with, and without the provisions of, the law, it is invalid and will not be followed.

**APPEAL FROM STATE LAND OFFICE**

Continental Oil Company has appealed from a decision of the Colorado Land Office, dated December 22, 1961, as amended by decision dated February 12, 1962, which held that the terms of the above-noted oil and gas leases as to the lands eliminated from the McCallum Unit Area by contraction approved effective January 1, 1961, are extended for two years from the contraction or to January 1, 1963, and for so long thereafter as oil or gas is produced in paying quantities.

Leases Colorado 0215, 0833, 0946 and Denver 028961, were issued effective March 1, 1950, March 1, 1951, September 1, 1950, and April 5, 1939, respectively. The lands involved in these leases were committed to the McCallum Unit approved December 29, 1952.

The appellant contends, in substance, that the decision appealed from is in error in holding that actual production is necessary to extend any lease as to the lands contracted out of a unit as constructive production is the same as actual production. It is, also, contended that the decision would be correct if the entire leaseholds had been excluded from the unit; however, since only portions thereof were so contracted and production within the unit is constructive production with regard

\*Not in chronological order.

to the retained portion of the leases in the unit, such constructive production is sufficient to warrant extension of the portions of the leases eliminated from the unit for the life of production continuing in the unit.

Section 5 of the act of August 8, 1946 (60 Stat. 952) amended Section 17 of the Mineral Leasing Act to provide as follows:

\* \* \* Any other lease [other than a 20 year lease] \* \* \* which is committed to any such [unit] plan \* \* \* shall continue in force and effect as to the land committed so long as the lease remains subject to the plan, \* \* \*. Any lease which shall be eliminated from any such approved or prescribed plan, \* \* \* and any lease which shall be in effect at the termination of any such approved or prescribed plan, \* \* \* shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities.

With the 1946 amendment of the Mineral Leasing Act the regulations were enlarged by Circular 1624 (11 F.R. 12956, October 28, 1946) to provide in pertinent part:

\* \* \* Any lease or portion thereof eliminated from any \* \* \* unit plan \* \* \* shall continue in effect for the original term of the lease, or for two years after its elimination from the plan \* \* \* whichever is the longer, and so long thereafter as oil or gas is produced in paying quantities.

This provision has remained the same to the present time. 43 CFR 192.123.

The leases in question were fully committed to the unit agreement. Production was had in paying quantities on the unit prior to the expiration date of the terms of the leases, and consequently they were to continue for the life of the unit plan. *Solicitor's Opinion M-36629*, 69 I.D. 110 (1962). Subsequently, portions of these leases were eliminated from the unit plan. But, the portion of a lease eliminated from a unit plan cannot be segregated into a separate lease upon such partial elimination. *Solicitor's Opinion M-36592* (January 21, 1960). It remains an integral part of the original lease and continues to have the same lease term. There is no authority under the law to change the term. Cf. *Opinion of the Chief Counsel, Bureau of Land Management* (December 18, 1953).

The Department has never varied from the position that a producing lease would be continued in its entirety so long as production in paying quantities continued on the lease; i.e., production anywhere on a lease is sufficient to continue the entire lease. Cf. *Seaboard Oil Company*, 64 I.D. 405, 410-411 (1957). And, in the present case, there is production on the leases in question precisely because there is production on the unit. Thus, it follows that, since the eliminated portions of the leases cannot be segregated into separate leases and they retain the

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same lease terms as the portions of the leases committed to the unit agreement, the terms of the eliminated portions will continue coextensively with the terms of the leases as to the lands committed to the unit plan so long as there is production anywhere on the lease. It is not material that the production is constructive with respect to these leases and not actually within the leaseholds.

Since the Departmental regulation in question is inconsistent with, and without the provisions of, the law, it is invalid and will not be followed. Cf. *United States v. Morehead*, 243 U.S. 607 (1917), *Forbes v. United States*, 125 F. 2d 404 (9th Cir. 1942).

Accordingly, the decision appealed from is reversed, and the leases in issue are held to continue in force and effect in their entirety for the life of production continuing in the unit.

KARL S. LANDSTROM, *Director*.

Approved:

STEWART L. UDALL, *Secretary*

CHARLES LEWELLEN

A-29644

*Decided November 5, 1963*

**Rules of Practice: Appeals: Statement of Reasons—Rules of Practice: Appeals: Extensions of Time—Rules of Practice: Appeals: Service on Adverse Party**

Where an appellant files a timely request for an extension of time to file a statement of reasons in support of his notice of appeal and files a statement within the extension of time requested, although the request for extension is misfiled and not acted upon prior to the filing of the statement, the request may subsequently be granted, thus making timely the filing of the statement of reasons and service of a copy of the statement on an adverse party.

**Alaska: Homesteads—Homesteads (Ordinary): Contests—Homesteads (Ordinary): Settlement—Rules of Practice: Private Contests**

Although the rights of a homestead settler on public lands covered by an existing entry attach instantly on the relinquishment of the prior entry and are superior to those of settlers or applicants initiating their rights later, such a settlement is nevertheless subject to the superior right of a contestant who secures the cancellation of the entry.

**Alaska: Homesteads—Homesteads (Ordinary): Contests—Rules of Practice: Private Contests**

An allegation in a private contest complaint filed immediately after the end of the second entry year which charges that the entryman failed to have under cultivation  $\frac{1}{16}$  of the acreage meets the requirements of the regula-

tion that a contest complaint must allege in clear and concise language the facts which constitute the grounds for the contest.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles Lewellen has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated April 19, 1962, which affirmed a decision of the Fairbanks land office, dated September 21, 1961, rejecting his homestead application because the land was occupied under a prior settlement claim.

On February 3, 1958, Lewellen filed a contest complaint against the homestead entry of Roy N. Mikel, Fairbanks 013019, allowed on February 2, 1956, covering land described as the NE $\frac{1}{4}$  sec. 20, T. 1 S., R. 1 W., Fairbanks Meridian, Alaska. Bernard E. Darling filed a junior contest against the entry on March 6, 1958. On March 20, 1958, Mikel filed a relinquishment of his entry, and Lewellen immediately filed an application to enter the land. Darling protested allowance of this application.

In a decision dated May 6, 1958, the land office canceled the Mikel entry and allowed each of the contestants to file an application to enter the land and provided for a hearing to permit the junior contestant to prove his charge of collusion between the senior contestant and the entryman. Accordingly, on May 14, 1958, Darling filed an application to enter, Fairbanks 019620. Lewellen's application of March 20, 1958, was deemed sufficient to meet the requirements of the above decision as to exercising a preference right. By decision dated November 26, 1958, after a hearing on the matter, the hearing examiner held that the evidence presented by Darling of fraud and collusion between Lewellen and Mikel was insufficient and dismissed the contest. On appeal, this decision was affirmed by the Director on November 3, 1959. An appeal to the Secretary was found to be defective and was not considered on the merits.

The contest was closed, but the required notice of cancellation and award of preference right to Lewellen was not made. Further, because of the relinquishment by Mikel, neither the merits of the two complaints against Mikel's entry nor the status of the land at the time of the contest were considered.

On April 26, 1961, Darling filed a notice of location of settlement on the land under the homestead law. He stated that he had settled on the land on July 21, 1957, and explained in an accompanying letter that he is the son-in-law of Henry J. Ernst, who had had an entry on the land but whose entry had been canceled as the result of a contest brought by Mikel. Darling stated that although Ernst's entry had been canceled and Mikel's entry was allowed on February 2, 1956,



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Ernst continued to reside on the land and then on July 21, 1957, sold his house and improvements to Darling. Darling thereafter resided on the land and he claimed that his settlement rights attached to the land the moment Mikel relinquished his entry on March 20, 1958.

The Bureau decisions sustained his contentions.

Lewellen contends, in his appeal to the Secretary, that Darling had an election of remedies before the trial examiner, that he could have asserted his rights as a settler but that he elected to resist solely on the allegation of collusion, and that there was no collusion found by the examiner. He contends that since the issue of collusion was determined the doctrine of *res judicata* governs. He alleges, further, that the Bureau decision is not predicated on any evidence showing that there was a valid settlement on the part of Darling on the land, as against Lewellen.

Darling, in his answer to the statement of reasons submitted by the appellant, contends that the appellant's statement of reasons was filed late in the office of the Secretary and he requests that the appeal be summarily dismissed. He also asserts that service on him of a copy of the statement was not timely made.

Lewellen's statement of reasons was due on June 18, 1962. On that day he timely filed a request for extension of time to July 5, 1962, to file his statement. The request was misfiled and has never been acted upon. Lewellen nonetheless filed his statement of reasons on July 9, 1962, apparently mailing it on July 5, 1962. Had his extension been granted, the filing would have been timely. 43 CFR 221.92(b). Since undoubtedly the extension would have been granted and Lewellen's request is still pending, it is hereby granted. Service of a copy of the statement on Darling on July 6, 1962, was therefore timely, and all questions of procedural compliance by Lewellen are eliminated from the case.

The decisions below were based on the finding that Darling's settlement gave him rights as a settler superior to Lewellen's preference right as a successful contestant and that Lewellen's contest affidavit was inadequate, was subject to summary dismissal, and earned him no rights under the contest.

If these conclusions are incorrect, then Lewellen would be entitled to make his entry and his contentions that Darling was barred under the principle of *res judicata* from asserting these issues would be immaterial.

In support of its finding, the decision of April 19, 1962, relied upon cases holding that a settler who made settlement during the life of an entry takes precedence, upon the relinquishment of that entry, over a

later settlement or application for entry. *Ernest J. Ackermann, Clifford V. Young*, A-29349 (July 26, 1963), and cases cited therein. While this proposition is sound, none of the cases cited involved the respective rights of a contestant and a settler. In cases considering specifically such a conflict, the Department has long and uniformly held that a settlement on land covered by an entry of another is subject to the superior right of a contestant who secures the cancellation of the entry. *Paulson v. Richardson*, 8 L.D. 597 (1889); *Gilmore v. Shriner*, 9 L.D. 269 (1889); *Sproat v. Durland*, 21 L.D. 474 (1895); *Hodges et al. v. Colcord*, 24 L.D. 221 (1897); *Hine v. Cliff*, 24 L.D. 432 (1897). Accordingly, as these cases establish, Lewellen's rights as a contestant take precedence over those of Darling as a settler.

The remaining issue is whether Lewellen's contest complaint met the requirement of the pertinent regulation, 43 CFR 221.54, that it state in clear and concise language the facts constituting the grounds of the contest. The only allegation in Lewellen's complaint was:

That the above *Homestead* entry, Serial No. 013019, should be cancelled because of the following reasons: *Failure to have under cultivation 1/16th of the acreage.* (Italic words inserted by contestant on printed form.)

Since the complaint, as appears from the dates set out in it, was filed immediately after the end of the second year of the entry, it seems that Lewellen's allegation is a plain statement that Mikel, the entryman, had not satisfied the requirement of the homestead act that not less than  $\frac{1}{16}$  of the area of the entry be cultivated beginning with the second year of the entry. 43 U.S.C., 1958 ed., sec. 164. In a somewhat similar case, it has been held that a complaint alleging "not enough cleared land.  $8\frac{1}{2}$  to 9 acars and uncultivated or planted except this year" [*sic*], filed just prior to the end of the fifth entry year, asserted as a minimum that the entryman had not cultivated more than  $8\frac{1}{2}$  to 9 acres during the second, third, or fourth years of his entry and, thus, satisfied the regulation. *Earl D. Deater v. John C. Slagle*, A-28121 (May 24, 1960). Cf. *Scheele v. Dockery*, 68 I.D. 100 (1961). There is no question but that the entryman understood the complaint, for in his answer he said he had 10 acres cleared and sought to explain his failure to do more than that.

Darling's charge, it is noted, gave as the only reason for cancellation of Mikel's entry:

\* \* \* That the entryman contestee, Roy Mikel, has wholly failed and neglected to cultivate not less than one sixteenth of the area of his entry, beginning with the second year of the entry; \* \* \*

Except for the reference to the entry year, Darling's allegation is essentially the same as Lewellen's. It is difficult to see how the

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charge based on failure to comply with the cultivation requirement could be more specific. It is not simply a statement of a conclusion (*cf. Fosdick v. Shackleford*, 47 L.D. 558 (1920)) but says plainly in what manner the entryman has been derelict—that he failed to cultivate one-sixteenth of his entry—and informs the contestee of what facts he will have to meet at the hearing.

Accordingly, it is concluded that it was improper to hold Lewellen's complaint defective and subject to summary dismissal.

Thus, neither of the grounds upon which Lewellen was denied his preference right is found valid. Consequently, there appears to be no reason to deny him the preference right due a successful contestant.<sup>1</sup>

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 Division of Appeals, Bureau of Land Management, is reversed, and the case is remanded for further proceedings consistent herewith.

ERNEST F. HOM,  
Assistant Solicitor.

## APPEAL OF VITRO CORPORATION OF AMERICA

IBCA-376

Decided November 7, 1963

### Contracts: Appeals—Rules of Practice: Appeals: Statement of Reasons

In determining whether a notice of appeal from a decision of a contracting officer states with sufficient particularity the grounds of the appeal, the notice is to be read in conjunction with documents contained in the appeal file that are referred to in the notice.

### Contracts: Appeals—Rules of Practice: Appeals: Dismissal

The mailing of a supporting brief in a contract appeal to the Board of Contract Appeals instead of to the contracting officer is not so fundamental an error as to necessitate dismissal of the appeal.

## BOARD OF CONTRACT APPEALS

Department Counsel has moved to dismiss, apparently, on the following grounds: (1) The notice of appeal "is patently and grossly insufficient to constitute compliance" with 43 CFR 4.5(a), and "this

<sup>1</sup> When a relinquishment is filed after a contest has been initiated, it is presumed that the relinquishment is a result of the contest and the contestant earns his preference right, unless it can be shown that the affidavit of contest was not "good and sufficient", or that the contest charge was not true, or that the contestant was not a qualified applicant, or that the land is not subject to his application. *Zillig v. Milburn*, 67 L.D. 136 (1960).

requirement is jurisdictional"; (2) Appellant failed to comply with the requirement of 43 CFR 4.5(b) in that the supporting brief was not filed "with the contracting officer, addressed to the Board."

The notice of appeal states that the "Findings of Fact and Decision are erroneous because, *inter alia*, they do not provide the equitable adjustment in price, pursuant to Articles 3 and 4 of the General Provisions of the contract, to which contractor is entitled, as set forth in contractor's letters of December 22, 1961, and July 24, 1962, which letters are attached to the said Findings of Fact and Decision." The letters mentioned specify in considerable detail the grounds for the claims that form the subject of this appeal. When what is said in them is compared with the Findings of Fact and Decision, the reasons why the contracting officer's determinations are deemed erroneous by appellant become clear. Such an incorporation, by reference in the notice of appeal, of reasons stated in documents forming part of the appeal file is adequate to meet the requirement of 43 CFR 4.5(a), and the Board has so held.<sup>1</sup>

While the filing of a notice of appeal is "jurisdictional,"<sup>2</sup> the filing of a supporting brief is not,<sup>3</sup> as 43 CFR 4.16 clearly indicates by stating: "The Board may grant extensions of time except with respect to the filing of the notice of appeal."

The cases cited by Department Counsel are not in point. In *Gillespie*,<sup>4</sup> the notice of appeal did not specify any grounds for the appeal, either within its own four corners or by reference, and no supporting brief at all was filed. Moreover, the claimant had previously executed a release without any reservation. In *Leffel*,<sup>5</sup> the Board could not determine the issues from the submitted papers such as claim by contractor, contracting officer's decision, etc., and appellant failed to reply to an order of the Board that cause be shown why the appeal should not be dismissed.

The circumstances concerning this appeal are quite different. The notice of appeal was adequate, and the filing of a supporting brief was optional with appellant. The Board had extended the date for filing the brief (43 CFR 4.5(b)) until October 21, 1963. Appellant

<sup>1</sup> *Midland Constructors, Inc.*, IBCA-272 (May 3, 1961), 68 I.D. 124, 61-1 BCA par. 3012, 3 Gov. Contr. 358(c); *Weldfab, Inc.*, IBCA-268 (April 11, 1961), 68 I.D. 107, 61-1 BCA par. 3005, 3 Gov. Contr. 298(k); *General Excavating Company*, IBCA-188 (August 15, 1960), 60-2 BCA par. 2754, 2 Gov. Contr. 469; *Flora Construction Company*, IBCA-180 (March 2, 1959), 59-1 BCA par. 2091, 1 Gov. Contr. 214.

<sup>2</sup> *Lewis Construction Company*, IBCA-340 (July 3, 1963), 70 I.D. 352, 1963 BCA par. 3779, and numerous decisions cited in its fn. 5; *The Cardell Company*, IBCA-384 (September 3, 1963).

<sup>3</sup> *Flora Construction Company*, IBCA-180, fn. 1 *supra*.

<sup>4</sup> *T. E. Gillespie Construction Company*, IBCA-333 (December 13, 1962), 1962 BCA par. 3599, 5 Gov. Contr. 22(b).

<sup>5</sup> *The James Leffel Company*, IBCA-214 (June 20, 1960).

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has submitted in duplicate a supporting brief, addressed to the Board. While the brief was mailed to the Board, instead of to the contracting officer, the Board has held numerous times that such a misdirection is not fatal.<sup>6</sup> Further, since hearing has been requested, in cases such as the present one, *Bianchi*<sup>7</sup> requires the production of a full administrative record by the Board.

For all these reasons the motion of the Department Counsel to dismiss is denied.

A copy of appellant's brief will be forwarded to Department Counsel by the Board simultaneously with the issuance of this opinion. The 30 days (43 CFR 4.7(b)) in which Department Counsel must transmit the appeal file, statement of the Government's position, and supporting brief, will start on the date of the receipt of this opinion.

PAUL H. GANTT, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

### MADGE V. RODDA

### LOCKHEED PROPULSION COMPANY

A-29483

*Decided November 12, 1963*

#### Public Sales: Award of Lands

When two preference right claimants cannot come to an agreement as to the division of land, it is proper for the land office to award all of the tract to one claimant when considerations of topography, desirable use, land pattern, accessibility and need for the land favor the one claimant.

#### Regulations: Interpretation—Public Sales: Preference Rights

Where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith.

#### Public Sales: Preference Rights

The regulation requiring a corporate purchaser to furnish a copy of its articles of incorporation does not clearly require that the material be furnished

<sup>6</sup> In *Henly Construction Company, Inc.*, IBCA-165 (March 18, 1959), 59-1 BCA par. 2109, 1 Gov. Contr. 214, the Board held that it "cannot regard the misdirection of the supporting brief as a dereliction so serious in its implications as to justify the dismissal of a timely appeal otherwise properly taken." Accord: *Bushman Construction Company*, IBCA-193 (April 23, 1959), 66 I.D. 156, 59-1 BCA par. 2148, 1 Gov. Contr. 312 (Mailing of notice of appeal to Board instead of to contracting officer "not jurisdictional" defect); *Larsen-Meyer Construction Co.*, IBCA-85 (November 24, 1958), 65 I.D. 463, 58-2 BCA par. 1987 (Mailing of appeal to Department Counsel instead of to contracting officer not fatal).

<sup>7</sup> 373 U.S. 709 (1963).

within 10 days after the corporation is declared the purchaser, and a corporation will not be held to have lost its preference right for failure to submit the material within the 10-day period.

### Public Sales: Applicants

When a corporation which is declared the purchaser at a public sale is wholly owned by a parent corporation, it will be required to furnish the statement required by 43 CFR 250.12(b) (1) showing the extent of control of the stock of the parent corporation by aliens or persons having addresses outside of the United States as though the parent corporation were the purchaser.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Madge V. Rodda has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated February 2, 1962, which affirmed a Los Angeles land office decision, dated October 13, 1961, awarding all of a 320-acre tract, offered for public sale on July 25, 1961, and for which she had asserted a preference right claim, to the other preference claimant, the Lockheed Propulsion Company, formerly the Grand Central Rocket Company. Since the two claimants could not come to an agreement as to the division of the land, the acting manager made the award pursuant to 43 CFR 250.11(b) (3).

The appellant alleges, *inter alia*, that Lockheed has not complied with the requirements of regulation 43 CFR 250.12(b) (1) in that it did not file a certified copy of its articles of incorporation within 10 days after being declared the purchaser and did not, within the same period, furnish a statement of the percentage of each class of its stock and of all of its stock owned or controlled by or on behalf of persons whom the corporation knows or has reason to believe to be aliens or who have addresses outside of the United States, indicating which classes of stock have voting rights.

The evidence has been carefully reviewed and it is concluded that the award of all of the land to Lockheed was, on the basis of topography, desirable land use, land pattern, accessibility and the need for the land, a proper award. This leaves then only the consideration of whether Lockheed is disqualified as a preference right claimant.

As to the appellant's contention that Lockheed has not met the requirements of 43 CFR 250.12(b) (1) because a copy of its articles of incorporation was filed subsequent to the 10-day period referred to in the regulation, the regulation reads as follows:

(b) (1) Unless he has previously done so, the purchaser must, within 10 days after he has been so declared, file with the manager a statement of his citizenship, or if a partnership, a statement of the citizenship of its members. If the purchaser is an unincorporated association, a statement must be filed showing the citizenship of each member. A corporation is required to file a certified

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copy of its articles of incorporation showing that it is organized under the laws of the United States, or of some State, Territory or possession thereof, and that it is authorized to acquire and hold real estate in the State or Territory in which the land is situated, and it must furnish a statement showing the percentage of each class of its stock, and the percentage of all of its stock, which is owned or controlled by or on behalf of persons whom the corporation knows to be or has reason to believe are aliens, or who have addresses outside of the United States, indicating which classes of stock have voting rights. If more than 10 percent of the voting stock, or of all of the stock, is owned or controlled by or on behalf of such persons, the corporation must give their names and addresses, the amount and class of stock held by each, and, to the extent known to the corporation or which can be reasonably ascertained by it, the facts as to the citizenship of each such person. 43 CFR 250.12.

Lockheed was declared the purchaser in a decision of the land office dated October 13, 1961, which was served on Lockheed on October 18, 1961. It filed its articles of incorporation on November 13, 1961, more than 10 days after it was notified that it had been declared the purchaser.

However, a reading of the regulation shows that the 10-day period is referred to only in the first sentence of the regulation which refers to a purchaser who is an individual or partnership. It does not appear in the third sentence which requires a corporation to file a copy of its articles of incorporation. Although it may have been the intent that all filings required by the regulation must be made within a 10-day period, it cannot be denied that the regulation is not clear on this point. The Department has frequently held that where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith. See *Donald C. Ingersoll*, 63 I.D. 397 (1956), and cases cited therein. Thus Lockheed will not be held to have lost its preference right for failure to file its articles of incorporation within the 10-day period.

As to the appellant's contention that Lockheed has not met the requirements of the same regulation because it has not shown how much of its stock is controlled by aliens or persons who have addresses outside of the United States, Lockheed filed with its articles of incorporation on November 13, 1961, a copy of an amendment of its articles changing the name of the corporation from its former name of Grand Central Rocket Company to its present name. In the amendment it was stated that the sole stockholder of the company was Lockheed Aircraft Corporation, and in its consent to the amendment the latter company stated that it was a California corporation. Thus it seems evident that Lockheed complied literally with the regulation.

It is clear, however, that the purpose of the regulation is to ascertain whether a purchaser is an alien, if an individual, or controlled by aliens, if other than an individual, so that the Secretary may give consideration to whether the purchaser should be allowed to buy the land. See 43 CFR 250.12(b) (2). It is appropriate, therefore, in cases where the purchaser is a corporation which is wholly owned by another corporation that the corporate veil be pierced in order to determine whether the corporate purchaser is in fact controlled by aliens. Accordingly, Lockheed will be allowed 30 days from the date of this decision in which to furnish to the land office the information which would be required by the regulation if Lockheed Aircraft Corporation were the purchaser.

The other allegations made by the appellant have been considered but they are found to be without 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 Bureau decision is affirmed and the case remanded to it for such further action as is necessary or appropriate in view of this decision.

EDWARD WEINBERG,  
*Deputy Solicitor.*

A. M. CULVER, JOHN F. PARTRIDGE, JR., AND DUNCAN MILLER

A-29494

A-29522

A-29692

*Decided November 14, 1963*

#### **Oil and Gas Leases: Applications**

When copies of an oil and gas lease offer in the number specified in the applicable regulation are prepared on the proper form and in one operation by the use of a typewriter and carbon paper, the offer is not to be rejected because some of the copies are found to be illegible.

#### **Words and Phrases**

*Copies.* An oil and gas offer is not to be rejected on the ground that the requisite number of "copies" has not been filed merely because some of the copies are found to be illegible.

#### **APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

A. M. Culver, John F. Partridge, Jr., and Duncan Miller have appealed to the Secretary of the Interior from decisions of the Division of Appeals, Bureau of Land Management, affirming the rejection of their oil and gas lease offers by the Wyoming land office.



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Culver's offer (Wyoming 0164443) is for a lease on public land pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., Supp. IV, sec. 226). The Partridge offer (Wyoming-A 0157075) and the Miller offer (Wyoming-A 0111810 (Nebraska)) are for leases on acquired lands pursuant to the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., sec. 351 *et seq.*). Each offer was filed on the appropriate form and in each case the required number of copies of the form was filed.

The offers were rejected because, in Culver's case, less than five legible copies were filed, and, in the other two cases, because less than seven legible copies were filed.

The land office found that only the original ribbon copies of the Culver and Partridge offers are legible.

In affirming the rejection, the Division of Appeals held that, although the regulations do not expressly provide that the copies of the offers required to be filed must be legible, this is implicit in the regulations and that the legal effect of the filing of illegible copies is the same as filing less than the required number of copies. It found that the original ribbon copy of Culver's offer is clearly legible but the carbon imprints on the remaining four copies are less distinct and that on two carbon copies parts of the description cannot be deciphered without a question as to their accuracy and reference to a legible copy for identification of the lands described. It found that none of the six carbon impressed copies of the Partridge offer can be read completely with any degree of certainty and suggested that if the impressions obtained from the use of carbon paper are not clear, legible reproductions the use of carbon paper is not desirable and such carbon copies should not be accepted. In Miller's case, the Division of Appeals affirmed the rejection on the basis of its decision on the Partridge offer.

The appellants contend that all copies of their offers were legible when filed and that they complied with the applicable regulations when they filed the number of copies specified in those regulations. Miller points to the fact that his offer, filed more than a year and 9 months prior to its rejection for illegibility, had previously been rejected for another reason and suggests that the passage of time or some foreign substance with which the copies came in contact in the land office may have weakened the plainness of the carbon copies. The appellants contend that if the land office did not consider the copies legible it should have notified them at once in order to give them the opportunity to correct the deficiency without loss of priority. They also contend that what may be legible to one person may not

be legible to another. In support of this argument they point to the decisions on the Culver offer, wherein the land office found only the original ribbon copy legible and the Division of Appeals found the land description on only two of the copies illegible.

Insofar as material to these appeals, the regulations governing the filing of oil and gas lease offers for public lands and for acquired lands are, except for the number of copies required to be filed and the form of offer to be used, essentially the same and are set forth in 43 CFR 192.42 and 200.8.

43 CFR 192.42 provides in part as follows:

(a) To obtain a non-competitive lease an offer to accept such lease must be made on Form 4-1158 \* \* \* or on unofficial copies of that form in current use: *Provided*, That the copies are exact reproductions of one page of both sides of the official approved one page form and are without additions, omissions or other changes or advertising. \* \* \*

(b) Five copies of Form 4-1158, or valid reproduction thereof, for each offer to lease shall be filed \* \* \*. If less than five copies are filed, the offer will not be rejected \* \* \* until 30 days from filing have elapsed and if during that period the remaining required copies are filed, the offeror's priority will date from the date of the first filing. If the additional copies are not filed within the 30-day period, the offer will be rejected and returned and will afford no priority to the offeror. \* \* \*

(c) The offeror shall mark one of the copies first filed at the top with the word "original." \* \* \* If there is any variation in the land descriptions among the five copies, the copy marked "original" shall govern as to the lands covered by the lease.

(d) Each offer must be filled in on a typewriter or printed plainly in ink \* \* \*.

(g) (1) Except as provided in subparagraph (2) of this paragraph, an offer will be rejected and returned to the offeror and will afford the applicant no priority if:

(vi) Less than five copies of the offer are filed and the copies lacking are not received in the land office before the expiration of 30 days from the date of receipt of the copies first filed.

43 CFR 200.8 contains substantially identical provisions and, in fact, incorporates some of the above provisions, except that seven copies are required on Form 4-1196. 43 CFR 200.4, 200.8(d).

The Bureau has interpreted the regulation to mean that a copy of an offer is not a copy within the meaning of the regulation if it is illegible in any respect. As a consequence, if a total of five or seven legible copies, as the case may be, is not filed within 30 days from the date of first filing, the offer must be rejected. Although this is a possible interpretation, I do not believe that it is the only one that can be given to the regulation. I think that the word "copy" does not have

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a precise meaning and that the regulation itself evidences that the word is not used in a precise sense.

To begin with, paragraph (a) permits unofficial "copies" of Form 4-1158 to be used provided that they are "exact reproductions" of the form. This clearly indicates that "copy" is not used to mean an exact reproduction; otherwise the proviso would not be necessary. This is further indicated by the fact that the required copies can be filled in by pen and ink. It is hardly likely that each copy so completed will be filled in exactly the same so far as the writing is concerned. Thus "copy" means something less than an exact reproduction.

Paragraph (c) of the regulation provides that if there is a variation in the land description "among the five copies" the copy marked "original" shall control. Here the word "copies" is used to denote documents which are not even the same in substance.

We therefore have the word "copies" being used to denote documents which are not exact reproductions of each other and which, in the case of land descriptions, may vary in substance. Assuming that the only variance in substance which is permissible is in connection with a land description, there is no indication as to what variance in form is permissible and still have documents which are "copies." For example, would a set of offer forms be "copies" if an address on one was given as "100 1st Street" while the address on others was given as "100 1st St.?" Or, if the offeror's name on one was spelled as "Robert Smith" and on others as "Robt. Smith?"

It may be said that legibility is a different matter but here again there is uncertainty. What is legible to one reader may not be legible to another. Thus, the land office and the Division of Appeals differed as to how many copies of the appellant's offers were legible.

There is also a question as to how much legibility is required in order to make one document a copy of another. Suppose a lease offer is filed for 2,560 acres with each 40-acre legal subdivision being described separately, a total of 64 descriptions. Suppose that 63 descriptions can be read without difficulty on all the copies but that the carbon on one copy is blurred so that the 64th description cannot be deciphered on that one copy. Is the Department to conclude that this copy is not a copy within the meaning of the regulation?

These questions demonstrate, it seems to me, that the regulation cannot be said to be so clear in meaning in the use of the word "copies" as to require the rejection of the appellants' offers for noncompliance with the regulation. Cf. *Madison Oils, Inc., et al.*, 62 I.D. 478 (1955); *Merwin E. Liss et al.*, 70 I.D. 231 (1963). I conclude, therefore, that

it was improper to reject the appellants' offers for failure to file the requisite number of copies of their offers.

This does not mean, of course, that the Department can do nothing if copies filed are illegible. It is our understanding that the specified numbers of the forms are required, not to adjudicate the offers, but to satisfy various administrative requirements once leases are issued, when one copy of the offer form is returned to the lessee as his copy of the lease, another copy of the lease is filed with the Geological Survey, other copies are forwarded to the agency having jurisdiction over the land, etc. It is desirable, therefore, that the information placed upon all copies of the lease form by the offeror, such as his name, address, description of the lands, etc., be legible so that the copies can serve their purpose in the event the offer ripens into a lease. Accordingly, it is entirely appropriate, when an offer is about to ripen into a lease and when, at that time, some or all of the additional copies of the lease form are determined to be so indistinct as to be incapable of serving their purpose, to call upon the offeror to supply sufficient distinct copies of his offer. In such a situation there would be no question of loss of priority unless the offeror failed to respond to the request.

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 decisions of the Division of Appeals are reversed and the cases are remanded to the Bureau of Land Management for such further consideration as the offers may warrant.

ERNEST F. HOM,  
*Assistant Solicitor.*

### APPEAL OF C. W. "BILL" LAMB

IBCA-397

*Decided November 18, 1963*

#### Rules of Practice: Generally

In Board of Contract Appeals procedures the "appeal file" consists of the notice of appeal, brief in support of the appeal, if any, all documents on which the contracting officer has relied in making his findings of fact or decision, statement of the Government's position and supporting brief, and reply by appellant, if any. The "appeal record" consists of all these documents and of the transcript of conference (43 CFR 4.9), oral and written evidence presented by the parties pursuant to 43 CFR 4.11(a), the transcript of hearing, if any, and post-hearing briefs, if any.

#### Rules of Practice: Generally

One of the purposes of the "conference" provided in 43 CFR 4.9 is the determination of the completeness of the "appeal file" and to enable the parties to establish, preferably by agreement, the written "appeal record."

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### BOARD OF CONTRACT APPEALS

Appellant's counsel has petitioned the Board for an order

directing that all documents and papers, including any and all books and record of any kind whatsoever, and any and all reports of any kind which have been placed in the Government's possession by the contractor be included in the appeal file upon which this case is to be considered.

In his reply to the petition, Department Counsel stated, in part, as follows:

In view of the broad nature of Mr. Haddock's contentions, this appeal probably cannot be adjudicated without a formal hearing. \* \* \*

We are willing to make relevant material available for inspection by the appellant and his counsel. We believe, however, that counsel should specify specific types of documents that he wishes to inspect. Of course, all material related to the appeal will be available at the hearing. As to notes and data obtained by Mr. Lamb during the period of his performance, a reasonable time should be allowed for turning these over for inspection because BPA at the present time is using this material in connection with completion of the survey.

Department Counsel further asked the Board to postpone a hearing "until all issues are joined, including the excess cost assessment, since findings with respect to the value of partially completed work undoubtedly will be made in the document covering this assessment."

In appellant's reply, received by the Board on November 12, 1963, appellant's counsel agreed to the postponement of a hearing until excess costs, if any, are determined by the Government "provided such determination is made on or before November 30, 1963, and is immediately communicated to the Board of Contract Appeals" and that contractor "desires the earliest possible hearing date after November 30, 1963."

He further stated that the:

\* \* \* contractor accepts the offer of the Government to furnish all documents relating to the contract and at this point, considers every document ever handled by the contractor regardless of whether it is a scrap of paper or otherwise, to be relevant and material to the contract, and further, the contractor desires to avail himself of the opportunity for an inspection of these documents. It would obviously be a severe handicap if the documents were not tendered for our examination until the time of the hearing since there may be certain testimony which we would desire to present and the arrangement for witnesses might be difficult.

#### 1. *Hearing*

The request of the contractor for a hearing is granted. The hearing will be scheduled by the Board after the contracting officer has issued a findings of fact and decision concerning procurement costs. From this document, contractor may take an appeal. If appeal is filed

timely, the Board will then consolidate that appeal with IBCA-397. A hearing will then be scheduled by the Board.

Counsel for the parties are requested to notify the Board concerning their agreement as to where the hearings should be held. In the event that agreement cannot be reached, the Board will determine the place of the hearings.

## *2. Petition for Production of Documents*

The rules governing the procedures before the Board set forth succinctly the contents of the appeal file in 43 CFR 4.6, as follows:

The appeal file shall consist of the notice of appeal and the memorandum of arguments, if any, submitted therewith and of all documents on which the contracting officer has relied in making his findings of fact or decision, including the following:

- (a) The findings of fact or decision;
- (b) The contract, specifications, pertinent plans, amendments, and change orders; and
- (c) Correspondence and other data material to the appeal.

At the stage of the procedure, then, the Government has to include in the appeal file all documents "on which the contracting officer has relied in making his findings of fact or decision." This does not deprive the contractor-appellant of the right to "offer" at the hearing "oral and written evidence, subject to the exclusion by the Board or the hearing official of irrelevant, immaterial and repetitious evidence."<sup>1</sup> The Board is liberal in the acceptance of evidence commensurate with its duty to keep the record and the transcript within reasonable bounds. In matters such as this, it is the particular function of the hearing official at the "Conference,"<sup>2</sup> which will immediately precede the hearing, to dispose of any question as to the completeness of the written appeal record before the Board.<sup>3</sup>

With regard to appellant's request for "every document ever handled by the contractor regardless of whether it is a scrap of paper or otherwise" the Board notes that only the contractor-appellant can determine what he has "handled." The contention of the Department Counsel that the documents which appellant desires to be included in the appeal record should be specified by appellant or its counsel seems to be well taken. These documents are peculiarly within the knowledge of appellant.

<sup>1</sup> In addition to the documents required in 43 CFR 4.6, the Board considers as part of the appeal file, the statement of the Government's position and supporting brief (43 CFR 4.7(b)), and appellant's reply, if any (43 CFR 4.7(c)).

<sup>2</sup> 43 CFR 4.11(a).

<sup>3</sup> 43 CFR 4.9.

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At this stage of the procedures only the completeness of the appeal file, and not of the appeal record,<sup>4</sup> is in issue.

Hence, the petition of appellant to include contractor's documents in the appeal file is denied.

PAUL H. GANTT, *Chairman.*

I CONCUR:

THOMAS N. DURSTON, *Member.*

### CHARLOTTE E. BROWN ET AL.

A-29667

*Decided November 21, 1963*

#### Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions

For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease; where the requirements for filing a partial assignment of a noncompetitive oil and gas lease are not met before the end of the next to last month of the lease term, the assignment cannot be approved.

#### Oil and Gas Leases: Assignments or Transfers—Agency

Where an attorney in fact or agent of a lessee signs an assignment of an oil and gas lease on behalf of the lessee, evidence must be furnished of the authority of the attorney or agent to execute such an assignment; and the fact that such evidence has been previously furnished in the same land office in connection with another case will not satisfy this requirement if there has been no incorporation in the record of a reference to the case file number in which evidence of the authority is filed.

#### Words and Phrases

*Furnished.* Where a regulation requires that in cases where an attorney in fact or agent signs an assignment of an oil and gas lease there must be "furnished" evidence of his authority to sign, the word "furnished" does not mean that such evidence must "accompany" the assignment.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charlotte E. Brown, as assignee, Cecil G. McLaughlin, as assignor, and Stuart W. McLaughlin, as attorney in fact for Cecil G. McLaughlin, have appealed to the Secretary of the Interior from a decision dated May 14, 1962, wherein the Division of Appeals, Bureau of Land Management, affirmed a decision of the Colorado land office

<sup>4</sup> The contents of the appeal file (43 CFR 4.6) have been previously discussed. The term "appeal record" includes the appeal file, transcript of the conference, evidence presented by appellant and the Government pursuant to 43 CFR 4.11(a), the transcript of the hearings, and the various briefs, if any, pursuant to 43 CFR 4.5(b), 43 CFR 4.7 (b) and (c), and 43 CFR 4.12.

denying approval to a partial assignment of an oil and gas lease to appellant Charlotte E. Brown.

The oil and gas lease, Colorado 03736, was issued pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), to W. Layton Stanton, effective January 1, 1952. Effective February 1, 1956, an entire assignment of the lease was made to Trident Company, a limited partnership composed of Evelyn M. Levison, Cecil G. McLaughlin and Stuart W. McLaughlin. Thereafter the lease was extended for an additional 5 years until January 1, 1962. Effective July 1, 1958, an entire assignment was made to Cecil G. McLaughlin by the Trident Company, acting through Stuart W. McLaughlin as general partner. On November 30, 1961, Stuart W. McLaughlin executed a purported partial assignment of the lease to Charlotte E. Brown. This assignment, if approved, would have extended both the assigned and the unassigned portions of the lease for an additional two years. 43 CFR 192.144.

The assignment to Brown was disapproved by the land office because Cecil G. McLaughlin was shown to be the record titleholder of the lease, and Stuart W. McLaughlin did not appear to hold any interest in it.

In their appeal to the Director of the Bureau of Land Management, the appellants submitted a copy of a power of attorney, executed by Cecil G. McLaughlin on June 20, 1960, by which she authorized Stuart W. McLaughlin to act in her stead with respect to all oil and gas leases of which she was the holder of record. The appellants alleged that a copy of this power of attorney had been previously furnished and was filed in the land office in case file Colorado 03998.

The applicable regulation provides in part that:

Where an attorney in fact, in behalf of the holder of a lease, operating agreement or of a royalty interest in a producing lease, signs an assignment of the agreement, lease, or interest, or signs the application for approval, there must be furnished evidence of the authority of the attorney to execute the assignment or application \* \* \*, CFR 192.141(b).

The Division of Appeals held that while it is not required that such evidence of the authority of the attorney in fact be furnished with each filing of an assignment, the applicant must, at least, refer to the case file in which the power of attorney is filed and that evidence of the attorney in fact's authority must be filed prior to the expiration of the lease.

In their appeal to the Secretary, the appellants stress the difference in the meaning of the words "accompanied" and "furnished" as used in the regulations. "Where it is intended that a showing be made at a certain time," they argue, "the drafters of the Regulations have used



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the word 'accompanied.' When a showing other than at a specific time is required, the word 'furnished' has been commonly used." They conclude that the fact that evidence of the power of attorney had been previously submitted in connection with Colorado 03998 satisfied the regulation and completed all the requirements necessary to perfect the assignment on November 30, 1961.

The appellants cite a case in which the Department held that an application for a 5-year extension of a lease, filed by one other than the lessee, serves to extend the lease if there is substantial evidence in the record that the person applying is acting on behalf of the record titleholder. *Herbert R. Lewis, Charlotte L. Murphey*, A-26819 (June 30, 1954). The Department has also held that if timely application is made for a 5-year extension by an agent of the lessee, the application may be accepted although proof of the agency is not submitted until after the expiration of the primary term of the lease. *O. G. Green*, A-28154 (February 1, 1960).

These decisions, however, were based upon a different regulation with different requirements. 43 CFR 192.120, which sets forth the procedure for obtaining an extension of an oil and gas lease, is silent as to the authority of an agent of the lessee to apply for an extension. Since the regulation contains no express authorization for an attorney in fact or an agent to act for the lessee in applying for an extension, it, of course, makes no provision for the furnishing of proof of the agent's authority. This was specifically pointed out in *O. G. Green, supra*.

43 CFR 192.141(b), *supra*, however, expressly provides that evidence of the agent's authority must be furnished. Similar language has been used in the regulations with respect to the furnishing of a bond by the assignee of a lease. The pertinent regulation states:

(c) If a bond is necessary, it must be furnished.\* \* \* 43 CFR 192.141(c).

In construing this regulation, the Department has held that where a bond is required, a partial assignment cannot be approved until a bond has been filed. Furthermore, since an assignment becomes effective on the first of the lease month following the date on which required documents are filed, such documents must be filed while at least one lease month remains in which the assignment can become effective. *Donald K. Ladd et al.*, 68 I.D. 169 (1961); *Joe T. Juhan*, A-28667 (May 17, 1962).

The same requirements are applicable to the furnishing of evidence of an agent's authority. When an attorney in fact or an agent signs an assignment for the lessee, the authority of the agent must be established before the assignment can be approved. The attempted

assignment from Stuart W. McLaughlin to Charlotte E. Brown was filed on November 30, 1961, the last day on which an assignment could be filed. It must, therefore, have been in proper order on that date to merit approval. *Franco Western Oil Company et al.*, 65 I.D. 316, 427 (1958); *Safarik et al. v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), cert. denied, 371 U.S. 901. A review of the record does not disclose an iota of evidence that was then included in the record to support a finding that Stuart was acting as the agent of Cecil. The purported assignment was signed by Stuart W. McLaughlin, assignor, and he expressly certified that he held a 100 percent interest in the described lands. Accordingly, the land office properly refused to approve the assignment. See *Pine Valley Gas & Oil Co.*, A-28812 (September 11, 1960); *Robert L. Smart et al.*, 70 I.D. 383 (1963). The fact that proof of the authority of the attorney in fact had been filed in connection with another lease cannot help the appellants. Even if proof by reference is permissible, without a specific provision to that effect<sup>1</sup> it would still not justify a filing devoid of any reference to a record in which the required disclosure has been made.

At this juncture it should be pointed out that the Department is not construing the word "furnished" in 43 CFR 192.141(b) to mean "accompanied." The ruling here is that the regulation imposes a requirement for an assignment which must be met when there is still time for the completed assignment to become effective. That is, all requirements necessary to perfect an assignment must be met prior to the commencement of the last month of the term of the lease being assigned. *Franco Western Oil Company et al.*, *supra*. In this case, if the assignment had been filed at any time prior to November 30, 1961, it would not have been necessary to file evidence of Stuart McLaughlin's authority to act with the assignment. All that would have been required was the filing of such evidence not later than November 30, 1961. Thus, if the assignment had been filed on November 1, October 15, July 10, or any date prior to November 30, 1961, the assignment could have been completed by filing evidence of Stuart McLaughlin's authority on November 30, 1961, and this would have permitted approval of the assignment effective December 1, 1961, so as to extend the term of the segregated leases for two years.

The appellants allege that the personnel of the Colorado land office were well aware that Stuart W. McLaughlin consistently managed the oil and gas leases owned by Cecil G. McLaughlin. Such informal dissemination of information among Bureau employees is not an acceptable substitute for compliance with the regulations.

<sup>1</sup> Cf. 43 CFR 192.42(f) where reference is allowed for certain showings required of corporate offerors.

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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 appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

**APPEAL OF MORGEN & OSGOOD CONSTRUCTION CO., INC.**

**IBCA-389**

*Decided November 21, 1963*

**Contracts: Appeals—Contracts: Changed Conditions—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Hearings**

Where a contract appeal presents a genuine issue of material fact over which the Board of Contract Appeals has jurisdiction (such as the issue of whether a changed condition was encountered) that has not been submitted for decision on the record without a hearing, the contractor is entitled to a hearing at which evidence may be offered with respect to such issue: A motion to dismiss the appeal for failure to state a case on which any relief could be granted by the Board will be denied.

**Contracts: Changed Conditions**

Allowance of an equitable adjustment for a changed condition is not precluded merely because the changed condition also amounts to an actionable misrepresentation of breach of warranty.

**Contracts: Changed Conditions—Contracts: Drawings—Contracts: Specifications**

The design, methods and details of the work, as described in the drawings and specifications, may properly be taken into account in determining whether changed conditions exist, since they constitute a source that can give rise to inferences, where factually and logically justified, concerning the physical conditions which the contractor was entitled or bound to expect would be encountered, and with which the physical conditions actually encountered are to be compared.

**BOARD OF CONTRACT APPEALS**

This is a timely appeal, as to which the Government has filed a motion to dismiss. The ground for the motion is that appellant's contentions furnish no basis upon which the relief sought could be granted by this Board.

The dispute grows out of a contract with the Bureau of Indian Affairs for the construction of a pumping plant, known as the Wiota Pumping Plant, on the bank of the Missouri River near Fraser, Montana, to serve lands of the Fort Peck Indian Irrigation Project. The contract, dated January 11, 1963, and designated No. 14-20-0250-

3096, was on Standard Form 23 (January 1961 Edition) and incorporated the General Provisions of Standard Form 23A (April 1961 Edition) for construction contracts. The dispute revolves around the "Changed Conditions" clause (Clause 4) of the General Provisions. That clause provides for the making of an equitable adjustment if it is found that there are "subsurface or latent physical conditions at the site differing materially from those indicated in this contract" (known as first category changed conditions), or "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" (known as second category changed conditions).

The essence of appellant's contentions is that in excavating for the pumping plant it encountered fine sand and seeping water in such quantities and combination as to form quicksand and to cause excessive caving of the banks of the excavation. These circumstances, appellant says, were changed conditions within the meaning of each of the categories described in Clause 4. In developing the contention that changed conditions of the first category existed, appellant relies heavily upon certain features of the contract drawings and specifications which it regards as being indications or representations that the material in the excavation would be capable of standing at a slope of 2 vertical to 1 horizontal—a slope which appellant was, in fact, unable to maintain. This, however, is not the whole of appellant's case, for, among other things, it contends that the alleged quicksand involved unknown and not to be anticipated circumstances that met the test for changed conditions of the second category. All of these contentions were either expressly or impliedly rejected in the findings of fact made by the contracting officer.

The motion to dismiss is based primarily on the view that no changed conditions were encountered. Thus, in justification of the motion, Department Counsel avers:

There is no ambiguity in the contract provisions and drawings. It is submitted that it would be improper to make what would amount to an allowance of damages for loss of profits because the Contractor encountered conditions which were reasonably foreseeable and, in fact, should have been anticipated if due consideration had been given to the apparent geological structure and water table. The contract contained no representation as to the soil conditions which would be encountered. No log of borings was shown on the plans, indeed none could be as no borings had been made by the Government.

Appellant opposes the motion on the ground that the question of whether changed conditions were encountered is a factual issue that "can only be determined after all of the facts have been heard." The reply filed by its counsel goes on to state:

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Up to this point the Contractor has never had an opportunity to present evidence of its own witnesses including investigations made by independent engineering firms. The reason the Contractor appealed was so that he would have an opportunity to present this evidence which he feels is favorable to his positions.

\* \* \* \* \*

It is our contention that through our appeal we have raised a factual issue which must be decided by the Board of Contract Appeals after hearing all the evidence and we contend that we are entitled to be heard.

The Board considers that appellant's position is well founded, whereas the Government's is not. Appellant presented to the contracting officer a claim for additional compensation on account of changed conditions. The contracting officer found that no changed conditions had been encountered. Appellant has appealed from this determination, alleging that changed conditions were encountered. Furthermore, it has demanded an opportunity to present evidence upon the issues so drawn. The motion to dismiss, consequently, amounts to an attempt to obtain a decision upon the merits of a factual dispute without any trial of the issues in controversy.

The General Provisions of the contract contain a "Disputes" clause (Clause 6) which provides that:

In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal.

The rules governing procedure before the Board state:

If the appeal involves disputed questions of fact, the Board shall, at the request of either party, grant a hearing.

These contractual and regulatory requirements clearly preclude us from dismissing on motion an appeal that presents a genuine issue of material fact, which the contractor has not submitted for decision on the record without a hearing, if such issue is subject to our jurisdiction. The Board has consistently so ruled.<sup>1</sup> The issue of whether a

<sup>1</sup> *Baldwin-Lima-Hamilton Corporation*, IBCA-329 (September 20, 1963), 70 I.D. 426, 1963 BCA par. 3851; *Morgan Construction Company*, IBCA-299 (February 28, 1962), 4 Gov. Contr. 147 (a); *H. B. Fowler & Company*, IBCA-294 (October 23, 1961), 61-2 BCA par. 3168, 3 Gov. Contr. 551(c); *Kiewit-Judson Pacific Murphy*, IBCA-141 (January 5, 1961), 61-1 BCA par. 2898, 3 Gov. Contr. 131; *Cheney-Cherf and Associates*, IBCA-250 (November 14, 1960), 67 I.D. 396, 60-2 BCA par. 2853, 2 Gov. Contr. 620(a); *Morgan Construction Company*, IBCA-258 (September 20, 1960), 67 I.D. 342, 60-2 BCA par. 2737, 2 Gov. Contr. 500; cf. *Parker-Schram Company*, IBCA-96 (April 7, 1959), 66 I.D. 142, 59-1 BCA par. 2127, 1 Gov. Contr. 289; *Charles H. Tompkins Company*, ASBCA No. 306 (February 24, 1950). Even when the only question presented is whether a claim falls within or without the jurisdiction conferred by the "Disputes" clause, the holding of a hearing may be needed in order to resolve controverted matters of fact upon which the question of jurisdiction necessarily turns. See *Unexcelled Chemical Corporation*, ASBCA No. 2399 (March 13, 1957), 57-1 BCA par. 1220; *Robertson Aircraft Corporation*, Army BCA Nos. 1240 and 1241 (July 30, 1947), 4 CCF par. 60,374.

changed condition was encountered by the contractor is an issue of fact to be determined under the "Disputes" clause.<sup>2</sup> In the circumstances of the present case, appellant is entitled to the hearing it has demanded.

The situation here involved parallels that presented in *H. Krieger Machinery Company*.<sup>3</sup> There an appeal was taken from a decision of the contracting officer rejecting a claim for an extension of time upon the ground that the delay was not due to an excusable cause. A motion to dismiss the appeal for failure to state a case on which any relief could be granted was denied by the Armed Services Board of Contract Appeals.<sup>4</sup> In the course of explaining its ruling, the Board said:

\* \* \* The Government is, in effect, asking us to examine the facts which appellant states in support of his defense of excusable cause and determine as a matter of law that they do not established his defense. The Government cites several cases to support its contention that the facts do not establish excusable cause. No authority is cited to support its contention that such deficiency in the evidence, at a stage in the proceedings that is prior to either a hearing on the merits or a submission on the record, requires us to dismiss the complaint without considering the merits.

\* \* \* \* \*

We do not think that we should apply Rule 11 and hold that appellant has failed to state a case on which any relief could be granted by the Board, merely because on a similar state of facts in a previous case we have held that an appellant failed to make out a case or sustain a defense. It is not correct to say that we could not grant relief on the merits if appellant proves what he offers to prove, i.e., that his failure was due to causes beyond his control and without his fault or negligence.

Appellant has not submitted this appeal on its merits on the record and thus is not restricted to the evidence now before the Board. Additional evidence may be and usually is brought out at a hearing. This additional evidence may change the factual situation. If we adjudicate the case solely on the basis of the facts which appellant sets out in his complaint we deprive an appellant of his right to a hearing and to present evidence. We think this should be avoided unless it is clearly apparent that no useful purpose could be served by a hearing.

If in the foregoing quotation references to changed conditions were substituted for the references to excusable causes, the quotation would

<sup>2</sup> *Shepherd v. United States*, 125 Ct. Cl. 724, 734 (1953). This decision was rendered under a contract which did not expressly tie the "Changed Conditions" clause into the "Disputes" clause. The applicability of its reasoning to the instant appeal is made more certain by the presence of such a tie. The current standard form of "Changed Conditions" clause, as used in the instant contract, states: "If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions."

<sup>3</sup> ASBCA No. 7879 (March 23, 1962); 1962-BCA par. §340, 4 Gov. Contr. 391(d).

<sup>4</sup> Rule 11 of the Armed Services Board of Contract Appeals expressly provides for the dismissal of appeals, after completion of the pleadings, for failure to state a case on which any relief could be granted by the Board; our rules are silent.

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describe exactly the theory of the motion before us and the reasons why that theory is unsound.

The Government also asserts that the claim presented by appellant is, from any perspective, based upon a breach of contract and, therefore, beyond the jurisdiction of the Board. In this connection the Department Counsel states:

The Contractor's contentions can only be construed as a claim that there was an alleged breach of warranty by the Government, or, in the alternative, that it was required to perform work far in excess of that contemplated by the contract, which requirement constituted a breach of an implied condition of reasonability.

Appellant's reply to these assertions is that it is not claiming for a breach of contract, but only for changed conditions.

The Government may have been led to believe that the claim was one for breach of warranty because sometimes the circumstances that amount to a changed condition, particularly one of the first category, also amount to an actionable misrepresentation. However, this overlap in scope between the doctrine of changed conditions and the doctrine of misrepresentation does not preclude the allowance of an equitable adjustment for the changed conditions if that form of relief is sought by the contractor.<sup>5</sup> The Government may also have been led to view the claim as one for breach of warranty because of appellant's theory that the 2-to-1 slope shown on the contract drawings was an indication or representation that the material would be capable of standing at such a slope. However, the design, methods, and details of the work, as described in the drawings and specifications, may properly be taken into account in determining whether changed conditions exist, since they constitute a source that can give rise to inferences, where factually and logically justified, concerning the physical conditions which the contractor was entitled or bound to expect would be encountered, and with which the physical conditions actually encountered are to be compared.<sup>6</sup> Appellant's characterization of the slope shown on the drawings as a misrepresentation of the physical condi-

<sup>5</sup> See, for example, *Tobin Quarries, Inc.*, 114 Ct. Cl. 286, 333 (1949), where the contractor sued on the ground of misrepresentation, and also on the ground of changed conditions, and where the Court, in granting relief on the latter ground, observed: "We think, therefore, that the problems of misrepresentation, and of unforeseen conditions not contemplated by the parties really constitute a single problem." See also Seagle, "Changed Conditions"—An Appraisal, 2 Government Contracts Review 4 (July 1958).

<sup>6</sup> *D. A. Whitley*, IBCA-177 (March 8, 1961), 61-1 BCA par. 2941, 3 Gov. Contr. 198(e); *Herman Groseclose*, IBCA-190 (December 22, 1960), 61-1 BCA par. 2885, 3 Gov. Contr. 63(f); *Inter-City Sand and Gravel Company*, IBCA-128 (May 29, 1959), 66 I.D. 179, 59-1 BCA par. 2215, 1 Gov. Contr. 430-32; *Wawberg Construction Company*, IBCA-144 (March 31, 1959), 66 I.D. 123, 59-1 BCA par. 2122, 1 Gov. Contr. 280; *Calvada, Incorporated*, ASBCA No. 2062 (August 8, 1956), 56-2 BCA par. 1033.

tions at the site is, therefore, consistent with its position that it is claiming only for changed conditions.

Nor is there merit to the suggestion that a breach of an implied condition of reasonability is involved. This suggestion is evidently based upon *R. P. Shea Company*,<sup>7</sup> which involved a situation where the contractor was regarded as having put itself outside of the Board's jurisdiction by conceding that its claim was not based upon the only article in the contract under which relief could have been afforded by us. Here, no such concession has been made.

The motion to dismiss is denied for the reasons stated above. The Department Counsel is allowed a period of 30 days, running from the date on which he receives his copy of this decision, within which to transmit to the Board a statement of the Government's position upon the merits of the appeal, together with a supporting brief and any documents necessary to complete the appeal file. Counsel for appellant may, within 15 days after he has received his copy of such statement and brief, file a reply thereto with the Board, if he so wishes. When the pleadings have been concluded, a hearing upon the merits of the appeal will be scheduled in due course.

HERBERT J. SLAUGHTER, *Member.*

I CONCUR:

PAUL H. GANTE, *Chairman.*

PRENTISS E. FURLOW

A-29646

*Decided November 22, 1963*

**Color or Claim of Title: Generally—Color or Claim of Title: Applications**

A color of title application filed under the provisions of the Color of Title Act of December 22, 1928, is not thereby automatically entitled to consideration as an application under the act of February 19, 1925.

**Color or Claim of Title: Generally—Color or Claim of Title: Applications**

A color of title class 1 application must be rejected when there has been less than the 20-year, good faith, peaceful adverse possession required by statute.

**Color or Claim of Title: Generally**

Where a class 1 applicant under the Color of Title Act has not held the land applied for himself for 20 years, he can purchase the land only if his possession to the date he learned of his defective title when added to that of his immediate predecessors equals the statutory period, and such possession meets the requirements of the act.

<sup>7</sup> IBCA-37 (November 30, 1955) 62 I.D. 456, 6 CCF par. 61,738.



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### Color or Claim of Title: Generally

When a holder of public land under claim or color of title learns that his title is defective, the 20-year statutory period is interrupted and any later applicant under the Color of Title Act must demonstrate that the statutory requirements have been met thereafter.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Prentiss E. Furlow has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated April 2, 1962, which affirmed a decision of the New Orleans office, Bureau of Land Management, dated July 5, 1960, rejecting his color of title application to the extent of lots 10, 11, 12, 13, 14, and 15, sec. 14, T. 17 N., R. 10 W., La. Mer., Louisiana, as shown on the plat of dependent resurvey, filed July 17, 1959. The application was rejected as to these lands because the applicant had not submitted sufficient evidence to sustain his claim to the lands and because the land descriptions supplied were not considered legally sufficient to show the boundaries and to identify the lands claimed.

The appellant contends that he is entitled to a patent under the provisions of the act of February 19, 1925 (43 U.S.C., 1958 ed., sec. 993), or the act of December 22, 1928, as amended (43 U.S.C., 1958 ed., sec. 1068). He asserts that, although he did not file an application under the former act, his application filed under the latter act should entitle him to consideration under the former act as well. He states that, since both acts state only that an application must be filed to obtain a patent, a patent should be granted if the applicant meets the requirements under any statute in existence.

Congress has authorized applications for patents to be filed under the respective statutes, *supra*. It has, however, nowhere authorized the filing of an application under one of the above statutes to be considered as the filing of an application under some other statute. Thus, this contention of appellant is without merit and since his application was, admittedly, filed under the act of 1928 his contentions as to his alleged rights under the act of 1925 must be dismissed.

The appellant asserts a class 1 claim under the color of title act of 1928 to lots 10, 11, 12, 13, 14, and 15, sec. 14, T. 17 N., R. 10 W., La. Mer., Louisiana, upon the basis of a deed dated September 22, 1943, which purports to convey to him the NE $\frac{1}{4}$ NW $\frac{1}{4}$ , lot 2, and that part of lot 8 north and east of a road, sec. 14, together with all rights of "batture and accretion," and a deed dated March 6, 1944, which purports to convey to him, among other land, all of lots 4, 5, and 7 and that part of lot 8 not previously sold, except for five

acres thereof, of sec. 14. He alleges that the lands listed in these deeds "embrace what now appears on the plat of the United States survey as Lots 10 through 15, Section 14."

In the original Government survey approved on May 18, 1842, section 14 was depicted as a fractional section consisting roughly of the  $E\frac{1}{2}SW\frac{1}{4}$  (lots 4 and 5), the  $NW\frac{1}{4}$  ( $NE\frac{1}{4}NW\frac{1}{4}$ ,  $NW\frac{1}{4}NW\frac{1}{4}$ , lots 2 and 3), and the  $NW\frac{1}{4}NE\frac{1}{4}$  (lot 1), with Lake Bistineau to the east. Lots 1, 2, 4, and 5 were shown to be riparian. It appears that in 1849 and 1854 the United States patented all the lots shown to be riparian, except lot 1, to Stephen Applewhite through whom appellant claims title by mesne conveyances.

In 1911 the State of Louisiana surveyed the township. Its plat shows as lots 6, 7, 8, and 9 the area needed to make regular the  $SW\frac{1}{4}SW\frac{1}{4}$ ,  $NW\frac{1}{4}SW\frac{1}{4}$ ,  $NE\frac{1}{4}SW\frac{1}{4}$ ,  $SW\frac{1}{4}NE\frac{1}{4}$ , respectively. That is, lot 6 of the State survey together with lot 5 of the United States survey would make up a regular subdivision, the  $SW\frac{1}{4}SW\frac{1}{4}$ . Lot 7 of the State survey and lot 4 of the United States survey would make up the  $NW\frac{1}{4}SW\frac{1}{4}$ , etc.

A private survey by R. A. McLaughlin, on March 8, 1944, showed an extensive area outside the original meander line.

The area was again resurveyed by the United States pursuant to instructions of January 7, 1957. It was concluded that the original meander line was grossly in error and the correct meander line as it existed in 1812 (when Louisiana was admitted to the Union) and in 1841, when the township was subdivided, was established. The dependent resurvey shows as additional public land an area of 213.29 acres which fills out generally fractional section 14 except for the  $E\frac{1}{2}E\frac{1}{2}$ . A portion of land determined to have been part of the bed of the lake as it existed in 1812 was not returned as public land.<sup>1</sup> The lands determined to be public land were divided into lots 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

In addition to tracing its title back to the United States patentee of the lots originally shown as riparian (except lot 1), the appellant also shows in his abstract of title that he is the successor to a grantee of the State who in 1911 was granted lots 7 and 8 as shown on the State's 1911 plat (United States lot 8, or roughly the  $E\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$  and  $NE\frac{1}{4}SW\frac{1}{4}$ ). On the basis of this conveyance, the land office held that appellant had established a claim of title to lot 8 so that it is not involved in this appeal. The remaining land covered by the application lies to the east and south of United States lot 8.

<sup>1</sup> See *State of Utah*, 70 I.D. 27 (1963), for a discussion of the rights of the United States to accretions to public land.

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As we have seen, the decisions below held the descriptions in the deeds on which appellant relies did not purport to pass title to the land at issue. The Department has often held that a color of title claim will not lie for land not included within the description of the deed or other document on which the applicant relies for his claim or color of title even though the parties assumed that it had been. *Storm Brothers*, A-29023 (October 8, 1962); *Ingrid T. Allen*, A-28638 (May 24, 1962), and cases cited therein.

As the Division of Appeals stated, it is well established that, although in general the actual water line, not the meander line, is the boundary of public land disposed of pursuant to a plat showing the land bordering on a body of water, yet where it is demonstrated that the meander line is grossly in error, through fraud or mistake, the meander line becomes the boundary and the land lying between it and the water line is public land which the United States may dispose of. See *State of Louisiana*, 60 I.D. 129, 135 (1948); *Northern Pacific Railway Co. et al.*, 62 I.D. 401, 408 (1955), and cases cited therein.

Thus, upon the Department's determination that the original meander line was grossly in error and that the land between it and the water line was public land, the original meander line became the boundary of the lots shown on the 1842 plat. At least from that time on a description in terms of one of the original lots encompassed no more than the land up to the meander line.

However, whether prior to the dependent resurvey, it could be found to be so limited, as the Division of Appeals held, need not be decided because the appellant's application must be rejected for another reason.

#### The Color of Title Act provides:

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for 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 State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre: \* \* \*

The appellant acquired the land on which he bases his application in 1943 and 1944. Since he says in his application that he learned

in 1944 that he did not have title to the lands applied for, he does not himself have the necessary 20 years and must, consequently, rely upon the possession of his predecessors in title.

Before examining their status, we may well consider some general propositions relating to color of title applications. First, it is well established that an applicant who acquires land knowing that the title is actually in the Government will not be permitted to purchase the land even though it has been held in good faith for more than 20 years under color of title by his vendor. *Purvis C. Vickers et al.*, 67 I.D. 110 (1960); *Anthony S. Enos*, 60 I.D. 106 (1949). In other words, an applicant must have acquired his claim or color of title in good faith.

It is also well established that an applicant who himself purchased and held in good faith a tract of land for less than the required period cannot acquire it if his predecessors have not held in good faith and peaceful, adverse possession for a period sufficient to meet the statutory requirements. *Walter G. Kreuter*, A-29065 (October 22, 1962).

Another situation arises when an applicant who has held for less than the required time has purchased in good faith from a grantor who himself became aware of the defect in his title during the 20 years preceding the date on which the applicant learned of the defect in his title, but whose own predecessors in title had held for the required period. Whether the applicant in such a situation can purchase under the act depends upon whether the 20-year period of which the statute speaks must immediately precede the date on which the applicant learns of the defect in his title. It seems to me that the answer must be in the affirmative. That the Department requires a person to acquire his color of title in good faith despite the fact that his predecessors have long since qualified demonstrates that an unbroken chain for over 20 years prior to the date the applicant learned of the defect in his title is necessary. It would not be consistent to deny an applicant the possession of his immediate predecessors but allow him to avail himself of the possession of his remote predecessors despite the bad faith of his immediate ones. Otherwise a purchaser with notice who would himself be ineligible could convey title to an innocent purchaser who would then become immediately eligible to acquire the land. Once the chain of title on which an applicant must rely is broken, the statutory period begins anew. See 4 Tiffany, *Real Property* (3d ed., 1939), sec. 1162. That is, if the property comes into the possession of one who could not himself acquire land under the Color of Title Act, then his successors are also barred until the statute has again been satisfied.

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Turning now to the facts in this case, we see that the appellant alleges that he learned on March 8, 1944, that he did not have clear title to the land he seeks. Since this date is only two days after one of the deeds on which he relies and six months after the other, he had not possessed the land for 20 years before he learned of the defect in his title and his color of title claim must rest upon the possession of his predecessors for the 20 years prior to March 8, 1944.

One of these was C. R. Foreman, who acquired the NE $\frac{1}{4}$ NW $\frac{1}{4}$ , lots 2, 3, 4, and 5, sec. 14, from Joseph L. Green on December 26, 1928. On December 28, 1928, Foreman conveyed the NE $\frac{1}{4}$ NW $\frac{1}{4}$  and lot 2 to E. A. Woods, and on January 2, 1934, Woods' administrator conveyed those tracts and lots 7 and 8 (State survey of 1911) to Foreman.

Meanwhile, on April 15, 1932, Foreman entered into a 5-year agricultural lease with the State of Louisiana for land described as:

SE $\frac{1}{4}$  of NE $\frac{1}{4}$ , SE $\frac{1}{4}$ , SE $\frac{1}{4}$  of SW $\frac{1}{4}$  and Lot 6 of Sec. 14, \* \* \*

These tracts cover all of lots 10, 11, 12, 13, 14, and 15 of the dependent resurvey and more.

The lease also stated:

Which said above described property is owned by the State of Louisiana by virtue of her inherent sovereignty, being the bed of Lake Bistineau as shown on the official Government Plats of Survey.

Thus, at the time Foreman reacquired the NE $\frac{1}{4}$ NW $\frac{1}{4}$  and lot 2 and acquired State lots 7 and 8, he was the lessee of the State for the area appellant now seeks. Having leased from the State and acknowledged its ownership of these lands, Foreman could not thereafter be said to have been holding them in good faith under claim or color of title.

Whether or not Foreman's knowledge that the lands in question were not covered by his deeds can be imputed to his successors, the 20-year statutory period could not in any event begin to run until Foreman conveyed on April 12, 1939, to J. S. Willis, who was appellant's grantor. Since less than 20 years elapsed between that date and March 8, 1944, the date on which appellant says he learned he did not have title to the land applied for, the basic requirement of the statute has not been satisfied and the application, for this reason alone, must be rejected.

The application being inadequate on this ground, it is unnecessary to consider appellant's allegations that there is a distinction between claim of title and color of title.

The appellant has requested the opportunity to present oral argument on this appeal. It is not believed that oral argument is necessary to a proper disposition of this case.

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 request for oral argument is denied and the decision is affirmed for the reasons stated in this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

MARVIN M. McDOLÉ

A-29376 (Supp.) *Decided November 29, 1963*

Applications and Entries: Generally—Contests and Protests—Desert Land Entry: Generally—Patents of Public Land: Generally

Where final proof on a desert land entry is rejected within two years after issuance of a receipt for the money paid with the proof and new proof is filed and is rejected and the entry canceled in part within two years after the new proof is filed but more than two years after the receipt was issued, the entryman is not entitled to a patent pursuant to section 7 of the act of March 3, 1891.

SUPPLEMENTAL DECISION

On April 1, 1963, the Department affirmed the cancellation of Marvin M. McDole's desert land entry as to the NE $\frac{1}{4}$  sec. 34, T. 4 N., R. 27 E., W.M., because of his failure to comply with the reclamation requirements for that land.

By letter of October 4, 1963, McDole now asserts that he is entitled to a patent to the tract by virtue of the proviso of section 7 of the act of March 3, 1891 (43 U.S.C., 1958 ed., sec. 1165), which reads as follows:

That 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, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him \* \* \*.

The pertinent circumstances in this case are that McDole submitted final proof on his desert land entry, comprising the N $\frac{1}{2}$  sec. 34, T. 4 N., R. 27 E., W.M., paid \$1 per acre for the 320 acres of land, and received a receipt, all on March 27, 1959. On May 14, 1959, the land office issued a decision rejecting his final proof in its entirety on the ground that the proof showed on its face that the testimony of his witnesses had

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not been given in compliance with departmental regulations. The rejection was without prejudice to the entryman or his witnesses to appear before the proof-taking officer and submit new testimony and forms; instructions for such action, to be taken within 30 days of receipt of the decision, were furnished. On June 10, 1959, in response to McDole's telephoned request, the land office issued a decision granting him additional time until July 15, 1959, to submit new proof. McDole filed new final proof on July 15, 1959.

On July 11, 1961, the land office issued a decision holding that McDole's proof was inadequate for 320 acres of land because it showed a lack of a water supply and an irrigation system for the NE $\frac{1}{4}$  of the entry. The decision therefore canceled the entry as to that quarter section.

McDole appealed the cancellation of the entry as to the NE $\frac{1}{4}$  and carried this appeal to the Secretary of the Interior. The decision of April 1, 1963, upholding the propriety of the cancellation resulted.

McDole asserts that section 7 of the act of March 3, 1891, *supra*, requires the issuance of a patent two years after issuance of a receiver's receipt, which is now issued by the manager of a local land office (43 CFR 107.3, fn. 1), in the absence of a pending contest or protest against the entry. He contends that his right to a patent is clear because the receipt was issued on March 27, 1959, and the adverse decision was not issued until July 11, 1961, which is clearly more than two years later.

This argument ignores the intervening decision of the land office, issued on May 14, 1959, rejecting in its entirety the final proof filed on March 27, 1959. New final proof was not filed until July 15, 1959, and that proof was rejected and the entry canceled as to the NE $\frac{1}{4}$  sec. 34 on July 11, 1961, less than two years later.

Section 7 of the 1891 act applies only where there is no pending "contest or protest" against the validity of an entry after the lapse of two years from the issuance of the receipt. Its purpose was to prevent undue delay in acting upon final proof; the period of limitation is tolled while a case is being closed following a timely challenge of final proof.

Shortly after the passage of the 1891 act, the Department considered the question as to what proceedings would remove a case from the operation of the act. In instructions issued on May 8, 1891 (12 L.D. 450, 452), the Department stated that "when there are no proceedings initiated within that time [the two-year period] by the government or individuals the entryman shall be entitled to patent \* \* \*." In further instructions issued on July 1, 1891 (13 L.D. 1, 3), the Department defined the word "proceedings" as

\* \* \* including any action, order or judgment had or made in your office [Commissioner of General Land Office] canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

The same view was expressed in a later decision and instructions. *Jacob A. Harris*, 42 L.D. 611 (1913); Instructions, 43 L.D. 322 (1914). And, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Supreme Court cited and indicated its approval of the instructions and the *Harris* decision.

There can be no doubt then that the land office decision of May 14, 1959, rejecting McDole's final proof and holding the entry for cancellation unless proper proof were filed within the time allowed, stopped the operation of section 7 of the 1891 act which had commenced with the issuance of the receipt on March 27, 1959. New final proof was not filed until July 15, 1959, and before two years from that date elapsed the proof was rejected and the entry canceled as to the NE $\frac{1}{4}$  sec. 34.

It is true that the money paid by McDole and receipted for on March 27, 1959, was not returned to him with the decision of May 14, 1959. That payment, however, having been made in connection with a final proof which was rejected outright on May 14, 1959, could not serve to effect a relation back to March 27, 1959, for the purpose of determining the running of the two-year period specified in section 7 of the 1891 act. Rejection of the proof on May 14, 1959, no appeal therefrom having been taken, closed out that phase of the case. Moreover, failure to return the money receipted for could not have prejudiced McDole since it relieved him of what would otherwise have been the necessity to have made a new payment when the new proof was submitted on July 15, 1959. For the purposes of the operation of section 7 of the 1891 act, the money that remained on deposit will be considered as having been paid and receipted for on July 15, 1959. To conclude otherwise would be to produce the absurdity that, if McDole had failed for two years to submit new proof as required, the Department would be compelled to issue him a patent merely because it had failed to close out his case and refund the money.

For the reasons set forth, 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), McDole's request for a patent to the NE $\frac{1}{4}$  sec. 34 pursuant to section 7 of the act of March 3, 1891, is denied.

FRANK J. BARRY,  
SOLICITOR.



## CLAIM OF MR. Y. G. SANCHEZ

TA-258

*Decided December 2, 1963***Torts: Amount of Damages**

The common law rule that the expenses of litigating a tort claim are not recoverable as damages is followed in California, and applies to the expenses of prosecuting a claim administratively under the Federal Tort Claims Act. Under this rule, the charge made by a physician for the preparation of a medical report to be used in establishing the nature or extent of an alleged injury, rather than to assist in its treatment, is not a proper element of damages.

**Torts: Amount of Damages**

Under the law of California, the trier of the facts is accorded a wide latitude and an elastic discretion in determining the amount of compensation to be awarded as general damages for pain and suffering, temporary disability, and the like. The only standard is that the amount awarded must be such as a reasonable person would consider fair compensation.

**APPEAL FROM ADMINISTRATIVE DETERMINATION**

On March 5, 1963, the Field Solicitor, San Francisco, California, awarded the claimant, Mr. Y. G. Sanchez, 16074 Via Catherine, San Lorenzo, California, the sum of \$250. This award was for compensation due to an injury sustained as a result of an accident on University Avenue in Berkeley, California, on August 21, 1962. The claimant, through his attorney, Mr. James S. Martin, 176 Juana Avenue, San Leandro, California, has taken a timely appeal from the administrative determination of the Field Solicitor (T-S-S-100).

In the appeal letter of March 12, 1963, appellant's attorney stated that the award of \$250 "is unrealistic," described the medical findings contained in a report prepared by Dr. Gwilym B. Lewis, referred to "the violence of the collision between the cars,"<sup>1</sup> and requested a re-examination of the claim. He stated that the diathermy treatments which Mr. Sanchez had received from Dr. Lewis could well have extended over a considerably longer period of time, but that appellant chose to treat himself with heat and home massage. The attorney conceded that there was no loss of income by appellant, but argued that this circumstance was due to the nature of his employment, which

<sup>1</sup> The Investigation Report of Motor Vehicle Accident (Standard Form 91-A) estimates the speed of the Government-owned vehicle at the time of impact as "15-10 mph." The copy of the report of "Non-Injury Vehicle Accident" by the Berkeley Police Department shows that the Government operator was "Exceeding safe speed—but not speed limit." Officer Chandler, in submitting this report, stated that "no citation is in order" for the operator. Although the operator was "at fault," he was not charged with any traffic violation.

required only a brief appearance daily at his office, and, therefore, did "not accurately represent the severity of Mr. Sanchez' disability."

The first question that needs to be decided is whether the Field Solicitor erred in determining that Dr. Lewis' bill, amounting to \$25, for the medical report was not an allowable element of damages. The report is dated February 20, 1963. It describes appellant's medical history, physical examinations, diagnoses, and treatment beginning with August 24, 1962, and continuing weekly until September 27, 1962. It is obvious that no treatment or medication was given to appellant by Dr. Lewis at the time his report was prepared, and that it is merely an evaluation report obtained to support appellant's claim.

Mr. Sanchez' attorney states that the medical report was obtained because of the Field Solicitor's "insistence that the claim be accompanied by a narrative medical report." This statement appears to refer to a letter in which the Field Solicitor called to the attention of the attorney the instruction in the standard "Claim for Damage or Injury" form (Standard Form 95) that—

In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

In the absence of a statutory provision, "a successful party in an action of tort is not entitled to compensation for loss of time, attorney fees or other expenses in the conduct of the litigation. He can recover only the statutory costs which are usually insubstantial and give reimbursement for only a small part of the actual expenditures of the litigant."<sup>2</sup>

It has been held that "Medical expenses are allowed as items of damages when incurred for treatment, but when incurred for the sole purpose of evaluating the injuries of the plaintiff, these expenses cannot be recovered as damages."<sup>3</sup> Similarly, it has been held that the bill submitted by a physician for appearing as a witness at the trial of a personal injury suit is not a proper item of damages in such a suit.<sup>4</sup>

While no California case directly in point has been found, the courts of that State have ruled that attorney fees are not allowable as damages,<sup>5</sup> and in the course of so doing have treated as part of the law of California the common law rule "that expenses of litigation could not

<sup>2</sup> RESTATEMENT, TORTS, sec. 914, comment c (1939).

<sup>3</sup> *Travis v. Norfolk and Dedham Mutual Fire Ins. Co.*, 137 So. 2d 653, 658 (La. App. 1962).

<sup>4</sup> *Pivoz v. Iannacone*, 406 Pa. 588, 178 A. 2d 707 (1962).

<sup>5</sup> *LeFavé v. Dimond*, 46 Cal. 2d 868, 299 P. 2d 858, 859 (1956); *Woodward v. Bruner*, 104 Cal. App. 2d 83, 230 P. 2d 861 (1951).

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be recovered as damages, and no costs were recoverable beyond those taxable under the statute."<sup>6</sup>

The facts clearly show that the bill for the medical report represents an expense incurred in the prosecution of appellant's claim. It is merely a part of the cost of proving the nature and extent of the harm for which he is entitled to compensation, just as attorney or witness fees would be. It is used in this administrative proceeding for the same purposes that it would be in a judicial proceeding. Under the authorities, the bill for the medical report is not a proper element of damages.

Dr. Lewis' bill for the examination and treatment of Mr. Sanchez, dated November 15, 1962, is in the amount of \$103.50.<sup>7</sup> This bill appears to be reasonable in amount, and is clearly a proper element of damages.

The only remaining question that needs to be determined is the amount of the general damages, in the form of pain and suffering and temporary partial disability, sustained by Mr. Sanchez. With respect to the assessment of general damages for a personal injury, the Supreme Court of California has said that the jury "is accorded a 'wide latitude' and an 'elastic discretion'",<sup>8</sup> and that "the only standard is such an amount as a reasonable person would estimate as fair compensation."<sup>9</sup>

The Field Solicitor, in his award, included the sum of \$146.50 as compensation for pain and suffering resulting from the accident. A review of the medical report and the other data contained in the administrative record indicates that this amount is inadequate, and that \$400 would constitute fair compensation for appellant's general damages.<sup>10</sup>

<sup>6</sup> *Woodward v. Bruner*, *supra*, note 5, at p. 862.

<sup>7</sup> It is itemized as follows:

"8/24/62	Office examination-----	\$25. 00
	Diathermy, cervical collar-----	5. 00
	X Rays 3 Views Cervical spine-----	15. 00
"8/30/62	Office call, diathermy, Vitamin B 12 injection-----	12. 50
"9/ 6/62	Office call, diathermy, Vitamin B 12 injection-----	12. 50
"9/10/62	Office call, diathermy, Vitamin B 12 injection-----	12. 50
"9/17/62	Office call, diathermy-----	8. 50
"9/27/62	Office call, diathermy, Vitamin B 12 injection-----	12. 50
		\$103. 50"

<sup>8</sup> *Taylor v. Pole*, 16 Cal. 2d 668, 107 P. 2d 614, 616 (1940).

<sup>9</sup> *Roedder v. Rowley*, 28 Cal. 2d 820, 172 P. 2d 353, 354 (1946).

<sup>10</sup> In a similar rear end collision between automobiles, plaintiff was stopped for an intersectional traffic signal in the city of Oakland, California, when his car was struck from the rear by defendant's car. He claimed injury to his neck, requiring the wearing of a neck brace. The Superior Court in and for the County of Alameda rendered a judgment for the plaintiff in the amount of \$770 for personal injuries and damage to his car. Plaintiff appealed, contending that the verdict was insufficient. Noting that the jury was able to observe the plaintiff during the trial, and from the evidence could infer that his injuries "were slight," the District Court of Appeal affirmed this judgment. *Griffoul v. Seeman*, 96 Cal. App. 2d 313, 215 P. 2d 59, 60 (1950).

We determine that the compensation due Mr. Sanchez for the personal injury that forms the basis of this appeal consists of \$103.50 for medical expenses, and \$400 for pain and suffering and temporary partial disability, or a total of \$503.50. To this extent the decision (T-S-S-100) of the Field Solicitor at San Francisco, California, is reversed.

We award to Mr. Y. G. Sanchez the sum of \$503.50, and deny the remainder of his claim in the amount of \$1,996.50.

EDWARD WEINBERG,  
*Deputy Solicitor.*

### DUNCAN MILLER

A-29697

*Decided December 4, 1963*

#### Oil and Gas Leases: Applications—Oil and Gas Leases: Noncompetitive Leases—Oil and Gas Leases: Acquired Lands Leases

An oil and gas lease offer for acquired land filed before the amendment of the Mineral Leasing Act on September 2, 1960, which was still pending at that time, became subject to the act of September 2, 1960, so that the offeror is properly required to consent to the issuance of a lease subject to the terms prescribed by the amendatory act.

#### Applications and Entries: Amendments—Oil and Gas Leases: Description of Land—Oil and Gas Leases: Applications

An amendment of an oil and gas offer to change the description of land sought for leasing to include the correct designation of a legal subdivision owned by the United States within a reservoir area in place of a previous designation of a subdivision not within the reservoir area and not owned by the United States should not be rejected as a substitution of one tract of land for another which requires the filing of a new offer, where it appears that the offeror intended originally to apply for the land described in the amendment.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from decisions dated June 6 and June 5, 1962, by which the Division of Appeals of the Bureau of Land Management affirmed decisions of the land office at Santa Fe, New Mexico, requiring him to consent to amendments of the lease terms contained in his noncompetitive oil and gas lease offers New Mexico 023622 and 030512 for certain acquired land in Oklahoma in order to comply with the amendments of the Mineral Leasing Act contained in the act of September 2, 1960 (30 U.S.C., 1958 ed., Supp. IV, sec. 226). His appeal also challenges the

December 4, 1963

rejection of an amendment to his offer New Mexico 023622 changing a portion of his description of the land sought for leasing from the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of a certain section 5 to the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of that section. The decision of June 6, 1962, affirmed the decision of the land office rejecting his amendment on the ground that a substitution of one tract of land for another constitutes a new offer which must be accompanied by a new filing fee and payment of rental.

On appeal, Miller contends, first, that, because he filed his offers before the amendment of the Mineral Leasing Act on September 2, 1960, imposing new terms and conditions, he is not bound by the amendatory provisions and that, in any event, the act of September 2, 1960, is not applicable to leases of acquired land of the United States. He contends, second, that the changing of a "w" to an "e" in his land description is such a minor amendment that it should be allowed as an aid to administration of lands under lease.

The decisions appealed from are affirmed insofar as they require Miller's consent to the amendment required by the act of September 2, 1960, of the terms of the oil and gas leases to be issued to him. *Duncan Miller*, A-29921, A-29922 (November 26, 1963); *Lucille S. West, Duncan Miller et al.*, A-29242 (February 23, 1963).

As to the amendment of the one lease offer, New Mexico 023622, I believe that the Division of Appeals erred in treating the amendment as a substitution of new land for old and as thus constituting a new offer. Miller's offer, as originally filed on March 21, 1956, described a number of legal subdivisions, including the "SW $\frac{1}{4}$ NW $\frac{1}{4}$ " of section 5. It also described portions of legal subdivisions, including some in section 5, lying "within the government property line." And, as a catch-all, it asked for "all land within the government property line" within section 5 and other sections.

On April 16, 1959, Miller wrote to the land office, saying

I would like to correct the typographical error in the above captioned lease offer. In section 5, instead of the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , it should be SE $\frac{1}{4}$ NW $\frac{1}{4}$ .

On May 7, 1959, he wrote again, submitting a metes and bounds description of the boundary line of the land applied for and a copy of a map showing the land. The map shows the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of section 5 as lying outside the boundary whereas practically all of the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of section 5 lies within the boundary.

Although Miller's original description referred only to portions of certain legal subdivisions as lying "within the government property line" and did not so identify the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of section 5, it seems quite clear from the metes and bounds description and the map later submitted by Miller that his offer was intended to be limited to the tracts

and the portions of tracts designated that were within the Altus Reservoir area owned by the United States. The SW $\frac{1}{4}$ NW $\frac{1}{4}$  is not within the reservoir area but practically all the SE $\frac{1}{4}$ NW $\frac{1}{4}$  is. Thus, it is clear that he did not intend to include the SW $\frac{1}{4}$ NW $\frac{1}{4}$  in his offer but intended to include the SE $\frac{1}{4}$ NW $\frac{1}{4}$ . Hence, it is quite reasonable to conclude that the amendment was intended to correct a typographical error so that the offer would describe only land within the reservoir area which was available for leasing. Certainly, there is no indication at all that Miller originally wanted to lease the SW $\frac{1}{4}$ NW $\frac{1}{4}$  but then changed his mind and decided to apply for different land, so that there was, in fact, a substitution of one tract for another. In the circumstances, I do not think that Miller's attempted amendment should be regarded as a new offer that requires a new filing fee and a separate payment of rental.

The record does not indicate whether there was a filing by some other person of an offer to lease the land in question at some time between the filing of Miller's offer and of his subsequent amendment. If there was not, Miller's amendment should have been accepted and his offer considered to include the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of section 5.

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 decisions appealed from are affirmed as to the first point and the decision of June 6, 1962, is reversed as to the second, and the case is remanded for further consideration in conformity with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

## PAYMENT OF INTEREST ON THE CAPITAL COST OF THE NATIONAL FISHERIES CENTER AND AQUARIUM

### Bureau of Sport Fisheries and Wildlife: Generally

The inclusion of an interest component in establishing user charges under section 8 of the Aquarium Act is discretionary and not mandatory.

Where the language of an Act is silent on the question of interest, resort must be had to the legislative history of the applicable statute.

### Fees

The inclusion of an interest component in establishing user charges or fees under section 8 of the Aquarium Act is discretionary and not mandatory. If interest is to be considered, the Secretary would need to determine the proper interest rate and the effect the increased charges would have in collecting sufficient revenues to meet the specific obligations of section 8 of the Aquarium Act.

December 9, 1963

**Statutory Construction: Legislative History**

Where the language of an Act is silent on the question of interest, resort must be had to the legislative history of the applicable statute.

**Words and Phrases**

Reference to "costs of construction" or similar phraseology in Federal statutes do not in themselves necessarily impute an interest requirement.

M-36663

December 9, 1963

TO: ASSISTANT SECRETARY FOR FISH AND WILDLIFE

SUBJECT: PAYMENT OF INTEREST ON THE CAPITAL COST OF THE NATIONAL FISHERIES CENTER AND AQUARIUM.

During recent hearings on the proposed budget for fiscal year 1965 of the Bureau of Sport Fisheries and Wildlife, the Budget Bureau requested this Department to consider whether interest is required to be recovered by the Secretary in the capital costs of constructing the National Fisheries Center and Aquarium. Your office has requested our interpretation of the provisions of the Act of October 9, 1962 (16 U.S.C. sec. 1051 *et seq.*), in this regard.

In our opinion, the inclusion of an interest component in establishing user charges is discretionary and not mandatory.

Section 8, which is the relevant provision of the Act of October 9, 1962, provides:

Funds appropriated and expended hereunder for construction of the buildings for the National Fisheries Center and Aquarium shall not exceed \$10,000,000: *Provided*, That the expenditure of such funds shall be made subject to the condition that the Secretary of the Interior shall establish charges relating to visitation to and uses of the \* \* \* Center and Aquarium at such rates as in the Secretary's judgment will produce revenues to (a) liquidate the costs of construction within a period of not to exceed thirty years and (b) pay for the annual operation and maintenance costs thereof. (Italics supplied.)

This language is silent on the question of interest. Therefore, resort must be had to the legislative history of the 1962 Act to determine whether this provision is to be read as requiring, precluding, or as permitting, as a matter of discretion, an interest component.

Generally, references to "costs of construction" or similar phraseology in Federal statutes do not in themselves necessarily impute an interest requirement. Compare for example the practice under section 4 of the Act of June 17, 1902 (32 Stat. 389), which provides that irrigation "charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project" with that prevailing under section 7 of the Bonneville Project Act, as amended (16 U.S.C. sec. 832d), and section 5 of the Flood Control Act of 1944 (16 U.S.C. sec. 825s). None of these statutes refers to

the interest element. In the case of the former, interest is not charged. In the case of the latter two statutes, which deal with power rates at the Bonneville Project and Corps of Engineers projects, respectively, the interest component is included in the rate base.

The pertinent legislative history on the issue of interest under the Aquarium Act can be found in the Senate consideration of H.R. 8181, a bill which later became the Act of October 9, 1962. When H.R. 8181 passed the House on August 28, 1961, it did not include a provision for reimbursement of the costs of construction and annual operation and maintenance costs.

This Department, in its report of May 11, 1962, to the Chairman of the Senate Committee on Public Works on the House passed bill, recommended the enactment of H.R. 8181 if amended as suggested by the Department. One of the suggested amendments is as follows:

Funds appropriated and expended hereunder for construction of the buildings for the National Fisheries Center and Aquarium shall not exceed \$10 million: *Provided*, That the expenditure of such funds shall be made subject to the condition that the Secretary of the Interior shall establish charges relating to visitation to the National Fisheries Center and Aquarium and he may establish charges for other uses at such rates as in the Secretary's judgment will produce revenues to cover an appropriate share of the annual operation and maintenance costs thereof.

The purpose of this amendment was to provide "fiscal guidance and to permit appropriate reimbursement to the Treasury for costs of operation and maintenance."

Subsequently, during the Senate hearings on H.R. 8181 (see Hearing before Subcommittee of the Committee on Public Works, June 15, 1962, 87th Cong., 2d Sess. on H.R. 8181) as it passed the House, and a companion bill certain questions were raised by Senator Lausche on the cost of constructing the aquarium and whether a fee should be charged to make the aquarium self-sustaining. In response to this the following colloquy took place (page 8, *supra*):

Senator Gruening. Senator Lausche, I wonder whether an amendment along these lines would perhaps meet the objections that you stated very clearly. This would be the approximate language:

It is the purpose of the Congress that this project be self-supported, and the Secretary of the Interior is directed to provide a system of projected admission fees which will, over a period of years, repay amortization and interest charges of the original cost.

Senator Lausche. That would be a very excellent improvement of the bill.

Senator Gruening. Well, I think that it is very clear from your testimony, I think we are very sympathetic to the fact that if we could make this thing self-sustaining, so that the cost to the Government could be repaid over the years, that would remove a major part of your objection, would it not?

Senator Lausche. You still have the matter of the time being opportune to go into the project at this time.

\* \* \* \* \*



## THE NAT. FISH. CTR. &amp; AQUARIUM

*December 9, 1963*

The suggestion made by the Senator from Alaska is excellent. But I do think that you still ought to consider the other aspect of it.

Senator Gruening. When we get into executive session I shall certainly propose such an amendment, \* \* \*.

Later at these hearings, the Subcommittee Chairman, Senator Randolph, after referring to the above proposed amendment of the Department, said:

This goes to the same subject matter as Senator Gruening anticipates in his amendment. The sense of the amendment has the recommendation of the Secretary of the Interior.

Later the Committee in its report on H.R. 8181 (see S. Rept. No. 1782, 87th Cong., 2d Sess.) adopted the Department's suggested amendment on this subject indicating that the "collection [by the Secretary] of moderate admission fees will cover the operation and maintenance costs." No mention was made of recouping the cost of construction plus interest in establishing these fees.

Subsequently, on the Senate floor a number of Senators, in considering H.R. 8181, expressed a belief that the proposed fisheries center and aquarium should be self-supporting (see 108 Cong. Record 19184-19196). Senator Lausche first raised the question when he said:

My question is, if the bill is to be passed, why ought we not make charges that will amortize the cost of the building and will provide sufficient funds for operating and maintenance expenses each year.

Senator Randolph, who was the floor manager of the bill, then recalled the colloquy between Senators Lausche and Gruening on this subject during the hearings on the bill after which Senator Lausche remarked that the bill as reported by the Committee

\* \* \* does not conform to what the Senator from Alaska \* \* \* said at the [above quoted] hearing. The Senator mentioned amortization of the capital investment. The language of the bill now provides for recouping a part of the operating and maintenance costs.

Mr. Randolph. Yes. I read this so that the Record might reflect what the Senator was saying today [on the Senate floor] is something he said in the committee. It was appropriate for him to speak in terms of amortization, rather than an appropriate share of the cost, as we have indicated by the language.

Senator Miller then advised the Senate that he had an amendment which was designed to meet the objections of Senator Lausche. The Senator's amendment, which was often referred to as the Miller amendment during the debate, amended section 8 of the reported bill. The bill was later enacted with this amendment.

The following colloquy on the Senate floor concerning the question of amortizing the costs of the aquarium is pertinent to our inquiry.

Mr. Proxmire. \* \* \* The distinguished Senator from Iowa [Mr. Miller] has submitted an amendment \* \* \*, but I suggest to the Senator from Iowa that, \* \* \* he give real consideration, in offering the amendment, to supporting a motion that the bill be recommitted for the purpose of studying whether it would be practical or feasible to require the Interior Department to try to raise \$10 million, pay the interest, and cover all maintenance costs in a period of 30 years. It may be possible, but I submit, based on all the experience of the aquariums in this country, that it could not be done. [This motion was later defeated.]

\* \* \* \* \*  
 The Senator from Iowa has put his finger on a very crucial part of the bill in referring to section 8 [of the reported bill]. The Senator from Ohio [Mr. Lausche] has discussed it. I want to discuss it again. I want to emphasize how flimsy it is with respect to an assurance that any substantial cost is going to be covered in the bill.

\* \* \* \* \*  
 It does not say a full share. It says "an appropriate share". If it costs \$800,000, an appropriate share, in his judgment might be \$50,000 or \$100,000. There is nothing in the bill that provides that it is to be one-half or one-third of the maintenance cost. Whatever he chooses to cover he can cover.

\* \* \* \* \*  
 Mr. Lausche. The section [in the reported bill] to which the Senator has just referred does not say that the charges collected for admission shall help amortize the cost of the capital investment.

\* \* \* \* \*  
 Mr. Miller. Mr. President, the amendment [to section 8 of the reported bill] is self-explanatory. It is designed to conform with the policy which was recommended by the Outdoor Recreation Resources Review Commission, \* \* \*. That Commission recommends very strongly that there be an increased use of user fees for the purpose of defraying the cost of recreational facilities.

Regardless of how one feels about the timeliness of this bill, it seems to me our policy ought to be to have this a self-liquidating, self-maintaining operation.

\* \* \* \* \*  
 Mr. Morse. I am opposed to the amendment, because there ought to be hearings on it. We do not have the slightest idea that we can work out an amortization program on the basis of any such fee paying principle as has been proposed.

\* \* \* \* \*  
 Mr. Randolph. Mr. President, this bill has not come from the Senate Committee on Public Works merely because that committee desired to report another measure to the Senate. It was passed by the House of Representatives. The House version of the bill authorized expenditures of not to exceed \$20 million. It is not correct to charge the Senate Committee on Public Works with failure to give proper consideration to this legislation. Even though the bill had been passed by the House, the Senate Committee on Public Works held an adequate hearing on the bill. In our judgment, the amount of the authorization provided by the House version was excessive, so our committee voted to reduce it by \$10 million. Our committee voted to add four safeguarding amendments—amendments which should appeal to the Senator from Ohio [Mr. Lausche], the Senator from Oregon [Mr. Morse], and the Senator from Wisconsin [Mr. Proxmire]. Those amendments will tend to have the costs of the National Fisheries Center and Aquarium amortized over a period of years. The word "amortization" is not specifically set forth in the Senate Committee amendment, \* \* \*.

## THE NAT. FISH. CTR. &amp; AQUARIUM

December 9, 1963

That amendment was predicated on discussions at the hearings with several Senators, including the Senator from Ohio [Mr. Lausche]. So the amendments which were added by the Senate committee were directed at the objections which were lodged against the bill.

I compliment the Senator from Iowa, a member of the Public Works Committee. I have found, by and large, that when he offers an amendment it is worthy of the consideration of the Senator from West Virginia. \* \* \* He did not offer the amortization amendment within the Committee, but he has offered the amortization amendment in the Senate. It provides that there would be an amortization of the cost of the proposed project over a period not to exceed 30 years.

Mr. Proxmire. If ever a bill before the Senate should be recommitted, it is this one. The Senator from West Virginia has said he will accept the Miller amendment. What does the Miller amendment provide? It provides that the cost of constructing the building and the maintenance cost will be repaid through admission charges to the aquarium. The fact is that there is not a public aquarium in the United States that comes close to covering its maintenance cost and any advance charge for amortization.

As indicated above the Miller amendment was adopted by the Senate. Following this, but before passage of the bill, Senator Proxmire said:

The bill before the Senate has been improved by adding the Miller amendment, but if any Member of the Senate feels that by adding the Miller amendment we have now provided that the cost of construction will be borne by the members of the general public who go to the aquarium, he is deceiving himself.

There is no question that, on the basis of experience throughout the country for years and years, it will be impossible to provide charges which will be adequate to cover the \$800,000 maintenance costs which Mr. Hagen, of the Bureau of Sport Fisheries and Wildlife, has told me will be the maintenance cost, plus the \$400,000 or \$500,000 amortization and interest cost which will be required.

As the above legislative history indicates, Senator Miller's principal purpose in introducing his amendment to section 8 of the aquarium bill was to make the bill conform to the policy set forth in the report of the Outdoor Recreation Resources Review Commission. Recommendation 12-3 of that report is as follows:

Fees should be charged for those activities which involve exclusive use of facilities or which require the construction of specialized facilities by the Government. Fee rates should be calculated to recover a reasonable portion of the cost of administering, operating, and maintaining such facilities. However, this should not preclude the recovery of part or all of the capital costs in special cases where this is possible with reasonable fees.

User charges should not prevent or curtail the possible use and enjoyment of basic outdoor recreation opportunities. \* \* \* On the other hand, those who use

areas for activities that require the provision of special facilities, services, or supplies would pay a fee, as recommended above. Feasibility of collection is, of course, a limitation on this standard.

\* \* \* \* \*

The ORRRC report provides for the collection of user fees at recreational facilities and for making such facilities, at least in part, self-supporting wherever possible with reasonable fees. It recognizes that the extent to which fees can be established is restricted by considerations of feasibility of collection. Interest, therefore, is not necessarily called for under the ORRRC policy. Giving due sight to that policy, in considering the import of the legislative history of section 8 of the 1962 Act, it cannot be concluded in our judgment that a mandatory interest requirement has been imposed.

While Senator Randolph, the floor-manager of the bill, stated that the purpose of the Miller amendment was to make the aquarium self-supporting, he did not mention interest. The amendment's sponsor, Senator Miller, clearly had the ORRRC policy in mind when he introduced it. By contrast, the Senators who opposed the passage of the bill did not clearly indicate that the term "costs of construction" included the interest element. Primarily, they voiced doubt that sufficient fees could be collected to make the venture financially feasible.

It is therefore our opinion that the Secretary, in establishing visitation and user charges at the National Fisheries Center and Aquarium, is not required by law to recover interest on the capital costs of the center and aquarium. He is free, however, to consider the question of interest as a matter of policy, keeping in mind the standards of the ORRRC report. If interest is to be considered, the Secretary would need to determine the proper interest rate and the effect the increased charges would have in collecting sufficient revenues to meet the specific obligations of section 8 of the Act.

FRANK J. BARRY,  
*Solicitor.*

WILLIAM S. KILROY ET AL.

A-29650

*Decided December 13, 1963*

### Oil and Gas Leases: Assignments or Transfers

Where a regulation requires only that evidence be furnished of the authority of an agent or attorney in fact to sign an assignment, a partial assignment of an oil and gas lease is not to be rejected because the assignment is signed by a purported agent for the assignor and there is filed only a letter which makes reference to a case record in another land office in which a power of attorney authorizing the agent to act has been filed.

December 13, 1963

Oil and Gas Leases: Assignments or Transfers—Regulations: Interpretation

Where an applicant is to be deprived of a statutory right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William S. Kilroy and Charles R. Wilcox have appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated May 14, 1962, which affirmed a decision of the Salt Lake City land office, dated October 10, 1961, and an amended letter decision, dated October 23, 1961, rejecting the proposed partial assignment of Kilroy's oil and gas lease to Wilcox. The assignment was filed September 29, 1961.

The rejection of the assignment by the Bureau was based on the conclusion that no acceptable power of attorney had been filed on behalf of J. N. Conley, who signed the assignment for the assignor. In a letter filed on the same day as the assignment, it was stated that the power of attorney required was on file in the Denver, Colorado, land office, and the file in which it was to be found was listed.

The appellants contend that there is no requirement that the evidence of a power of attorney accompany the filing so long as it is furnished. They contend, also, that there is no requirement that evidence of authority of an attorney in fact must be furnished by reference to a case record in the same land office wherein the assignment is filed, if it is furnished by reference. They further assert that prior practice of the Bureau substantiates their position and that the new interpretation of the applicable regulation, 43 CFR 192.141(b), by the Director should not be applied retroactively to them since they had no notice of it and it was not publicly announced.

43 CFR 192.141(b) reads in pertinent part:

Where an attorney in fact, in behalf of the holder of a lease \* \* \* signs an assignment of the \* \* \* lease \* \* \*, there must be furnished evidence of the authority of the attorney to execute the assignment \* \* \*.

Appellants' first contention is well taken. The regulation requires only that the necessary evidence be "furnished." The evidence need not accompany the partial assignment, for, as has recently been held, "furnish," as used in the regulation, does not mean "accompany." *Charlotte E. Brown et al.*, 70 I.D. 491 (A-29667, November 21, 1963).

The regulation does not demand that the evidence be presented in any specific form—that is, it does not ask for a copy of the agreement creating the agency or require any other particular proof to establish the agent's authority. Evidence, of course, can be any document

tending to establish the truth of the point at issue. Thus, it would seem that "evidence" could be a reference to a case record in which a document has been filed as well as the submission of the document itself.

The oil and gas regulations specifically permit the use of a reference in one instance, i.e., with respect to the statements required of a corporate offeror (43 CFR 192.42(f)). In another instance, i.e., with respect to the documents required where the offeror is an association or partnership (43 CFR 192.42(e)(6)), it had been held that a reference does not satisfy the regulation. *George N. Keyston, Jr., Ltd.*, 70 I.D. 156 (1963). In a third situation, i.e., one in which a bond must be filed, the regulation simply says that if a party to an assignment of an oil and gas lease has filed a nationwide bond applicable to the State and the act under which the lease issued, no additional showing is necessary as to the bond requirement (43 CFR 192.141(c)).<sup>1</sup>

The regulations, then, provide a variety of methods for bringing to the Department's attention information required in processing applications relating to oil and gas rights, one of which is the use of a reference to another case record which apparently can be in another land office. Thus, there is nothing intrinsically improper in employing that method nor does it raise administrative problems so obviously difficult that it would be immediately apparent that it ought not to be used.

The Department has often held that where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for an applicant's failure to comply with it. *Madge V. Rodda, Lockheed Propulsion Company*, 70 I.D. 481 (A-29483, November 12, 1963); *Donald C. Ingersoll*, 63 I.D. 397 (1956).

Since a reference such as appellants used is evidence of the authority of the agent to sign an assignment and since the regulation, 43 CFR 192.141(b), does not plainly prohibit its use, the assignor and assignee are not to be deprived of the benefits of the assignment for failure to use another method of complying with the regulation.

Accordingly, it was error to deny approval to the assignment and to hold that the lease had expired by operation of law. In view of the conclusion reached herein, it is unnecessary to consider the other arguments raised by the appellants.

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

<sup>1</sup> See also the Soldiers' Additional Homestead Rights regulations which permit evidence of the right to be shown by reference to the case, by land office, serial number, and description of land, containing the evidence. 43 CFR 132.8(b).

*December 18, 1963.*

Manual; 24 F.R. 1348), the decision is reversed and the case remanded for such further proceedings as may be consistent herewith.<sup>2</sup>

ERNEST F. HOM,  
*Assistant Solicitor.*

JOHN MARTIN PEARSON

A-29674

*Decided December 18, 1963*

**Rules of Practice: Appeals: Statement of Reasons**

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant fails to file a statement of reasons in support of the appeal.

**Alaska: Homesites—Alaska: Possessory Rights—Applications and Entries: Priority**

Where an applicant for a homesite files a protest against an application to purchase a headquarter site within 30 days after the publication of the latter application, the protest being based on the assertion that the protestant has a superior right to part of the land included in the headquarter site application, the protest is properly dismissed where the protestant fails, as required by section 10 of the act of May 14, 1898, to commence an action within 60 days in a court of competent jurisdiction to quiet title to the land in conflict.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

John Martin Pearson has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated June 15, 1962, which affirmed a decision of the Anchorage, Alaska, land office, dated March 29, 1962, rejecting his homesite purchase application, Anchorage 049104, and conforming his claim to lot 17, U.S. Survey 3643. The application was rejected because the land was not described by aliquot parts of legal subdivisions. The claim was conformed to the public survey upon the appellant's failure to adjust it to the survey within 30 days after notice was given to him of the official filing of the plat of survey as required by 43 CFR 101.6 (c). The decision further held that the appellant had until May 31, 1964, within which to reapply for the purchase of his homesite by describing the land as lot 17 of U.S. Survey 3643.

Pearson also has appealed from a second decision of the Division of Appeals, Bureau of Land Management, dated June 15, 1962, dis-

<sup>2</sup>The 2-year period for which the segregated leases would have been extended upon approval of the assignment would have expired on September 30, 1963. The record does not indicate whether any other action has been taken which would serve to extend the segregated leases beyond that date if the assignment were to be approved now.

missing his appeal from a land office decision dated March 6, 1962, for failure to file a statement of reasons in support of his appeal. The land office decision dismissed Pearson's protest against David C. Harrison's conflicting headquarters site application, Anchorage 050126, on the ground that an action to quiet title was not filed within 60 days after the protest was filed. Since Pearson has not shown that he filed a statement of reasons in support of his appeal from the land office decision of March 6, 1962, the dismissal of his appeal was correct. 43 CFR 221.3, 221.98. However, the facts involved in that proceeding are entwined with the facts involved in the proceeding in which proper appeals have been taken so that the entire situation must be reviewed.

The facts of the case are as follows: Pearson filed on June 1, 1959, a notice of location under the homesite law (48 U.S.C., 1958 ed., sec. 461) of five acres of unsurveyed land which he described by metes and bounds. A subsequent survey was made (U.S. Survey No. 3643) and accepted on April 17, 1961, which put part of the five acres in lot 18 and part in lot 19 and included the remaining land, together with some additional land, in lot 17, containing 3.85 acres. By letter dated July 27, 1961, the land office notified Pearson that the plat of survey had been officially filed on June 28, 1961, and that the official description of the land in his homesite location notice was lot 17, U.S. Survey 3643, containing 3.85 acres. However, when Pearson filed his application to purchase the homesite on December 11, 1961, he described the land by metes and bounds as he had in his notice of location. This application was rejected by the land office on March 29, 1962, because of his failure to describe the land by aliquot parts of legal subdivisions.

Meanwhile, on September 8, 1959, Harrison had filed a notice of location under the same statute for a tract of land including part of that previously included in Pearson's notice. Subsequently, on February 14, 1961, Harrison filed an application to purchase which excluded the land in conflict. However, following the approval of U.S. Survey 3643, he published notice of his application, describing the land applied for as lot 19, U.S. Survey 3643.

On December 11, 1961, within 30 days after the date of the last publication, Pearson filed a protest against issuance of a patent to Harrison, asserting that he had a prior right to the portion of lot 19 included in his original location. He asked that lots 17 and 19 be resurveyed to include in lot 17 the land described in his notice of location. The protest was dismissed by the land office on March 6, 1962, because of his failure to institute a quiet title action within the time required. Pearson's appeal from the decision was dismissed for the reason stated earlier.



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Pearson, in his appeal to the Secretary, contends, *inter alia*, that there was gross error in the survey of the land and that a resurvey of the land should be made to conform it with the five acres described in his application. He also contends that the regulation, 43 CFR 64.12, which provides in the applicable part: "(1) An application for surveyed land must describe the land by aliquot parts of legal subdivisions \* \* \*" is not relevant in the instant case because the survey itself was not valid.

The appellant's contention that there was gross error in the survey does not call in question any technical accuracy of the survey itself but rather is based upon the alleged circumstances of the survey. He claims that the surveyor told him in 1959 that the portion of the five-acre tract subsequently included in lot 19 was to be so included because it adjoined an airport and was to be reserved for selection by the State of Alaska. Pearson states that he had no objection to such action but later discovered that a private individual, Harrison, was being permitted to apply for lot 19. He objects to allowing Harrison to have the land and denying it to him.

Accepting Pearson's statements as true, it must nonetheless be concluded that he lost whatever rights he had to the portion of lot 19 included in his notice of location because he failed to observe the procedure set out in the last paragraph of section 10 of the act of May 14, 1898, as amended (48 U.S.C., 1958 ed., sec. 359).

Both Pearson and Harrison applied for land under the portion of section 10 of the act of May 14, 1898, which was added by the act of May 26, 1934 (48 U.S.C., 1958 ed., sec. 461). The last paragraph of section 10 provides in pertinent part:

\* \* \* the applicant shall \* \* \* cause a copy of such plat [of survey of his claim], together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted \* \* \* for at least sixty days, and during such period \* \* \* or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending \* \* \* an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

In *Ripinsky v. Hinchman*, 186 Fed. 151, 152 (9th Cir. 1911), the court stated, in regard to a determination of an adverse claim to an application for a patent to land in Alaska for trade purposes under the above-quoted statutory provision:

\* \* \* If any person has an adverse interest or claim to the tract of land involved, he must file in the land office an adverse claim, setting forth the nature and extent of his demand, within such 60 days' publication of notice or 30 days thereafter; and within 60 days after such filing of adverse claim, *he is required to institute an action in the proper district court of Alaska to quiet the title to such claim.* [Italics supplied.]

In *Hinchman v. Ripinsky*, 202 Fed. 625, 627 (9th Cir. 1913), *cert. denied*, 234 U.S. 759, on a second appeal, the court stated:

The statute has in purview, no doubt, adverse claimants who are seeking title from the government to the same parcel of government land, and it is incumbent upon the contestants to show by what right they respectively claim superiority each over his adversary. The final judgment of the court will determine the respective rights of the parties, and the final patent is made dependent upon the result of such adjudication. The statute has its prototype in the statutes providing for the acquisition of mineral lands. Section 2326, Revised Statutes (U.S. Comp. St. 1901, p. 1430), provides for an action of the kind in case of contest between applicants for the same tract of mineral land. \* \* \*

In *Gavigan v. Crary*, 2 Alaska 370 (1905), the court stated:

This action is brought under a statute so nearly like \* \* \* [the mining law], in relation to the procedure in applications for patents for mining claims \* \* \* that this court feels constrained to be guided, by the principles so well settled in those cases. \* \* \* After filing his adverse claim, the adversary is *required* to "begin action to quiet title in a court of competent jurisdiction, within the District of Alaska." [Italics supplied.]

In subsequent proceedings in the Department, in *Crary v. Gavigan et al.*, 36 L.D. 225 (1908), the Department held that the decree of the court determining the superior right of possession under section 10 "must be accepted by the Department as conclusive *between the parties*, upon the issue decided."

In *Price et al. v. Sheldon*, 45 L.D. 555 (1916), Price filed a protest against the homestead of Sheldon and an adverse claim in the land office. Proceedings were initiated in the Alaska District Court but on the date set for trial Price's counsel stated that Price did not desire to prosecute his action further. The court dismissed with prejudice and held Sheldon to be entitled to possession of the land. The Department held the judgment of the court binding upon the Department in regard to the right of possession between the parties.

Another protest against the entry was filed by Johnson, but after the 90-day period the Department affirmed the dismissal of Johnson's protest, stating:

\* \* \* The act of May 14, 1898, \* \* \* provides for the assertion of adverse claims within the 60-day period of publication or within 30 days thereafter. Johnson failed to avail himself of the privilege of filing such claim within the time allowed and submitting his case thereafter to a court of competent jurisdiction. His protest therefore came too late and he has no standing as an adverse claimant to the lands involved. (P. 557.)

December 19, 1963

These cases are dispositive of Pearson's rights. Since he failed to comply with the statute by bringing an action in the courts within 60 days after filing his protest, he lost his right to claim possession of the disputed land in lot 19 superior to Harrison. Pearson states that he could not maintain a quiet title action because he had relinquished possession of the land in dispute when he was told that it would go to the State of Alaska. However that may be, the statute does not condition the requirement for bringing an action upon whether the protestant or adverse claimant will probably be successful in his action. Indeed, it would be contrary to the purpose of the statute if one who could not be successful in a court action would thereby be permitted to litigate the issue of prior rights before the Department.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.22A(4)(a), Departmental Manual; 24 F.R. 1348), the decision appealed from is affirmed for the reasons stated in this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

**PROPOSED ESTABLISHMENT OF A REFUGE FOR MIGRATORY  
BIRDS AT GRAYS LAKE, IDAHO**

**Migratory Bird Conservation Act: Generally**

The proviso in section 1 of the Palisades Project Act prohibiting the development, operation, and maintenance of a wildlife management area as part of the project until authorized by Congress, was not intended to limit the general authority of the Secretary under the Migratory Bird Conservation Act to establish and develop refuges for migratory birds anywhere in the United States.

Section 6 of the Migratory Bird Conservation Act directs that no payment shall be made on areas acquired by purchase or rent until the title thereto shall be satisfactory to the Attorney General.

M-36664

December 19, 1963

TO: ASSISTANT SECRETARY FOR FISH AND WILDLIFE

SUBJECT: PROPOSED ESTABLISHMENT OF A REFUGE FOR MIGRATORY  
BIRDS AT GRAYS LAKE, IDAHO.

We have been asked by your office whether, in light of a memorandum of this office, dated March 2, 1961, to the Commissioner of Reclamation, a Refuge for Migratory Birds could be established at Grays Lake, in Idaho, without the need of further legislation. In this re-

gard, we understand that representatives of this office and of the area office of the Bureau of Indian Affairs, and of the regional offices of the United States Fish and Wildlife Service and of the Solicitor, as well as the local residents, have reached a tentative agreement on the desirability of establishing a refuge at Grays Lake.

Grays Lake is located in Bonneville and Caribou Counties, Idaho. The area was meandered in 1875 and almost all of the public lands around Grays Lake were patented in the late 1890's and early 1900's. In front of these patented lands there has been a considerable amount of valuable grazing land, between the high water line and the meander line. In 1907, 1908, and in 1926, all of the public lands within the bed of the lake and adjoining Grays Lake were reserved from further entry for the benefit of the Fort Hall Indian Irrigation Project. As riparian owners, however, the patentees have claimed title to their proportionate share of the lake bed within the meander line.

At this point, it should be noted that the navigability or nonnavigability of Grays Lake has never been determined.

In 1908 the Government acquired certain water rights, including storage rights, in Grays Lake from Berzilla W. Clark in connection with the Fort Hall Indian Irrigation Project. In the early 1930's questions were raised concerning the Government's rights to the lake bed and the right to impound waters as against the patentees. A proposed quiet title action, however, was never filed.

In 1946 and 1947 the then Fish and Wildlife Service prepared a report on the fish and wildlife resources in Grays Lake in relation to the proposed Palisades Reservoir project, which included a proposal for the exchange of storage rights in the Palisades Reservoir for the water rights of the Fort Hall Indian Reservation in Grays Lake. It also was proposed that title to approximately 9,300 acres of private lands around the meander line at Grays Lake be acquired. These proposals were subsequently rejected in part by the Congress.

In the preparation of a Departmental report on S. 66, a bill "To authorize the Secretary of the Interior to construct, operate, and maintain a reregulating reservoir and other works at the Burns Creek site in the upper Snake River Valley, Idaho, and for other purposes," and similar bills H.R. 36 and H.R. 378 introduced during the 87th Congress, our views were asked on whether the above bills authorized a wildlife facility at Grays Lake. In response to this request, we stated:

Having reviewed Mr. Bennett's letter [former Under Secretary Bennett's letter of February 8, 1960, to Dr. Evan M. Kackley of Boise, Idaho] and the proposed legislation in the light of the authorities that would be available to the Department thereunder and under the Fish and Wildlife Coordination Act, it is my view that whether or not the specific prohibition on Grays Lake development as set out in Section 3(b) of H.R. 36 is adopted, the Burns Creek legislation cur-

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rently before the Congress would not authorize the Secretary of the Interior or any other administrative officer of the Federal Government to develop the Grays Lake wildlife area. Further legislation would be required.

This opinion was also based on the provisions of the Act of September 30, 1950 (64 Stat. 1083), which reauthorized the Palisades Dam and Reservoir project, in Idaho. Section 1 of that Act provides in part:

\* \* \* : *Provided, That, notwithstanding recommendations to the contrary \* \* \* the Secretary shall reserve not to exceed fifty-five thousand acre-feet of active capacity in Palisades Reservoir for a period ending December 31, 1952, for replacement of Grays Lake storage, but no facilities in connection with the proposed wildlife management area at Grays Lake shall be built and no allocation of construction costs of the Palisades Dam and Reservoir by reason of providing replacement storage to that area shall be made until the development and operation and maintenance of the wildlife management area has been authorized by Act of Congress, \* \* \** (Italics supplied.)

Subsequently, in an opinion dated June 14, 1963, the Field Solicitor at Boise held:

It is my view that additional legislation by reason of the language of the Act of September 30, 1950, would not be required to carry out a regular development at Grays Lake by the Bureau of Sport Fisheries and Wildlife, which is otherwise authorized. This view seems required by reason of the literal language of the Act of September 30, 1950 itself, is supported by the legislative history of the act as reflecting the intent of Congress, and is in accordance with the accepted rules of statutory construction.

We believe that the above opinions are entirely reconcilable, since the earlier opinion of the Solicitor went only to the question of whether either the Fish and Wildlife Coordination Act (16 U.S.C. sec. 661 *et seq.*) or the *then pending* legislation, if enacted, would authorize the establishment of a wildlife refuge at Grays Lake. Clearly, the question before us now was not decided, although a reference was made to a statement by former Under Secretary Bennett on this subject. It, thus, becomes essential to consider the legislative history of section 1 of the 1950 Act and the provisions of the Migratory Bird Conservation Act, as amended (16 U.S.C. sec. 715 *et seq.*).

In a letter of July 17, 1950, to the Secretary of the Interior, the Bureau of the Budget commented on this Department's proposed supplemental report to the House Committee on Public Lands on H.R. 5506, a bill similar to S. 2195 later enacted as the Act of September 30, 1950. The Budget Bureau stated:

It is recognized that the proposed construction of Palisades Reservoir affords an opportunity to permit the stabilization of Grays Lake \* \* \* thereby promoting the development of the wildlife potentialities of the Grays Lake area. While such a facility might be a desirable improvement, the project report shows that the construction of the Palisades Reservoir would not result in any net

loss or damage to fish and wildlife at Grays Lake but would actually constitute the establishment of a new wildlife area. The allocation proposed for fish and wildlife in the Palisades project would, therefore, represent a departure from the President's policy \* \* \*. *The need for such a development should be presented, justified, authorized, and financed as a separate feature, and not treated as a nonreimbursable allocation at the expense of the Palisades project \* \* \*. This statement is not intended to indicate in any way the relationship to the President's program of the provision of a fish and wildlife management area if authorized and financed as part of the activities and programs of the Fish and Wildlife Service. (H. Report 1297, Part 2, 81st Cong., 2d Sess.) (Italics supplied.)*

The Department, enclosing a copy of the above letter, recommended to the Committee that "before H.R. 5506 or any other bill embodying the reauthorization of Palisades Dam is passed by the House provision be made for conforming it to the views expressed by \* \* \* the Bureau of the Budget." Subsequently, the Committee in a supplemental report, *supra*, accompanying H.R. 5506, later concurred in by the Senate, stated:

The second additional amendment (the proviso recommended to be added to section 1 of the bill) will meet the first objection of the Bureau of the Budget so far as Palisades Dam is concerned. \* \* \* there will be no allocation of project costs by reason of enhancement of fish and wildlife values, although the Committee understands that with the undertaking of the Grays Lake wildlife-management area (which will be possible only through the use of storage capacity to be provided by Palisades Dam and Reservoir) there will be substantial benefits created. *In keeping, however, with the position of the Bureau of the Budget this amendment will make the expenditure of funds for the development of Grays Lake area dependent on enactment of a separate authorization by the Congress. In order to preserve the basis for the consideration of that problem by the Congress, the Committee recommends that there be reserved 55,000 acre-feet of active capacity in Palisades Reservoir for a limited period, and this will be accomplished by the proposed proviso to section 1. (Italics supplied.)*

It seems clear from the above legislative history that the intent of the proviso in section 1 of the 1950 Act was first, to prevent the establishment of a wildlife-management area at Grays Lake as part of a nonreimbursable allocation of the Palisades project as recommended by the Department pursuant to the provisions of the Act of August 14, 1946 (60 Stat. 1081), popularly known as the Fish and Wildlife Coordination Act; and second, to assure that such an area would not be established at Grays Lake, in accordance with the plan of development recommended in connection with the Palisades project, until specifically authorized by Congress. In this regard, Congress made available for a limited time 55,000 acre-feet of active capacity at Palisades Reservoir for this purpose. Since that time the above plan has been abandoned, and the water used for other purposes.

We do not believe, however, that the above-mentioned proviso was intended to limit the general authority of the Secretary under the

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Migratory Bird Conservation Act, as amended (16 U.S.C. sec. 715 *et seq.*) to establish and develop a refuge for migratory birds anywhere in the United States, including Grays Lake, Idaho, after receiving the approval of the Migratory Bird Conservation Commission. Accordingly, it is the opinion of this office and that of the Field Solicitor in Boise, that a migratory bird refuge could be established at Grays Lake in accordance with the terms and conditions of the Migratory Bird Conservation Act and without the need of further legislation.

We understand that there is a proposal to lease certain areas around Grays Lake for a term of 99 years pursuant to the above Act and to develop these leased areas as a migratory bird refuge. The Attorney General has held in a similar case that a 99 year lease without consideration, a month-to-month rental at \$1.66 per month, and a deed to land for \$1 were not purchases of lands within the meaning of Revised Statutes § 355 (40 U.S.C. sec. 255). He also stated that—

I think it advisable, however, that the titles to these tracts of land be submitted to the Attorney General for his opinion with reference to the validity thereof. This should be done as a wise precaution regardless of whether said section 355 be applicable to the facts here presented or not. (28 Op. A.G. 413.)

We concur in the above statement. Furthermore, we point out that section 6 of the Migratory Bird Conservation Act directs that no payment shall be made on areas acquired by purchase or rent until "the title thereto shall be satisfactory to the Attorney General."

In addition, we recommend that before initiating action to establish a refuge and expend funds thereon, consideration should be given as to whether there exists sufficient water to maintain the refuge for migratory birds. In this regard, we note that the original wildlife-management plan was predicated on the availability of 55,000 acre-feet of active capacity at Palisades Reservoir. This water is no longer available for any fish and wildlife purposes.

FRANK J. BARRY,  
*Solicitor.*

### ESTATE OF LUCY SIXTEEN

IA-1324

Decided December 20, 1963

#### Indians: Generally

The allowance of an attorney's fee by an Examiner of Inheritance for legal services rendered in an Indian's restricted estate will not be disturbed on appeal where it appears that such allowance meets the test of reasonableness specified in the Departmental probate regulations.

## APPEAL FROM A DECISION BY AN EXAMINER OF INHERITANCE

Houston Bus Hill, an attorney at law, Oklahoma City, Oklahoma, has appealed from a decision by an Examiner of Inheritance, dated September 14, 1962, denying the appellant's petition for a rehearing of the Examiner's earlier action of July 20, 1962, in the matter of setting the appellant's fee for legal services rendered in the proceeding on the estate and will of Tah-wat-is-tah-ker-na-ker or Lucy Sixteen, deceased Comanche allottee No. 429. Appellant feels aggrieved by the Examiner's action of allowing him a fee of \$1,000, whereas the attorney is claiming a fee of \$9,456.33 for representing various parties interested in the above estate.<sup>1</sup>

The attorney's claim for legal services in the amount of \$9,456.33 is based upon a contingent fee contract entered into by him and those persons whom he represented in the present probate proceedings, under which the attorney was to receive 25 percent of recovery, failing which he would receive nothing for his services. While this contract was prepared for the approval of the Area Director,<sup>2</sup> Bureau of Indian Affairs, Anadarko, Oklahoma, there is no indication that approval of the contract was given by that officer or by any other officer of this Department. In any event, the Examiner did not regard the contingent fee contract as controlling his determination of the sum regarded as due the attorney for legal services. Accordingly, the Examiner properly followed the pertinent provision of the probate regulations,<sup>3</sup> on the basis of which he found that a reasonable amount as compensation for the legal services rendered by appellant was the sum of \$1,000.<sup>4</sup>

<sup>1</sup> The orderliness of the appellate process was not aided by the fact that after the filing of the notice of appeal the Examiner, on October 9, 1962, requested permission to file a brief in support of his ruling on the attorney's fee, and the attorney, on February 7, 1963, addressed a communication on another matter to a member of the Solicitor's staff, but to which a postscript handwritten note was added, urging approval of the attorney's contract of employment in the present probate case. Notwithstanding these improper communications, and independently of them, consideration of the appeal will be made on the basis of the record on this matter.

<sup>2</sup> Under section 269 of Order 551, delegating authority from the Commissioner of Indian Affairs (14 IAM 3.1), Area Directors could act regarding "The approval of the employment of attorneys for individual Indians and the determination and payment of fees paid on a *quantum meruit* basis from restricted or trust funds."

<sup>3</sup> 25 CFR 15.26

<sup>4</sup> *Claims for attorney fees.* Attorneys representing Indians under the regulations in this part shall be allowed compensations in reasonable amounts. In determining attorneys' fees, consideration shall be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all interested parties. Such fees as may be allowed shall be charged against the interests of the attorneys' clients."

<sup>4</sup> Since the Examiner followed a specific provision in the Departmental probate regulations, made applicable to the fixing of fees by him in probate proceedings on restricted Indian estates, it was not incumbent upon the Examiner to pass upon appellant's observation that under the recommended Oklahoma State Bar minimum fee schedule, published on January 27, 1962 (O.B.J., Vol. 33, No. 3, P. 171), provision is made for a 33 $\frac{1}{3}$  percent contingent fee, after trial. However, we have noted also, for perhaps a closer comparison



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We concur in the Examiner's finding that a fee of \$1,000 is reasonable. Obviously, as the Examiner pointed out in his decision of July 20, 1962, any time and effort expended by the appellant in collateral actions before separate tribunals, and involving unrestricted properties of the decedent, have no bearing on the fixing of a fee by the Examiner, related as such a fee must be to the restricted estate to which the Examiner's probate authority is confined.

Because of the approval of decedent's testamentary dispositions, which result the appellant supported, benefits were received by appellant's clients which are claimed to amount to \$37,825.27.<sup>5</sup> This recovery apparently has not been disputed. Based upon such a recovery, the appellant had submitted the affidavits of practicing Oklahoma lawyers, which are to the effect that the fee claimed by him is reasonable. Nevertheless, since the Examiner is charged with the duty of determining the fee, he may form an independent judgment in that respect, with or without the aid of witnesses as to value,<sup>6</sup> particularly where, as here, the Examiner's duties, as the presiding official, make him peculiarly aware of the extent of the services rendered and the circumstances in which they were performed.

What the reasonable worth of legal services rendered in any given situation may be is determined not only according to what such services produced for the clients, but also according to what such services, in themselves, were reasonably worth, considering the labor, time, talent and skill reasonably expended in the bestowal of them.<sup>7</sup>

Both the decedent's will and codicil were prepared for her by an attorney in the field service of this Department. This scrivener, and the attesting witnesses to the instruments signed affidavits contemporaneously with the execution of the will and codicil. They also testified at the probate hearing. As the Examiner pointed out in his decision of July 20, 1962, the testimony of these persons who attended the testamentary dispositions was so clear, unequivocal and convincing regarding the validity of the will and codicil that interested parties and their counsel, who unquestionably would have desired to set the testamentary instruments aside, and who, no doubt, would have attempted to do so in more favorable circumstances, made no attack either upon the will or the codicil.

The attesting witnesses, whose statements might have been anticipated as important, lived in or reasonably close to Anadarko where

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with the present situation, another section of the same minimum fee schedule (p. 176) providing for the charging of fees ranging from \$200 to \$250 for contesting the probate of a will.

<sup>5</sup> The entire estate was valued at \$136,305.

<sup>6</sup> See *Campbell et al. v. Green*, 112 F. 2d 143 (5th Cir. 1940).

<sup>7</sup> Earl W. Wood, *Fee Contracts of Lawyers*, p. 71, Prentice-Hall (1936).

the hearing on the will and codicil was conducted. Because of their availability in that respect, only a minimum of effort would have been required beforehand for the appellant to have ascertained that the competency of the decedent was quickly as well as readily ascertainable, and that the will and codicil were executed in proper circumstances.

That the circumstances surrounding the execution of the decedent's will and codicil were such as to engender a strong belief that those instruments would be approved is borne out by the course of events. No briefs appear to have been filed in the proceedings on the wills, and none were essential because of the uncontroverted testimony presented and the absence of any novel or difficult questions. While the appellant appeared at the hearing and participated in the questioning, the record reflects quite clearly that the Examiner was in charge, and that he initiated the questions essential to elicit the answers required for a determination upon the will and codicil. Obviously, then, the Examiner retained a laboring oar in the proceedings, and in that respect carried out the basic function which Section 15.26<sup>8</sup> of the probate regulations contemplated he should have. The Examiner had the burden of going forward with the hearing, and procuring sufficient proof upon which to make a decision.

That appellant rendered valuable services is attested by the fact that the Examiner allowed him a fee of \$1,000. Obviously, he could not have a contingent fee for he had no valid contract.<sup>9</sup> Hence, he can recover only the reasonable value of his services. After a careful consideration of the entire record, and giving full consideration to all of the evidence submitted by appellant, we have concluded that \$1,000 is a fair, reasonable, and adequate fee for the services rendered by appellant in this case.

For the foregoing reasons we concur in the Examiner's determination of the appellant's fee as \$1,000. Accordingly, and pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Section 210.2.2A(3)(a), Departmental Manual, 24 F.R. 1348), the decision of the Examiner of Inheritance, denying appellant's petition for a rehearing regarding his fee, is affirmed, and the appeal is dismissed.

FRANK J. BARRY,  
*Solicitor.*

<sup>8</sup> See note 3, *supra*.

<sup>9</sup> *Cooke v. Gove*, 61 Nev. 55, 114 P. 2d 87 (1941).

## JACK V. WALKER

A-29804

*Decided December 31, 1963***Soldiers' Additional Homesteads: Generally—Scrip: Recordation**

Where all the documents relating to a partial assignment of a soldiers' additional homestead right have been presented timely to the Director, Bureau of Land Management, by a land office in connection with applications seeking to exercise part of the right assigned and the right is found valid to the extent asked, the balance of the right is not to be denied validity several years later on the ground that the assignee had not presented it for recordation within the period prescribed by the statute and regulations.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Jack V. Walker has appealed to the Secretary of the Interior from a decision dated September 4, 1962, of the Division of Appeals, Bureau of Land Management, which affirmed a decision of the Chief, Lands Adjudication Section, Division of Field Services, Bureau of Land Management, rejecting his application to record soldiers' additional homestead right under the act of August 5, 1955 (69 Stat. 534; 43 U.S.C., 1958 ed., sec. 274 note), on the ground that it was not timely presented for recordation.

The case record shows that on August 31, 1956, Edgar Paul Boyko assigned to the appellant 20 acres of the soldiers' additional right of George Morgan. On September 5, 1956, Walker filed an application, Anchorage 033095, for the exercise of a soldiers' additional homestead right covering 7.57 acres and on February 6, 1957, he filed another similar application, Anchorage 033780, for 2.87 acres. Walker submitted the original of the partial assignment of the right with his first application.

On February 21, 1957, the Operating Supervisor, Area IV, Alaska, transmitted to the Director, at Washington, all the papers pertaining to the soldiers' additional right and asked to be informed whether the right was valid, and, if so, how many acres were available to apply against the applications.

The Director replied that the right was valid for 10.44 acres, but did not declare it invalid as to the rest and returned the papers.

Thereafter, the applications were approved, and on November 5 and 6, 1957, final certificates were issued, followed by patents Nos. 1177821 on December 17, 1957, and 1177375 on December 9, 1957.

On February 23, 1961, Walker wrote to the Records Section, Bureau of Land Management, Washington, D.C., inquiring as to the balance of his scrip. The Acting Chief, Case Processing Section, informed him, in a letter dated August 28, 1961, that since he had never applied

for recordation of the Morgan right as he was required to do within six months of the time he acquired the right it was too late to accept it for recordation.

On January 27, 1962, Walker in a letter to the Director set forth the facts concerning his application and submission of the scrip. This letter was treated as an application for recordation and rejected initially and on appeal as set forth above.

The act of August 5, 1955, *supra*, provides:

Sec. 2. In the case of a transfer after the effective date of this Act, by assignment \* \* \* of a holding or claim of any right recorded under this Act, the holding or claim of right so transferred shall be presented to the Department of the Interior within six months after such transfer, for recordation by it; except that where such transfer occurs within the period of two years from the effective date of this Act and the prior owner has not complied with the provisions of this Act, the owner or claimant by transfer shall have the remainder of such period or a period of six months, whichever is the longer, within which to present his claims or holdings for recordation.

\* \* \* \* \*

Sec. 4. Claims or holdings not presented for recordation, as prescribed herein, shall not thereafter be accepted by the Secretary of the Interior for recordation or as a basis for the acquisition of lands.

Pursuant to the authority granted him by section 6 of the act to issue reasonable rules and regulations, the Secretary adopted a regulation stating:

Persons who desire to record their holdings or claims under the act must present the following to the Director, Bureau of Land Management, Washington 25, D.C., within the time periods prescribed in § 130.6:

(a) A statement, in duplicate, captioned "Application for Recordation of Scrip, Lieu Selection, or Similar Rights under the act of August 5, 1955 (69 Stat. 534)," containing the (1) name and full post-office address of the applicant, (2) names and full post-office addresses of all the owners or claimants of the right presented for recordation, (3) the type of scrip or right presented (see paragraph (b) of § 130.5), and (4) the acreage of such scrip or right.

(b) The scrip, warrant, or other document which evidences their right, providing their right is based on such a document.

(c) A statement, in duplicate, showing the basis of their right, providing the right is not based on scrip, warrant, or other document. (43 CFR 130.7.)

The decisions below considered Walker's letter of January 27, 1962, to be his first request for recordation and held it not timely filed in view of the statute and regulations.

This interpretation of the events that had occurred does not seem proper. When all the documents relating to Walker's right were first in the hands of the Director in connection with his two applications, they were examined, the right found valid, and patents issued for the lands applied for. The right involved in this appeal is exactly the same right as that recognized as a basis for the patents. The right

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having been presented to the Director and having been held by him to be valid for the 10.44 acres applied for, it seems unreasonable to say now that the right to the extent that it was not then used was not presented for recordation simply because no formal request for recordation was made at that time. In the circumstances, the right is deemed to have been presented for recordation when it was sent to the Director in connection with Walker's applications and is to be recorded.<sup>1</sup>

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Department Manual; 24 F.R. 1348), the decision of the Division of Appeals, Bureau of Land Management, is reversed and the case remanded for further proceedings consistent herewith.

ERNEST F. HOM,  
*Assistant Solicitor.*

**F. DON WADSWORTH v. DON FARRELL ANHDER, SR.**

A-29684

*Decided December 31, 1963*

**Contests and Protests—Rules of Practice: Private Contests**

A private contest brought against a desert land entry which alleges facts not reflected by records of the Bureau of Land Management at the initiation of the contest which, if proved, would invalidate the entry may be upheld notwithstanding some of the facts alleged may have been known to some Bureau personnel prior to the filing of the complaint.

**Contests and Protests—Rules of Practice: Private Contests**

A contest may be dismissed if not properly corroborated, but such action will not prevent the consideration of a second contest complaint, properly corroborated, by the same party, even though the charges therein are the same as those contained in the first.

**Desert Land Entry: Cancellation—Rules of Practice: Private Contests**

A desert land entry is properly canceled where the entryman fails to answer a complaint filed in a private contest against the entry which charges that the entryman has not met the reclamation requirements of the desert land law.

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<sup>1</sup> The documents evidencing Walker's right were transmitted to the Director on February 21, 1957, within the 6-month period following the assignment to Walker, but were not received by the Director until March 11, 1957, after the end of the period. However, the receipt by the Director was within the 2-year period following enactment of the act of August 5, 1955, *supra*, so the situation is governed by the excepting clause at the end of section 2 of the act.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

F. Don Wadsworth and Don Farrell Anhder, Sr., have each appealed to the Secretary of the Interior from a decision dated June 12, 1962, in which the Division of Appeals, Bureau of Land Management, reversed, as to the former, a decision of the Nevada land office upholding his private contest complaint against Anhder's desert land entry, and modified and affirmed that part of the land office's decision canceling Anhder's entry, allowed under the act of March 3, 1877, as amended (43 U.S.C., 1958 ed., sec. 321 *et seq.*).

Anhder's entry was allowed on July 3, 1951, for 240 acres. By subsequent petitions, appeals, and decisions the entry was amended to include 320 acres, and the life of the entry was extended to August 17, 1960, and final proof on the entry was set for and made on that date. It was filed in the land office on August 29, 1960.

On October 25, 1961, Wadsworth filed a contest complaint against the entry, charging that the entryman had not effectually irrigated the land and had failed to develop an adequate water supply, construct the necessary irrigation system, produce a merchantable crop, properly clear the land, or actually irrigate and cultivate one-eighth of the entry in a manner calculated to produce profitable results. The complaint was dismissed because of the failure of the contestant's witness to corroborate all of the allegations in the complaint.

On December 6, 1961, Wadsworth again filed a contest complaint in which he charged that Anhder had failed to reclaim the land, did not have an adequate water supply, had not completed his main ditches or any laterals, and had not plowed the land deeply enough to kill the brush. By a decision dated January 17, 1962, the land office upheld the contest and canceled the entry because of the failure of the entryman to file a reply to the complaint as required by 43 CFR 221.64.

The Division of Appeals, Bureau of Land Management, reversed the land office decision insofar as it pertained to the contest because the reasons given as a basis for the charges in the contest complaint were already a matter of record in the Bureau when the complaint was filed. 43 CFR 221.51. The entry, however, was canceled regardless of the contest, because the officer before whom final proof was made represented the contestee in connection with his entry in contravention of 43 CFR 210.13, the final proof testimony of the witnesses was inadequate to support the testimony of the entryman, and the entryman's own testimony showed that he had not met the requirements as to cultivation of the land.

In his appeal to the Secretary, Anhder admits that the cancellation of the entry was justified but requests that he be given a preferential right to file a new application within 30 days after the tract has been restored to entry.

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Wadsworth, in appealing the reversal of the contest action, alleges that no field inspection reports were on record prior to December 6, 1961, when he filed his complaint, and that his complaint showed for the first time that the water supply was inadequate and that ditches had not been completed or laterals constructed.

I cannot concur in the Bureau's finding that all of the contestant's charges were already a matter of record in the Bureau when the complaint was filed. The record shows that Anhder attempted to make final proof on his entry on July 16, 1956. On October 17, 1957, the land office rejected the proof because the pumping facilities on the well were inadequate, and sufficient irrigation ditches had not been installed to distribute the water on all of the irrigable portions of the land. The entryman, however, was granted additional time in which to correct the deficiencies. Except for the final proof, filed in the land office on August 29, 1960, there is no further evidence in the record as to the entryman's compliance with the desert land requirements until a field examination report dated January 26, 1962. The final proof did not show noncompliance with the requirements for a water supply or the construction of irrigation ditches. The field examination report substantiated the contestant's charges that the entryman did not have a sufficient water supply and that he did not construct all of the necessary irrigation ditches. It also alleged that the cultivated area observed by an examiner in 1957 had almost completely reverted to its native state at the time of the last examination. The report further indicated that a field examination had been made on May 24, 1961, at which time the entryman was informed that his water supply was entirely inadequate. However, no report was made of the examination of May 24, 1961, and the matters disclosed by the examination do not appear to have been made a matter of record until the examiner's reference to it in his report of January 26, 1962. Therefore, it appears that when Wadsworth filed his complaint on December 6, 1961, there was no information contained in the Bureau's records relative to the adequacy of the entryman's water supply or the construction of the necessary irrigation ditches at the time of submission of final proof, although the defects alleged may have been known to Bureau personnel.

The Department has held that it is proper to entertain a contest complaint that alleges proper charges for a contest that are not reflected by Bureau records even though the complaint alleges other charges that are reflected by those records. *Margaret L. Gilbert v. Bob H. Oliphant*, 70 I.D. 128 (1963). Accordingly, Wadsworth's charges were sufficient to initiate a contest.

It is, therefore, necessary to consider Anhder's contentions in his appeal to the Director, Bureau of Land Management, that the land office erred in upholding Wadsworth's contest complaint of December 6, 1961, after dismissing his complaint of October 25, 1961, on the technical ground that the statement of the corroborating witness was insufficient. Anhder apparently concluded that since Wadsworth did not appeal the dismissal of his first complaint he could not file another complaint on the same grounds. However, the Department has held that the dismissal of a contest or protest for want of sufficient corroboration does not prevent the consideration of a second complaint, properly corroborated, by the same party, even though the charges therein are the same as those contained in the first. *Hopeley et al. v. McNeill et al.*, 17 L.D. 108 (1893); see also *Shugren et al. v. Dillman*, 19 L.D. 453 (1894). The first complaint having been found defective, Wadsworth was not obligated to appeal the dismissal before filing a corrected complaint.

The record shows that Anhder was served with notice of the complaint as required by 43 CFR 221.58 and 221.95. He did not file an answer to the complaint within 30 days as required by 43 CFR 221.64. The allegations of the complaint were, therefore, taken as admitted by the contestee, and the case was decided by the land office without a hearing as provided by 43 CFR 221.65.

Anhder's contention that the land office decision canceling his entry is invalid because it was signed by the chief, lands adjudication section, is without merit. The Chief of the Lands Adjudication Section exercised authority delegated under the general authority of Reorganization Plan No. 3 of 1950 (15 F.R. 3174) and under specific delegations of authority to the land office manager dated April 18, 1958 (23 F.R. 2772), and from the manager dated May 20, 1959 (24 F.R. 4310).

It appears then that Anhder's entry was properly canceled because of his failure to answer the complaint. This makes it unnecessary to determine whether the decision appealed from properly canceled the entry for the reasons assigned in that 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 of the Bureau is reversed to the extent that it reversed the decision of the land office holding the contest complaint to be sufficient and is affirmed insofar as it affirmed the cancellation of the entry, but for the reason given in this decision.

ERNEST F. HOM,  
Assistant Solicitor.



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| 1. The rights acquired by the United States in the public domain are determined by the common law. Under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it is a littoral or riparian proprietor of public domain, has a vested right to future accretions and relictions. Because of the nature of the Federal system, and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its right to relictions or accretions ..... | 27 |
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**CONTESTS AND PROTESTS (See also Rules of Practice)**

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|---|-----|
| 1. A contest brought against a homestead entry which alleges only facts reflected by the Bureau records to constitute a charge relied upon to invalidate the entry is properly dismissed as to such charge...   | 128 |
| 2. Where final proof on a desert land entry is rejected within two years after issuance of a receipt for the money paid with the proof and new proof is filed and is rejected and the entry canceled in part within two years after the new proof is filed but more than two years after the receipt was issued, the entryman is not entitled to a patent pursuant to section 7 of the act of Mar. 3, 1891..... | 506 |
| 3. A private contest brought against a desert land entry which alleges facts not reflected by records of the Bureau of Land Management at the initiation of the contest which, if proved, would invalidate the entry may be upheld notwithstanding some of the facts alleged may have been known to some Bureau personnel prior to the filing of the complaint.....   | 537 |
| 4. A contest may be dismissed if not properly corroborated, but such action will not prevent the consideration of a second contest complaint, properly corroborated, by the same party, even though the charges therein are the same as those contained in the first.....   | 537 |

**CONTRACTS****ACTS OF GOVERNMENT**

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| 1. A claim for additional compensation on account of hindrances for which the Government is responsible that arise after the making of the contract, and so do not amount to changed conditions, that serve principally to increase the volume of work in time needed for achievement of the result prescribed by the contract, rather than to defer the calendar date by which such result can reasonably be achieved, and that are overcome in a manner voluntarily |  |
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**CONTRACTS—Continued****ACTS OF GOVERNMENT—Continued**

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| chosen by the contractor, rather than in a manner required by Government personnel, is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the standard form of Government construction contract (Claim A-1) -----  | 242  |
| 2. A contractor who undertakes to string a transmission line with a new variety of conductor furnished by the Government is entitled to additional compensation on account of work stoppage ordered by the Government in order to facilitate inspection of the Government for the correction of such defects, removal of obstacles to acceptable performance interposed by such defects, and other measures necessitated by their presence or suspected presence. The contractor, however, is not entitled to additional compensation for expenses incurred in devising and using reasonable stringing procedures needed because of novel qualities of the conductor, rather than because of defects in its fabrication, or for losses incurred in unsuccessful attempts to follow the procedures customarily applied in the past to the most nearly comparable varieties of conductor, since by engaging to string a new variety of conductor the contractor assumed the responsibility to ascertain whether the prevailing methods of stringing would work well with the new product and, if not, to find and adopt methods that would (Claims B-2, B-3, C-1 through C-4, and D-1 through D-4) ----- | 243  |
| 3. A contractor is entitled to reimbursement for expense actually and reasonably incurred in complying with a direction of the Government to perform work in advance of the date when performance is due. It follows that a contractor who has encountered an excusable cause of delay, who has requested an extension of time on account of such cause, who has been denied an appropriate extension, who has been instructed to complete the work within a lesser time than would have been available if an appropriate extension had been granted, and who complies with that instruction, is entitled to reimbursement for expenditures, such as the cost of working under adverse weather conditions, that could have been saved if an appropriate extension had been granted. Where, however, the Government directs that the work be accelerated, but the contractor in fact does not accelerate its performance, no additional compensation is allowable (Claim G-2) -----   | 245  |

**ADDITIONAL COMPENSATION**

1. An appeal involving a claim for additional compensation based on the contract price for deleted work not performed will be denied where the contractor fails to submit evidence of the costs of materials and labor claimed to have been incurred in anticipation of the performance of the deleted work -----
2. The additional compensation to be paid as damages for breach of contract or as an equitable adjustment under a contract may properly be measured by the difference between the costs that would have been incurred by the contractor if the job had not

**CONTRACTS—Continued**

**ADDITIONAL COMPENSATION—Continued**

been affected by the compensable event in suit, and the costs that were necessarily and reasonably incurred by the contractor in performing the job under the circumstances under which it actually had to be performed as a result of such compensable event. The "total cost" method whereby the sum to be paid is measured merely by the difference between the amount bid by the contractor, without regard to its reasonableness, and the costs actually incurred in performing the job, without regard to what caused them, is unacceptable in ordinary circumstances (Claims A-1 and A-2) -----

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3. The expense of measures undertaken for the purpose of performing extra work resulting from a change ordered by the Government, or of overcoming hindrances resulting from a breach of contract by the Government, is allowable to the extent to which the expense was actually and reasonably incurred, and, hence, if such measures were actually and reasonably undertaken during the winter, and the cost incurred in performing them at that time of the year would be allowable. When the measures so undertaken form an integral component of a series of operations that is pushed, wholly or partially, into the winter as a necessary consequence of the incorporation of such measures within the series, the compensation due the contractor also includes the amount by which the cost of the subsequent operations in the series was increased through their projection into an unfavorable season (Claim G-2) -----

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**APPEALS**

1. A communication from a contracting officer to a contractor, in order to amount to a decision, must, at least, be so worded as to fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended -----

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2. A Government-furnished property clause which states that the Government will make "every reasonable effort" to deliver materials "so as to avoid any delay in the progress of the contractor's work as outlined in his construction program," but that if the contractor is delayed "because of failure of the Government to make such deliveries" the only form of adjustment allowable will be a time extension, is to be construed as making the contractor's right to monetary compensation for a delay in delivery turn upon whether the Government made every reasonable effort to deliver materials by the time when they would be needed, and is also to be construed as making the construction program submitted by the contractor the criterion, in general, for determining the time when materials would be needed. If a failure to make timely delivery is proved, the burden of offering some reasonable explanation for the delay rests on the Government, and, if it offers no such explanation, the contractor is entitled to a finding that every reasonable effort was not made (Claims C-5 and E-2) -----

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CONTRACTS—Continued

APPEALS—Continued

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3. The limitation upon the time for taking appeals imposed by the "Disputes" clause of the standard forms of Government contracts is jurisdictional. An appeal from a decision of the contracting officer must be dismissed if it was not taken before the end of the thirtieth day after the receipt of the decision by the contractor, or before the end of the next business day if the thirtieth day falls on a Sunday or Federal holiday, unless the appeal involves only questions of law. Such limitation may not be waived or extended once the 30 days have run.....	352
4. Under a Government contract that contains the usual form of "disputes" clause, an appeal from a findings of fact and decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days specified in the contract.....	405
5. The timeliness of an appeal is governed by the time elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed by him to the contracting officer. The circumstance that the last day of the appeal period falls on a Saturday is immaterial and does not extend the appeal period.....	405
6. When a contract appeal involves a disputed issue of fact, each party is entitled to a hearing for the purpose of offering evidence upon such issue, and, if either party does request a hearing, a decision upon the merits of the appeal without holding the requested hearing would be premature. The rules and procedures of the Board of Contract Appeals do not provide for summary judgment in favor of either party.....	426
7. An interlocutory decision upon a contract appeal denying a motion to dismiss the appeal for lack of timely notice or protest, or denying a motion for summary judgment, leaves the appeal open for the presentation of evidence upon all disputed questions of material fact, including such a question as whether the Government was prejudiced by lack of timely notice or protest.....	434
8. In determining whether a notice of appeal from a decision of a contracting officer states with sufficient particularity the grounds of the appeal, the notice is to be read in conjunction with documents contained in the appeal file that are referred to in the notice.....	479
9. The mailing of a supporting brief in a contract appeal to the Board of Contract Appeals instead of to the contracting officer is not so fundamental an error as to necessitate dismissal of the appeal....	479
10. Where a contract appeal presents a genuine issue of material fact over which the Board of Contract Appeals has jurisdiction (such as the issue of whether a changed condition was encountered) that has not been submitted for decision on the record without a hearing, the contractor is entitled to a hearing at which evidence may be offered with respect to such issue: A motion to dismiss the appeal for failure to state a case on which any relief could be granted by the Board will be denied.....	495

**CONTRACTS—Continued****BIDS****Generally****Page**

1. The additional compensation to be paid as damages for breach of contract or as an equitable adjustment under a contract may properly be measured by the difference between the costs that would have been incurred by the contractor if the job had not been affected by the compensable event in suit, and the costs that were necessarily and reasonably incurred by the contractor in performing the job under the circumstances under which it actually had to be performed as a result of such compensable event. The "total cost" method whereby the sum to be paid is measured merely by the difference between the amount bid by the contractor, without regard to its reasonableness, and the costs actually incurred in performing the job, without regard to what caused them, is unacceptable in ordinary circumstances (Claims A-1 and A-2) ---- **242**

**BREACH**

1. A claim for additional compensation on account of hindrances for which the Government is responsible that arise after the making of the contract, and so do not amount to changed conditions, that serve principally to increase the volume of working time needed for achievement of the result prescribed by the contract, rather than to defer the calendar date by which such result can reasonably be achieved, and that are overcome in a manner voluntarily chosen by the contractor, rather than in a manner required by Government personnel, is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the standard form of Government construction contract (Claim A-1) - **242**
2. A contractor who undertakes to string a transmission line with a new variety of conductor furnished by the Government is entitled to additional compensation on account of work stoppages ordered by the Government in order to facilitate inspection of the conductor for fabricator-caused defects, repairs ordered by the Government for the correction of such defects, removal of obstacles to acceptable performance interposed by such defects, and other measures necessitated by their presence or suspected presence. The contractor, however, is not entitled to additional compensation for expenses incurred in devising and using reasonable stringing procedures needed because of novel qualities of the conductor, rather than because of defects in its fabrication, or for losses incurred in unsuccessful attempts to follow the procedures customarily applied in the past to the most nearly comparable varieties of conductor, since by engaging to string a new variety of conductor the contractor assumed the responsibility to ascertain whether the prevailing methods of stringing would work well with the new product and, if not, to find and adopt methods that would (Claims B-2, B-3, C-1 through C-4, and D-1 through D-4) ---- **243**
3. In the absence of express warranties or covenants by the Government, a construction contractor is not entitled to additional compensation for a delay caused by the failure of another contractor to perform, within the time set by his contract, work that is a nec-

**CONTRACTS—Continued****BREACH—Continued**

essary antecedent for availability of the construction site, unless the delay was due in some way to fault on the part of the Government. The awarding of a construction contract, or the issuance of notice to proceed thereunder, in circumstances where the Government knows that the antecedent work will not be finished by the time when the construction site will be needed, in the ordinary and economical course of contract performance, may be sufficient basis for a finding that the delay was due to fault of the Government (Claim G-2)-----

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**CHANGED CONDITIONS**

1. A claim for additional compensation on account of hindrances for which the Government is responsible that arise after the making of the contract, and so do not amount to changed conditions, that serve principally to increase the volume of working time needed for achievement of the result prescribed by the contract, rather than to defer the calendar date by which such result can reasonably be achieved, and that are overcome in a manner voluntarily chosen by the contractor, rather than in a manner required by Government personnel, is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the standard form of Government construction contract (Claim A-1)-----
2. Where a contract appeal presents a genuine issue of material fact over which the Board of Contract Appeals has jurisdiction (such as the issue of whether a changed condition was encountered) that has not been submitted for decision on the record without a hearing, the contractor is entitled to a hearing at which evidence may be offered with respect to such issue: A motion to dismiss the appeal for failure to state a case on which any relief could be granted by the Board will be denied-----
3. Allowance of an equitable adjustment for a changed condition is not precluded merely because the changed condition also amounts to an actionable misrepresentation of breach of warranty-----
4. The design, methods and details of the work, as described in the drawings and specifications, may properly be taken into account in determining whether changed conditions exist, since they constitute a source that can give rise to inferences, where factually and logically justified, concerning the physical conditions which the contractor was entitled or bound to expect would be encountered, and with which the physical conditions actually encountered are to be compared-----

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**CHANGES AND EXTRAS**

1. An appeal involving a claim for additional compensation based on the contract price for deleted work not performed will be denied where the contractor fails to submit evidence of the costs of materials and labor claimed to have been incurred in anticipation of the performance of the deleted work-----
2. A contractor who undertakes to string a transmission line with a new variety of conductor furnished by the Government is entitled to additional compensation on account of work stoppages ordered by

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**CONTRACTS—Continued**

**CHANGES AND EXTRAS—Continued**

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the Government in order to facilitate inspection of the conductor for fabricator-caused defects, repairs ordered by the Government for the correction of such defects, removal of obstacles to acceptable performance interposed by such defects, and other measures necessitated by their presence or suspected presence. The contractor, however, is not entitled to additional compensation for expenses incurred in devising and using reasonable stringing procedures needed because of novel qualities of the conductor, rather than because of defects in its fabrication, or for losses incurred in unsuccessful attempts to follow the procedures customarily applied in the past to the most nearly comparable varieties of conductor, since by engaging to string a new variety of conductor the contractor assumed the responsibility to ascertain whether the prevailing methods of stringing would work well with the new product and, if not, to find and adopt methods that would (Claims B-2, B-3, C-1 through C-4, and D-1 through D-4)-----

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3. A contractor is entitled to reimbursement for expense actually and reasonably incurred in complying with a direction of the Government to perform work in advance of the date when performance is due. It follows that a contractor who has encountered an excusable cause of delay, who has requested an extension of time on account of such cause, who has been denied an appropriate extension, who has been instructed to complete the work within a lesser time than would have been available if an appropriate extension had been granted, and who complies with that instruction, is entitled to reimbursement for expenditures, such as the cost of working under adverse weather conditions, that could have been saved if an appropriate extension had been granted. Where, however, the Government directs that the work be accelerated, but the contractor in fact does not accelerate its performance, no additional compensation is allowable (Claim G-2)-----

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**CONTRACTING OFFICER**

1. A communication from a contracting officer to a contractor, in order to amount to a decision, must, at least, be so worded as to fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended-----
2. When the contracting officer makes a decision under the "disputes" clause, he acts in a quasi-judicial capacity. The decision must represent his own judgment, rather than a determination dictated to him by another not authorized by the terms of the contract----
3. Under a contract for the clearing of the right-of-way for a transmission line which (1) prescribes specific standards to govern the clearing, (2) authorizes the contracting officer to issue special instructions for areas presenting special problems, and (3) states general objectives to be achieved or safeguarded through the clearing, the contracting officer may permit deviations from the specific standards by virtue of his authority to issue special instructions, provided such deviations are in keeping with the general objectives stated in the contract (Claims A-1 and A-2)-----

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**CONTRACTS—Continued****CONTRACTING OFFICER—Continued**

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|--|------|
| 4. Final delivery, final acceptance, and final payment do not operate to divest the contracting officer of his authority to act under the contract. Hence, these elements are not an absolute bar to allowance of a claim.....   | 400  |
| 5. When a claim for a time extension under a contract is presented to the contracting officer, it is the duty of the latter to make an impartial and objective determination of all questions that are directly relevant to the extent of the delays upon which such claim is founded..... | 436  |

**CONTRACTOR**

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|---|-----|
| 1. Under the standard form of Government construction contract, the risk of loss on account of increases in the cost of the job that are not the product of any compensable act or omission of the Government, but that are caused merely by the encountering of bad construction weather, whether normal for the season of the year involved or sufficiently abnormal to constitute an excusable cause of delay, rests upon the contractor (Claims A-3 and G-2)..... | 243 |
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**DAMAGES****Generally**

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|---|-----|
| 1. The additional compensation to be paid as damages for breach of contract or as an equitable adjustment under a contract may properly be measured by the difference between the cost that would have been incurred by the contractor if the job had not been affected by the compensable event in suit, and the costs that were necessarily and reasonably incurred by the contractor in performing the job under the circumstances under which it actually had to be performed as a result of such compensable event. The "total cost" method whereby the sum to be paid is measured merely by the difference between the amount bid by the contractor, without regard to its reasonableness, and the costs actually incurred in performing the job, without regard to what caused them, is unacceptable in ordinary circumstances (Claims A-1 and A-2).....   | 242 |
| 2. The expense of measures undertaken for the purpose of performing extra work resulting from a change ordered by the Government, or of overcoming hindrances resulting from a breach of contract by the Government, is allowable to the extent to which the expense was actually and reasonably incurred, and, hence, if such measures were actually and reasonably undertaken during the winter, the cost incurred in performing them at that time of the year would be allowable. When the measures so undertaken form an integral component of a series of operations that is pushed, wholly or partially, into the winter as a necessary consequence of the incorporation of such measures within the series, the compensation due the contractor also includes the amount by which the cost of the subsequent operations in the series was increased through their projection into an unfavorable season (Claim G-2)..... | 244 |



**CONTRACTS—Continued****DELAYS OF CONTRACTOR**

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1. The duration of a time extension for an excusable cause of delay is governed by the extent to which the excusable cause either increases the amount of time required for performance of the contract work as a whole, or defers the date by which the last of that work will be reasonably capable of completion. Depending upon the way in which the excusable cause affects the contractor's operations, the time extension may be either longer, as in some cases where the job is projected into bad weather, or shorter, as in some cases where part of the job is unaffected, than the period during which the excusable cause was operative. Among other considerations, regard must be had for the possibility that the impact of the cause of delay might have been avoided or shortened by the contractor (Claims under headings E and F, and Claim G-1)----- 244
2. In the absence of countervailing considerations, the time extension allowable for an excusable cause whose primary effect upon the job is to increase the volume of the work remaining to be done, rather than to defer the time when the doing of that work will become practicable, may appropriately be measured by dividing the average daily work capacity of the contractor into the volume of work added to the job by the excusable cause. In the absence of countervailing considerations, the time extension allowable for an excusable cause that puts off the date by which the job could otherwise have been brought to an end with reasonable efforts, for a time roughly equivalent to the duration of the period while extra work is being performed, or while work is being prevented by the Government, or while some other excusable cause is operative, may appropriately be measured by the duration of such period (Claim E-3, F-3 and F-7)----- 244
3. When a claim for a time extension under a contract is presented to the contracting officer, it is the duty of the latter to make an impartial and objective determination of all questions that are directly relevant to the extent of the delays upon which such claim is founded----- 436

**DELAYS OF GOVERNMENT**

1. A Government-furnished property clause which states that the Government will make "every reasonable effort" to deliver materials "so as to avoid any delay in the progress of the contractor's work as outlined in his construction program," but that if the contractor is delayed "because of failure of the Government to make such deliveries" the only form of adjustment allowable will be a time extension, is to be construed as making the contractor's right to monetary compensation for a delay in delivery turn upon whether the Government made every reasonable effort to deliver materials by the time when they would be needed, and is also to be construed as making the construction program submitted by the contractor the criterion, in general, for determining the time when materials would be needed. If a failure to make timely delivery is proved, the burden of offering some reasonable explanation for the delay rests on the Government, and, if it offers no such explanation, the contractor is entitled to a finding that every reasonable effort was not made (Claims C-5 and E-2)----- 244

**CONTRACTS—Continued****DELAYS OF GOVERNMENT—Continued**

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2. The duration of a time extension for an excusable cause of delay is governed by the extent to which the excusable cause either increases the amount of time required for performance of the contract work as a whole, or defers the date by which the last of that work will be reasonably capable of completion. Depending upon the way in which the excusable cause affects the contractor's operations, the time extension may be either longer, as in some cases where the job is projected into bad weather, or shorter, as in some cases where part of the job is unaffected, than the period during which the excusable cause was operative. Among other considerations, regard must be had for the possibility that the impact of the cause of delay might have been avoided or shortened by the contractor. (Claims under headings E and F, and Claim G-1)----- 244
3. In the absence of countervailing considerations, the time extension allowable for an excusable cause whose primary effect upon the job is to increase the volume of the work remaining to be done, rather than to defer the time when the doing of that work will become practicable, may appropriately be measured by dividing the average daily work capacity of the contractor into the volume of work added to the job by the excusable cause. In the absence of countervailing considerations, the time extension allowable for an excusable cause that puts off the date by which the job could otherwise have been brought to an end with reasonable efforts, for a time roughly equivalent to the duration of the period while extra work is being performed, or while work is being prevented by the Government, or while some other excusable cause is operative, may appropriately be measured by the duration of such period (Claims E-3, F-3 and F-7)----- 244
4. In the absence of express warranties or covenants by the Government, a construction contractor is not entitled to additional compensation for a delay caused by the failure of another contractor to perform, within the time set by his contract, work that is a necessary antecedent for availability of the construction site, unless the delay was due in some way to fault on the part of the Government. The awarding of a construction contract, or the issuance of notice to proceed thereunder, in circumstances where the Government knows that the antecedent work will not be finished by the time when the construction site will be needed, in the ordinary and economical course of contract performance, may be sufficient basis for a finding that the delay was due to fault of the Government (Claim G-2)----- 245

**DRAWINGS**

1. The design, methods and details of the work, as described in the drawings and specifications, may properly be taken into account in determining whether changed conditions exist, since they constitute a source that can give rise to inferences, where factually and logically justified, concerning the physical conditions which the contractor was entitled or bound to expect would be encountered, and with which the physical conditions actually encountered are to be compared----- 495

**CONTRACTS—Continued**

**INTERPRETATION**

	Page
1. A site examination provision in a construction contract may have the effect of incorporating by reference into that contract those portions of the specifications of a contract with another contractor that have to do with work the performance of which is a necessary antecedent for performance of work required by the construction contract, if the condition to be created or removed by the antecedent work is a condition that falls within the scope of the site examination provisions, and if the stage of completion of the antecedent work during the bidding period is not such as admits of its qualities upon completion being forecast through visual inspection alone (Claim A-1)-----	242
2. Under a contract for the clearing of the right-of-way for a transmission line which (1) prescribes specific standards to govern the clearing, (2) authorizes the contracting officer to issue special instructions for areas presenting special problems, and (3) states general objectives to be achieved or safeguarded through the clearing, the contracting officer may permit deviations from the specific standards by virtue of his authority to issue special instructions, provided such deviations are in keeping with the general objectives stated in the contract (Claims A-1 and A-2)-----	242
3. A provision in a contract for the stringing of aluminum conductor on a transmission line to be energized at a very high voltage which states that the contractor, if he elects against stringing the line under tension, may use lagging "to prevent the conductor from being dragged over the ground or other obstructions where there is possibility of damage to the conductor" means that enough lagging must be used to forestall any reasonable possibility of damage to the conductor through contact with the ground, and requires the use of sufficient lagging to keep the conductor entirely clear of the ground where, but only where, the terrain is so fraught with hazards that avoidance of all contact between it and the conductor is needed, as a practical matter, to forestall any reasonable possibility of damage to the latter (Claim B-1)---	243
4. A Government-furnished property clause which states that the Government will make "every reasonable effort" to deliver materials "so as to avoid any delay in the progress of the contractor's work as outlined in his construction program," but that if the contractor is delayed "because of failure of the Government to make such deliveries" the only form of adjustment allowable will be a time extension, is to be construed as making the contractor's right to monetary compensation for a delay in delivery turn upon whether the Government made every reasonable effort to deliver materials by the time when they would be needed, and is also to be construed as making the construction program submitted by the contractor the criterion, in general, for determining the time when materials would be needed. If a failure to make timely delivery is proved, the burden of offering some reasonable explanation for the delay rests on the Government, and, if it offers no such explanation, the contractor is entitled to a finding that every reasonable effort was not made (Claims C-5 and E-2)-----	244

**CONTRACTS—Continued****INTERPRETATION—Continued**

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5. The parol evidence rule does not preclude the introduction of parol evidence for the purpose of showing whether a particular document was or was not adopted as an integration of the contract between the parties. Nor does it preclude the introduction of parol evidence for the purpose of showing that prior to the date borne by the integration a contract had actually been made, which was subsequently merged into or discharged by the integration---

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**NOTICES**

1. A claim for additional compensation on account of hindrances for which the Government is responsible that arise after the making of the contract, and so do not amount to changed conditions, that serve principally to increase the volume of working time needed for achievement of the result prescribed by the contract, rather than to defer the calendar date by which such result can reasonably be achieved, and that are overcome in a manner voluntarily chosen by the contractor, rather than in a manner required by Government personnel, is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the standard form of Government construction contract (Claim A-1)-----
2. The right of a contractor to compensation is dependent upon timely compliance with a protest provision in the contract. This rule is not absolute but subject to exceptions. Under certain conditions failure to make timely protest may be waived by the contracting officer. The failure to waive is reviewable by the Board of Contract Appeals. One of the factors to be considered in such review is whether or not the lack of timeliness is prejudicial or injurious to the Government-----

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**PERFORMANCE**

1. A provision in a contract for the stringing of aluminum conductor on a transmission line to be energized at a very high voltage which states that the contractor, if he elects against stringing the line under tension, may use lagging "to prevent the conductor from being dragged over the ground or other obstructions where there is possibility of damage to the conductor" means that enough lagging must be used to forestall any reasonable possibility of damage to the conductor through contact with the ground, and requires the use of sufficient lagging to keep the conductor entirely clear of the ground where, but only where, the terrain is so fraught with hazards that avoidance of all contact between it and the conductor is needed, as a practical matter, to forestall any reasonable possibility of damage to the latter (Claim B-1)-----
2. A contractor who undertakes to string a transmission line with a new variety of conductor furnished by the Government is entitled to additional compensation on account of work stoppages ordered by the Government in order to facilitate inspection of the conductor for fabricator-caused defects, repairs ordered by the Government for the correction of such defects, removal of obstacles to acceptable performance interposed by such defects, and other measures necessitated by their presence or suspected presence. The

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**CONTRACTS—Continued**

**PERFORMANCE—Continued**

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contractor, however, is not entitled to additional compensation for expenses incurred in devising and using reasonable stringing procedures needed because of novel qualities of the conductor, rather than because of defects in its fabrication, or for losses incurred in unsuccessful attempts to follow the procedures customarily applied in the past to the most nearly comparable varieties of conductor, since by engaging to string a new variety of conductor the contractor assumed the responsibility to ascertain whether the prevailing methods of stringing would work well with the new product and, if not, to find and adopt methods that would (Claims B-2, B-3, C-1 through C-4, and D-1 through D-4) -----

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**PROTESTS**

1. The right of a contractor to compensation is dependent upon timely compliance with a protest provision in the contract. This rule is not absolute but subject to exceptions. Under certain conditions failure to make timely protest may be waived by the contracting officer. The failure to waive is reviewable by the Board of Contract Appeals. One of the factors to be considered in such review is whether or not the lack of timeliness is prejudicial or injurious to the Government -----

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**SPECIFICATIONS**

1. A site examination provision in a construction contract may have the effect of incorporating by reference into that contract those portions of the specifications of a contract with another contractor that have to do with work the performance of which is a necessary antecedent for performance of work required by the construction contract, if the condition to be created or removed by the antecedent work is a condition that falls within the scope of the site examination provision, and if the stage of completion of the antecedent work during the bidding period is not such as admits of its qualities upon completion being forecast through visual inspection alone (Claim A-1) -----

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2. Under a contract for the clearing of the right-of-way for a transmission line which (1) prescribes specific standards to govern the clearing, (2) authorizes the contracting officer to issue special instructions for areas presenting special problems, and (3) states general objectives to be achieved or safeguarded through the clearing, the contracting officer may permit deviations from the specific standards by virtue of his authority to issue special instructions, provided such deviations are in keeping with the general objectives stated in the contract (Claims A-1 and A-2) -----

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3. The design, methods and details of the work, as described in the drawings and specifications, may properly be taken into account in determining whether changed conditions exist, since they constitute a source that can give rise to inferences, where factually and logically justified, concerning the physical conditions which the contractor was entitled or bound to expect would be encountered, and with which the physical conditions actually encountered are to be compared -----

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**CONTRACTS—Continued****UNFORESEEABLE CAUSES**

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1. Under the standard form of Government construction contract, the risk of loss on account of increases in the cost of the job that are not the product of any compensable act or omission of the Government, but that are caused merely by the encountering of bad construction weather, whether normal for the season of the year involved or sufficiently abnormal to constitute an excusable cause of delay, rests upon the contractor (Claims A-3 and G-2) ----- 243
2. The duration of a time extension for an excusable cause of delay is governed by the extent to which the excusable cause either increases the amount of time required for performance of the contract work as a whole, or defers the date by which the last of that work will be reasonably capable of completion. Depending upon the way in which the excusable cause affects the contractor's operations, the time extension may be either longer, as in some cases where the job is projected into bad weather, or shorter, as in some cases where part of the job is unaffected, than the period during which the excusable cause was operative. Among other considerations, regard must be had for the possibility that the impact of the cause of delay might have been avoided or shortened by the contractor (Claims under headings E and F, and Claim G-1)----- 244

**WAIVER AND ESTOPPEL**

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**DESERT LAND ENTRY****GENERALLY**

1. Where final proof on a desert land entry is rejected within two years after issuance of a receipt for the money paid with the proof and new proof is filed and is rejected and the entry canceled in part within two years after the new proof is filed but more than two years after the receipt was issued, the entryman is not entitled to a patent pursuant to section 7 of the act of Mar 3, 1891... 506

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1. A desert land entry is properly canceled where the entryman fails to answer a complaint filed in a private contest against the entry which charges that the entryman has not met the reclamation requirements of the desert land law.----- 537

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1. Where land offered by a State in exchange for public land, pursuant to section 8 of the Taylor Grazing Act, as amended, has been used by the Department of the Navy for several years under leaseholds acquired through condemnation proceedings and the Navy's usage

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**EXECUTIVE ORDERS AND PROCLAMATIONS**

1. Lands in the Tyonek Reserve (Moquawkie Reservation) in Alaska which were "\* \* \* withdrawn from disposal, and reserved for the U.S. Bureau of Education \* \* \*" by Executive Order No. 2141, Feb. 27, 1915, were "\* \* \* withdrawn for Indian purposes or for the use and occupancy of \* \* \* Indians \* \* \*" within the meaning of the act of Mar. 3, 1927.....
2. Although the Secretary of the Interior is by Executive Order No. 10355 authorized to exercise the power of the President to withdraw and reserve public domain and other lands owned or controlled by the United States, including the authority to modify or revoke past or future withdrawals or reservations, such power cannot be exercised over lands in a national forest without the approval or concurrence of the Secretary of Agriculture as required by Section 1(c) of the Executive Order.....

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1. Reliance on information or advice furnished by an employee of a land office will not confer any right or interest that is not provided by law.....

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**FEES (See also Accounts)**

1. Where a Departmental regulation requires that the filing fee due in connection with a request for a 5-year extension of an oil and gas lease be paid before a certain date, a check for the filing fee (and rental) filed before, but erroneously dishonored by the drawee bank after, the pertinent date will be held to have been paid within the prescribed time.....
2. The inclusion of an interest component in establishing user charges or fees under section 8 of the Aquarium Act is discretionary and not mandatory.....
3. If interest is to be considered, the Secretary would need to determine the proper interest rate and the effect the increased charges would have in collecting sufficient revenues to meet the specific obligations of section 8 of the Aquarium Act.....

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1. Although the Fur Seal Act of 1944 prohibits the taking of sea otters, there is no international agreement or treaty, which can be found, as a basis for the protection of sea otter either at sea or within the territorial waters of the United States.....
2. The intended purpose of the Fur Seal Act of 1944 was to regulate persons under the jurisdiction of the United States.....

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4. The Fur Seal Act of 1944 fully protects fur seals both on the high seas and within the territorial waters of the States.....		107

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1. The failure of a range manager to comply with the departmental regulation which requires him to notify an owner of base property of an adjudication and allocation of range privileges by registered mail, allowing a right of protest, and, upon issuance of a final decision after protest, allowing a right of appeal, does not nullify an adjudication and allotment otherwise proper if, in fact, the owner does protest and appeal as though the proper notice had been given.....	369
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2. A decision by a hearing examiner denying a motion to vacate a decision of a district manager of a grazing district on only one of the issues raised by an appeal from the district manager's decision and indicating that a hearing would be held on other issues raised by the appeal is not a final disposition of the appeal but is in the nature of an interlocutory decision which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the whole appeal, and an appeal from such a decision will be dismissed as premature.....	388
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1. A voluntary agreement among the users of the Federal range in a particular area which is approved by the Bureau of Land Management or its predecessor, the Grazing Service, does not effect a permanent division of the range which nullifies the responsibility of the Department to adjudicate the rights of permittees on the Federal range.....	369
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**LEASES AND PERMITS—Continued**

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- 1. Lands in Alaska which have been withdrawn by Executive order for Indian purposes or for the use and occupancy of any Indians or tribe may be leased for oil and gas development pursuant to the act of Mar. 3, 1927----- 168

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- 1. The allowance of an attorney's fee by an Examiner of Inheritance for legal services rendered in an Indian's restricted estate will not be disturbed on appeal where it appears that such allowance meets the test of reasonableness specified in the Departmental probate regulations----- 531

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- 2. A direct cause has been defined as a cause without which the injury would not have occurred, and which by itself is a self-sufficient cause of the injury----- 97
- 3. Each claim must be considered on its own peculiar facts and merits. The payment of any claim does not necessarily assure the payment of another claim on the mere allegation that it is similar or identical----- 97
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**Animals and Livestock**

- 1. The loss of cattle which fall or wander into irrigation canals or other irrigation facilities cannot be considered to be the direct result of nontortious activities of officers or employees of the United States. 397

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- 1. In dealing with subterranean water, it is rare that conclusions can be drawn with mathematical precision. Such precision is not necessary. Reasonable and logical conclusions can and must be drawn from the evidence presented, and a decision will then be rendered consistent with the preponderance of the evidence.----- 97
- 2. When a claim is made that seepage water from a Bureau of Reclamation irrigation structure has damaged private property, it is not necessary to a proper denial of the claim under the Public Works Appropriation Acts to have a finding as to the source of the water causing the damage. It is necessary only that there be a finding based on the evidence that the damage was not the direct result of nontortious activities of employees of the Bureau of Reclamation----- 97

**MIGRATORY BIRD CONSERVATION ACT**

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1. The proviso in section 1 of the Palisades Project Act prohibiting the development, operation, and maintenance of a wildlife management area as part of the project until authorized by Congress, was not intended to limit the general authority of the Secretary under the Migratory Bird Conservation Act to establish and develop refuges for migratory birds anywhere in the United States..... 527
2. Section 6 of the Migratory Bird Conservation Act directs that no payment shall be made on areas acquired by purchase or rent until the title thereto shall be satisfactory to the Attorney General... 527

**MINERAL LANDS**

**GENERALLY**

1. Section (a) (3) of the Act of Aug. 27, 1958 (72 Stat. 928; 43 U.S.C., sec. 852), does not authorize the selection of lands which have been probed by core drilling and extensive exploration work to the extent that the boundaries and quantity of a valuable deposit of mineral are well defined and the mineral within such deposit is known to be of such quality as to warrant expenditure of funds for extracting..... 71

**MINERAL LEASING ACT**

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1. An application for a coal prospecting permit under regulations issued pursuant to the act of Oct. 20, 1914, filed after the repeal of that act by the act of Sept. 9, 1959, is subject to rejection because of the cessation of authority of this Department to issue permits under the 1914 act; and, even though the 1959 act extended the provisions of the Mineral Leasing Act of Feb. 25, 1920, to Alaska, the land office did not have any duty or authority to consider the application as one under the 1920 act until some action was taken by the appellant to amend the application to come within that act..... 451

**MINING CLAIMS**

**COMMON VARIETIES OF MINERALS**

1. To satisfy the requirement for discovery on a placer mining claim located for decorative building stone and clay before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before that date and when such showing is not made the mining claim is properly declared null and void..... 136
2. Building stone suitable for construction purposes which is found in pleasing colors, which splits readily and can be polished satisfactorily, but can be used only for the same purposes as other available building stone is a common variety of building stone and not locatable under the mining laws since its special characteristics do not give it a special, distinct value..... 136
3. Clay found on a mining claim which the claimant believes to be valuable but which laboratory tests show to be unsuitable for an oil-bleaching material or as a catalytic agent even with acid treatment to increase its absorbency cannot be regarded as an uncommon variety of clay on the basis of one sale for mixing in stone plaster.. 136

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4. A mining claim, the validity of which is challenged under section 3 of the act of July 23, 1955, is properly held to be null and void when the claimant's evidence shows that the great bulk of sales of stone from the claim are for ordinary construction purposes and that only two small sales of a better quality of the stone were made for lapidary purposes.....	184
5. Where a mining claim contains a large deposit of quartz suitable for ordinary construction purposes but scattered in the deposit are small pockets of pink or rose quartz suitable for lapidary purposes, it is questionable whether the pockets can be considered as a separate deposit of an uncommon variety of stone apart from the general deposit of which they are a part.....	184
6. Two sales of an uncommon variety of stone for \$260 in a period of 2 years falls far short of establishing that the stone constitutes a valuable mineral deposit which will establish the validity of a mining claim.....	184
7. Where there is no showing that there are within the limits of a mining claim deposits of sand and gravel in sufficient quantities to induce a prudent man to expend his labor and means with a reasonable prospect of developing a valuable operation, there has been no discovery within the meaning of the mining law.....	213

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1. A mining claimant has the burden of proving in a contest against his claim that a discovery has been made after the Government has made a prima facie case that the claim is invalid for want of a discovery of a valuable mineral deposit.....	136
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**DETERMINATION OF VALIDITY**

1. A mining claim is properly declared null and void where evidence supports the conclusion that there has been no discovery of valuable mineral deposits on the claim such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine.....	10
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**DISCOVERY**

1. To satisfy the requirement for discovery on a placer mining claim located for decorative building stone and clay before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before that date and when such showing is not made the mining claim is properly declared null and void.....	136
2. A mining claimant has the burden of proving in a contest against his claim that a discovery has been made after the Government has made a prima facie case that the claim is invalid for want of a discovery of a valuable mineral deposit.....	136
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- 4. Where there is no showing that there are within the limits of a mining claim deposits of sand and gravel in sufficient quantities to induce a prudent man to expend his labor and means with a reasonable prospect of developing a valuable operation, there has been no discovery within the meaning of the mining law..... 213
- 5. A mining claim is properly declared null and void when the evidence supports a finding that a valuable discovery has not been made within the limits of the claim..... 455

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- 1. A notice of hearing in a mining contest case which, in effect, incorporates the charges in the complaint that the land within the claim 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 sufficiently complies with the requirement in section 5 of the Administrative Procedure Act that a notice of hearing state the matters of fact and law asserted..... 455

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- 1. Where a 10-acre placer claim includes land situated within three regular 10-acre subdivisions and a discovery has been made on the land in one 10-acre subdivision, it is not necessary to show that the portions of the claim in the other two 10-acre subdivisions are mineral in character in order to sustain the validity of the entire claim ..... 213

**PATENT**

- 1. Patent to a mining claim cannot be withheld where it is shown that the claim is still being worked and the sand and gravel therefrom are still being removed and disposed of at a profit in the current market upon the conjecture that very little sand and gravel still remain on the claim..... 212

**PLACER CLAIMS**

- 1. A 10-acre placer claim consisting of a string of four contiguous 2½-acre tracts straddling three regular 10-acre subdivisions is not thereby invalid as not being in conformity with the public land surveys..... 213

**POWER SITE LANDS**

- 1. Since lands in national forests which are included in roads, roadbeds, and rights-of-way are withdrawn from mineral entry and are not open to location, mining, and patenting under the mining laws, entry on such lands is not authorized by the act of Aug. 11, 1955, opening certain lands in power withdrawals to mineral entry, and an order under that act relating to placer mining on such lands is not authorized..... 178
- 2. The fact that other remedies may exist against interference in the use of public land from placer mining operations does not preclude the prohibition of placer mining under the act of Aug. 11, 1955... 178
- 3. Permission to carry on placer mining operations on condition that the locator shall, following placer operations, restore the surface of the claim to the condition it was in immediately prior to those operations may be granted under the act of Aug. 11, 1955, where it

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appears that placer mining would not substantially interfere with other uses of the land for recreational purposes, or for homesites since no actual plans for such other uses have been completed and such uses are not anticipated within the reasonably near future.....

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**SPECIAL ACTS**

1. Since lands in national forests which are included in roads, roadbeds, and rights-of-way are withdrawn from mineral entry and are not open to location, mining, and patenting under the mining laws, entry on such lands is not authorized by the act of Aug. 11, 1955, opening certain lands in power withdrawals to mineral entry, and an order under that act relating to placer mining on such lands is not authorized.....
2. The fact that other remedies may exist against interference in the use of public land from placer mining operations does not preclude the prohibition of placer mining under the act of Aug. 11, 1955.....
3. Permission to carry on placer mining operations on condition that the locator shall, following placer operations, restore the surface of the claim to the condition it was in immediately prior to those operations may be granted under the act of Aug. 11, 1955, where it appears that placer mining would not substantially interfere with other uses of the land for recreational purposes or for homesites since no actual plans for such other uses have been completed and such uses are not anticipated within the reasonably near future.....

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**SURFACE USES**

1. A verified statement filed pursuant to section 5 of the act of July 23, 1955, asserting surface rights in mining claims which does not designate the section or sections of the public land survey which embrace most of the claims and contains only metes and bounds descriptions of such claims tied to points on the boundaries of certain sections fails to meet the statutory requirement that it "shall set forth \* \* \* [t]he section or sections" which embrace the claims and must be rejected as an incomplete statement as to such claims.....

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**WITHDRAWN LAND**

1. Since lands in national forests which are included in roads, roadbeds, and rights-of-way are withdrawn from mineral entry and are not open to location, mining, and patenting under the mining laws, entry on such lands is not authorized by the act of Aug. 11, 1955, opening certain lands in power withdrawals to mineral entry, and an order under that act relating to placer mining on such lands is not authorized.....

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**OIL AND GAS**

1. The act of May 11, 1938, repealed only those parts of the act of Mar. 3, 1927, which were inconsistent therewith, and did not affect the authority established in the earlier act to lease, for oil and gas development, lands withdrawn by Executive order for Indian purposes or for the use and occupancy of Indians.....

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OIL AND GAS LEASES

GENERALLY

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- 1. In order for an oil and gas lessee to be entitled to the extension or suspension benefits provided by the act of Sept. 21, 1959, or section 27(j) of the Mineral Leasing Act Revision of 1960, respectively, as to a given lease, the lease must have been included in a "proceeding" within the meaning of those acts, which entails at least some specific, direct action against the lease discernible from the departmental records, and there must have been a suspension by the Secretary of the lessee's rights under the lease pending a decision in the proceeding or a waiver of such rights by the lessee; a mere failure to take action to approve or deny a pending assignment of the lease prior to the expiration of its term is not sufficient to entitle the lessee to the extension benefits----- 19
- 2. When a Departmental regulation is inconsistent with, and without the provisions of, the law, it is invalid and will not be followed---- 473

ACQUIRED LANDS LEASES

- 1. An oil and gas lease offer for unsurveyed, acquired land which fails to include a metes and bounds description of the land sought for leasing but describes the land by tract numbers is not defective for failure to include a metes and bounds description, with the courses and distances between successive angle points on the boundary, unless the deed under which the land was acquired fails to include such a description----- 228
- 2. An oil and gas lease offer for unsurveyed, acquired land is not defective because it is not accompanied by a map or plat showing the location of the land applied for within the administrative unit or project of which it is a part, but the offeror may be required to submit a satisfactory showing of such a map or plat----- 228
- 3. Where a partial assignment of an acquired lands oil and gas lease is timely filed but is not accompanied by the statement of the assignee as to whether he is the sole party in interest in the assignment, as required by regulation, and such statement is not filed until after the expiration of the lease, approval of the assignment is properly refused----- 383
- 4. An oil and gas lease offer for acquired land filed before the amendment of the Mineral Leasing Act on Sept. 2, 1960, which was still pending at that time, became subject to the act of Sept. 2, 1960, so that the offeror is properly required to consent to the issuance of a lease subject to the terms prescribed by the amendatory act ----- 512

APPLICATIONS

- 1. It is proper to reject an offer for a noncompetitive oil and gas lease where the lands applied for are (1) in a producing lease, or (2) in a lease which was, during its extended term, further extended by reasons of a discovery made on a lease out of which the extended lease was segregated by partial assignment----- 1
- 2. Where a Departmental regulation requires that the filing fee due in connection with a request for a 5-year extension of an oil and gas lease be paid before a certain date, a check for the filing fee (and rental) filed before, but erroneously dishonored by the drawee bank after, the pertinent date will be held to have been paid within the prescribed time----- 113

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**APPLICATIONS—Continued**

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3. A noncompetitive offer to lease for oil and gas purposes public land upon which an earlier lease has terminated by operation of law at the expiration of the lease term, which offer is filed in advance of the period for simultaneous filing of offers announced by the land office as provided in the departmental regulations, is properly rejected.....	134
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5. The inclusion of offers in drawings simply establishes the order in which they will be considered and does not constitute a determination that a given offer is valid or waive any defect in such offer; thus a defective offer drawing first priority must be rejected .....	156
6. The rejection of an offer for failure to comply with the 640-acre minimum limitation because nonnavigable river bed lands adjacent to the public land applied for were available for lease will be affirmed where appellant does not show that the river bed lands were not available for lease, as an offer for lease under the Mineral Leasing Act will not be accepted as an offer for the Government's riparian rights to the river bed lands unless such lands have been properly described and rentals submitted for them .....	159
7. When copies of an oil and gas lease offer in the number specified in the applicable regulation are prepared on the proper form and in one operation by the use of a typewriter and carbon paper, the offer is not to be rejected because some of the copies are found to be illegible.....	484
8. An oil and gas lease offer for acquired land filed before the amendment of the Mineral Leasing Act on Sept. 2, 1960, which was still pending at that time, became subject to the act of Sept. 2, 1960, so that the offeror is properly required to consent to the issuance of a lease subject to the terms prescribed by the amendatory act.....	512
9. An amendment of an oil and gas offer to change the description of land sought for leasing to include the correct designation of a legal subdivision owned by the United States within a reservoir area in place of a previous designation of a subdivision not within the reservoir area and not owned by the United States should not be rejected as a substitution of one tract of land for another which requires the filing of a new offer, where it appears that the offeror intended originally to apply for the land described in the amendment.....	512

**ASSIGNMENTS OR TRANSFERS**

1. Where a partial assignment of an acquired lands oil and gas lease is timely filed but is not accompanied by the statement of the assignee as to whether he is the sole party in interest in the assignment, as required by regulation, and such statement is not

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- filed until after the expiration of the lease, approval of the assignment is properly refused..... 383
- 2. An assignment of an oil and gas lease which describes land not covered by the parent lease is properly rejected even though the incorrect description was in error and the parties intended to assign lands in the parent lease..... 406
- 3. Where an assignment of an oil and gas lease describes both land covered and land not covered by the parent lease, it is to be approved as to the land in the lease and rejected as to the land not in the lease..... 406
- 4. Where an assignment of an oil and gas lease issued prior to Sept. 2, 1960, covering all the lands in it, is approved as to only part of the lands described in the assignment, it constitutes a partial assignment and serves to extend the lease for not less than two years from the effective date of the assignment..... 406
- 5. For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease; where the requirements for filing a partial assignment of a noncompetitive oil and gas lease are not met before the end of the next to last month of the lease term, the assignment cannot be approved..... 491
- 6. Where an attorney in fact or agent of a lessee signs an assignment of an oil and gas lease on behalf of the lessee, evidence must be furnished of the authority of the attorney or agent to execute such an assignment; and the fact that such evidence has been previously furnished in the same land office in connection with another case will not satisfy this requirement if there has been no incorporation in the record of a reference to the case file number in which evidence of the authority is filed..... 491
- 7. Where a regulation requires only that evidence be furnished of the authority of an agent or attorney in fact to sign an assignment, a partial assignment of an oil and gas lease is not to be rejected because the assignment is signed by a purported agent for the assignor and there is filed only a letter which makes reference to a case record in another land office in which a power of attorney authorizing the agent to act has been filed..... 520
- 8. Where an applicant is to be deprived of a statutory right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith..... 521

**DESCRIPTION OF LAND**

- 1. An oil and gas lease offer for unsurveyed, acquired land which fails to include a metes and bounds description of the land sought for leasing but describes the land by tract numbers is not defective for failure to include a metes and bounds description, with the courses and distances between successive angle points on the boundary, unless the deed under which the land was acquired fails to include such a description..... 228
- 2. An oil and gas lease offer for unsurveyed, acquired land is not defective because it is not accompanied by a map or plat showing the

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location of the land applied for within the administrative unit or project of which it is a part, but the offeror may be required to submit a satisfactory showing of such a map or plat.....	228
3. An assignment of an oil and gas lease which describes land not covered by the parent lease is properly rejected even though the incorrect description was in error and the parties intended to assign lands in the parent lease.....	406
4. Where an assignment of an oil and gas lease describes both land covered and land not covered by the parent lease, it is to be approved as to the land in the lease and rejected as to the land not in the lease.....	406
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6. An amendment of an oil and gas offer to change the description of land sought for leasing to include the correct designation of a legal subdivision owned by the United States within a reservoir area in place of a previous designation of a subdivision not within the reservoir area and not owned by the United States should not be rejected as a substitution of one tract of land for another which requires the filing of a new offer, where it appears that the offeror intended originally to apply for the land described in the amendment.....	512

**EXTENSIONS**

1. An oil and gas lease in its extended term is extended for two years from the date of discovery of oil or gas in paying quantities on land in the lease out of which the extended lease was segregated by partial assignment.....	1
2. In order for an oil and gas lessee to be entitled to the extension or suspension benefits provided by the act of Sept. 21, 1959, or section 27(j) of the Mineral Leasing Act Revision of 1960, respectively, as to a given lease, the lease must have been included in a "proceeding" within the meaning of those acts, which entails at least some specific, direct action against the lease discernible from the departmental records, and there must have been a suspension by the Secretary of the lessee's rights under the lease pending a decision in the proceeding or a waiver of such rights by the lessee; a mere failure to take action to approve or deny a pending assignment of the lease prior to the expiration of its term is not sufficient to entitle the lessee to the extension benefits.....	19
3. Where a Departmental regulation requires that the filing fee due in connection with a request for a 5-year extension of an oil and gas lease be paid before a certain date, a check for the filing fee (and rental) filed before, but erroneously dishonored by the drawee bank after, the pertinent date will be held to have been paid within the prescribed time.....	113
4. Although a departmental regulation precludes the acceptance of oil and gas offers to lease lands within wildlife refuges and by de-	

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**EXTENSIONS—Continued**

departmental order certain lands within existing oil and gas leases are made a part of a refuge, applications for the five-year extension of such leases should not be rejected on the ground that such lands have been withdrawn, when none of the actions taken by the Department with respect to the lands purports to be a withdrawal of such lands from the operation of the Mineral Leasing Acts.....	225
5. Where an assignment of an oil and gas lease issued prior to Sept. 2, 1960, covering all the lands in it, is approved as to only part of the lands described in the assignment, it constitutes a partial assignment and serves to extend the lease for not less than two years from the effective date of the assignment.....	406
6. For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease; where the requirements for filing a partial assignment of a noncompetitive oil and gas lease are not met before the end of the next to last month of the lease term, the assignment cannot be approved.....	491

**FIRST QUALIFIED APPLICANT**

1. A noncompetitive offer to lease for oil and gas purposes public land upon which an earlier lease has terminated by operation of law at the expiration of the lease term, which offer is filed in advance of the period for simultaneous filing of offers announced by the land office as provided in the departmental regulations, is properly rejected.....	134
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**LANDS SUBJECT TO**

1. A noncompetitive offer to lease for oil and gas purposes public land upon which an earlier lease has terminated by operation of law at the expiration of the lease term, which offer is filed in advance of the period for simultaneous filing of offers announced by the land office as provided in the departmental regulations, is properly rejected.....	134
2. The act of Sept. 14, 1960, quitclaimed to the patentee all right, title, and interest in oil and gas deposits reserved by the United States in lands in the Kenai Peninsula in Alaska on which all requirements for a homestead patent had been met prior to July 23, 1957, except for submission of acceptable final proof; the act did not affect the mineral reservations to the United States in lands which were patented under the homestead laws prior to July 23, 1957.....	359
3. Although land is included within a homestead entry for which acceptable final proof has been filed and for which the entryman has met all the other requirements, it is to be considered as available for oil and gas leasing within the meaning of the 640-acre rule.....	422

**NONCOMPETITIVE LEASES**

1. When, subsequent to the filing of a noncompetitive offer to lease for oil and gas, a determination is made that a portion of the lands is thereafter to be considered within the known geologic structure of a producing field, the administrative practice of issuing sepa-	
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**OIL AND GAS LEASES—Continued****NONCOMPETITIVE LEASES—Continued**

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| rate leases for the lands within and without the structure is proper and not in conflict with the mineral leasing laws and regulations...   | Page<br>4 |
| 2. An oil and gas lease offer for acquired land filed before the amendment of the Mineral Leasing Act on Sept. 2, 1960, which was still pending at that time, became subject to the act of Sept. 2, 1960, so that the offeror is properly required to consent to the issuance of a lease subject to the terms prescribed by the amendatory act... | 512       |

**PATENTED OR ENTERED LAND**

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| 1. Although land is included within a homestead entry for which acceptable final proof has been filed and for which the entryman has met all the other requirements, it is to be considered as available for oil and gas leasing within the meaning of the 640-acre rule... | 422 |
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**PRODUCTION**

- |  |     |
|--|-----|
| 1. A noncompetitive oil and gas lease subject to the automatic termination provision of the act of July 29, 1954, is properly terminated for failure to pay annual rental for the fifth year of the lease on or before the fourth anniversary date of the lease when it appears that the lessee's claim to a well capable of producing oil or gas in paying quantities rests upon an uncompleted well which was then being drilled and was not in a physical condition to produce oil or gas in paying quantities.....   | 375 |
| 2. Elimination of a portion of a lease committed to a producing unit plan from that unit does not cause or permit a segregation of the eliminated portion into a new and distinct lease. The eliminated portion of the lease and the portion which remains unitized continue to form one lease. Consequently, the term of the eliminated portion will continue coextensively with the term of the portion still committed to the unit plan so long as there is production anywhere on the lease. It is not material that the production is constructive with respect to the lease and not actually within the leasehold... | 473 |

**ROYALTIES**

- |  |     |
|--|-----|
| 1. Royalties on production from land acquired for military purposes and leased protectively for oil and gas purposes are properly computed in accordance with the express terms of the leases without deductions for extraction or processing of liquid products and residue gas and of gathering, dehydration, and compression costs of gas; it is immaterial that the lessee does not do the extracting or processing and that it is performed by a contractor under an agreement whereby title to the liquid products passes to the contractor upon delivery of the well gas to the processing plant....  | 438 |
| 2. The Secretary of the Interior in computing the basic royalty due the United States under a lease recognized and maintained under section 6 of the Outer Continental Shelf Lands Act, where it is to receive royalty on the value of gas produced rather than in kind, may properly look to the actual consideration to be received by its lessee-seller under gas sales contracts with a buyer in order to determine the proper value basis for the royalty; and a determination by the Geological Survey that a reimbursement to the seller for an amount due the United States by it as an additional royalty pursuant to section 6(a) (9) of that act constitutes part of the contract sales price for the gas and should be included in the total |     |

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value basis for the basic royalty computation is proper, regardless of whether the reimbursement is specifically stated as separate from the contract price or is stated as being included in the total price in a settlement agreement approved by the Federal Power Commission-----

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**640-ACRE LIMITATION**

1. The rejection of an offer for failure to comply with the 640-acre minimum limitation because nonnavigable river bed lands adjacent to the public land applied for were available for lease will be affirmed where appellant does not show that the river bed lands were not available for lease, as an offer for lease under the Mineral Leasing Act will not be accepted as an offer for the Government's riparian rights to the river bed lands unless such lands have been properly described and rentals submitted for them-----
2. Although land is included within a homestead entry for which acceptable final proof has been filed and for which the entryman has met all the other requirements, it is to be considered as available for oil and gas leasing within the meaning of the 640-acre rule-----

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**TERMINATION**

1. A noncompetitive oil and gas lease subject to the automatic termination provision of the act of July 29, 1954, is properly terminated for failure to pay annual rental for the fifth year of the lease on or before the fourth anniversary date of the lease when it appears that the lessee's claim to a well capable of producing oil or gas in paying quantities rests upon an uncompleted well which was then being drilled and was not in a physical condition to produce oil or gas in paying quantities-----
2. There is no occasion for having a hearing on the question as to whether an oil and gas lease is saved from automatic termination for nonpayment of rental because it has a well capable of producing oil or gas in paying quantities where there is no indication that the lessee accepts the Department's interpretation as to what constitutes such a well and is prepared to submit evidence in accordance with that interpretation-----

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**UNIT AND COOPERATIVE AGREEMENTS**

1. Elimination of a portion of a lease committed to a producing unit plan from that unit does not cause or permit a segregation of the eliminated portion into a new and distinct lease. The eliminated portion of the lease and the portion which remains unitized continue to form one lease. Consequently, the term of the eliminated portion will continue coextensively with the term of the portion still committed to the unit plan so long as there is production anywhere on the lease. It is not material that the production is constructive with respect to the lease and not actually within the leasehold-----
2. Section 17(j) (formerly section 17b) of the Mineral Leasing Act of 1920, as amended, contains no authority for the Department to segregate a unitized lease into separate leases upon its partial elimination from a unit plan by reason of contraction of the unit area-----

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## OUTER CONTINENTAL SHELF LANDS ACTS

## GENERALLY

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1. The Secretary of the Interior in computing the basic royalty due the United States under a lease recognized and maintained under section 6 of the Outer Continental Shelf Lands Act, where it is to receive royalty on the value of gas produced rather than in kind, may properly look to the actual consideration to be received by its lessee-seller under gas sales contracts with a buyer in order to determine the proper value basis for the royalty; and a determination by the Geological Survey that a reimbursement to the seller for an amount due the United States by it as an additional royalty pursuant to section 6(a) (9) of that act constitutes part of the contract sales price for the gas and should be included in the total value basis for the basic royalty computation is proper, regardless of whether the reimbursement is specifically stated as separate from the contract price or is stated as being included in the total price in a settlement agreement approved by the Federal Power Commission-----

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## OIL AND GAS LEASES

1. Barging costs are a relevant matter to be taken into account in computing the royalties due the United States where there is no bona fide established market at the field or area where the leases are situated. The Secretary has discretion to determine the method of establishing an allowance for barging costs-----
2. The Secretary of the Interior in computing the basic royalty due the United States under a lease recognized and maintained under section 6 of the Outer Continental Shelf Lands Act, where it is to receive royalty on the value of gas produced rather than in kind, may properly look to the actual consideration to be received by its lessee-seller under gas sales contracts with a buyer in order to determine the proper value basis for the royalty; and a determination by the Geological Survey that a reimbursement to the seller for an amount due the United States by it as an additional royalty pursuant to section 6(a) (9) of that act constitutes part of the contract sales price for the gas and should be included in the total value basis for the basic royalty computation is proper, regardless of whether the reimbursement is specifically stated as separate from the contract price or is stated as being included in the total price in a settlement agreement approved by the Federal Power Commission-----

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## STATE LEASES

1. The Secretary of the Interior in computing the basic royalty due the United States under a lease recognized and maintained under section 6 of the Outer Continental Shelf Lands Act, where it is to receive royalty on the value of gas produced rather than in kind, may properly look to the actual consideration to be received by its lessee-seller under gas sales contracts with a buyer in order to determine the proper value basis for the royalty; and a determination by the Geological Survey that a reimbursement to the seller for an amount due the United States by it as an additional royalty pursuant to section 6(a) (9) of that act constitutes part of the contract sales price for the gas and should be included in



**OUTER CONTINENTAL SHELF LANDS ACTS—Continued**

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the total value basis for the basic royalty computation is proper, regardless of whether the reimbursement is specifically stated as separate from the contract price or is stated as being included in the total price in a settlement agreement approved by the Federal Power Commission-----

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**PATENTS OF PUBLIC LANDS**

**GENERALLY**

1. A patent issued pursuant to a color or claim of title must be in the name of all those claiming an interest in the land or in the name of a person designated by all claiming an interest in the land-----
2. Where final proof on a desert land entry is rejected within two years after issuance of a receipt for the money paid with the proof and new proof is filed and is rejected and the entry canceled in part within two years after the new proof is filed but more than two years after the receipt was issued, the entryman is not entitled to a patent pursuant to section 7 of the act of Mar. 3, 1891-----

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**POTASSIUM LEASES AND PERMITS**

**PERMITS**

1. An application for a potassium prospecting permit is properly rejected when the land described in the application is determined to contain valuable deposits of potassium as of a time after the filing of the application-----

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**PRACTICE BEFORE THE DEPARTMENT**

**PERSONS QUALIFIED TO PRACTICE**

1. While an appeal to the Director of the Bureau of Land Management is properly dismissed when it is prosecuted by an agent of the appellants who has not shown that he is authorized to practice before the Department, if the agent on appeal to the Secretary of the Interior states that he is a practicing attorney at law and the Director has also ruled on the merits of the appeal, the appeal may be considered on its merits-----

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**PRESIDENT OF THE UNITED STATES**

1. Although the Secretary of the Interior is by Executive Order No. 10355 authorized to exercise the power of the President to withdraw and reserve public domain and other lands owned or controlled by the United States, including the authority to modify or revoke past or future withdrawals or reservations, such power cannot be exercised over lands in a national forest without the approval or concurrence of the Secretary of Agriculture as required by Section 1(c) of the Executive Order-----

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**PUBLIC LANDS**

**GENERALLY**

1. The owner of riparian lots does not own public land within an unsurveyed island in a navigable stream lying between the riparian lots and the thread of the stream which was in existence when the State was admitted to the Union-----

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**PUBLIC LANDS—Continued****JURISDICTION OVER**

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| 1. In the absence of the approval or concurrence of the Secretary of Agriculture a Public Land Order purporting to exclude certain lands from a national forest and reserve them under the jurisdiction of the Bureau of Indian Affairs is ineffective to remove such lands from the jurisdiction of the Secretary of Agriculture, and a purported lease of such lands approved by the Assistant Secretary of the Interior pursuant to the Navajo-Hopi Rehabilitation Act of Apr. 19, 1950 (64 Stat. 44; 25 U.S.C. sec. 631 <i>et seq.</i> ), is invalid..... | 429         |

**LEASES AND PERMITS**

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| 1. In the absence of the approval or concurrence of the Secretary of Agriculture a Public Land Order purporting to exclude certain lands from a national forest and reserve them under the jurisdiction of the Bureau of Indian Affairs is ineffective to remove such lands from the jurisdiction of the Secretary of Agriculture, and a purported lease of such lands approved by the Assistant Secretary of the Interior pursuant to the Navajo-Hopi Rehabilitation Act of Apr. 19, 1950 (64 Stat. 44; 25 U.S.C. sec. 631 <i>et seq.</i> ), is invalid..... | 429 |
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**RIPARIAN RIGHTS**

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| 1. The rights acquired by the United States in the public domain are determined by the common law. Under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it is a littoral or riparian proprietor of public domain, has a vested right to future accretions and relictions. Because of the nature of the Federal system, and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its rights to relictions or accretions..... | 27  |
| 2. The rejection of an offer for failure to comply with the 640-acre minimum limitation because nonnavigable river bed lands adjacent to the public land applied for were available for lease will be affirmed where appellant does not show that the river bed lands were not available for lease, as an offer for lease under the Mineral Leasing Act will not be accepted as an offer for the Government's riparian rights to the river bed lands unless such lands have been properly described and rentals submitted for them.....             | 159 |
| 3. The owner of riparian lots does not own public land within an unsurveyed island in a navigable stream lying between the riparian lots and the thread of the stream which was in existence when the State was admitted to the Union.....  | 193 |

**PUBLIC SALES****APPLICANTS**

- |  |     |
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| 1. When a corporation which is declared the purchaser at a public sale is wholly owned by a parent corporation, it will be required to furnish the statement required by 43 CFR 250.12(b) (1) showing the extent of control of the stock of the parent corporation by aliens or persons having addresses outside of the United States as though the parent corporation were the purchaser..... | 482 |
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**PUBLIC SALES—Continued**

**AWARD OF LANDS**

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- 1. When two preference right claimants cannot come to an agreement as to the division of land, it is proper for the land office to award all of the tract to one claimant when considerations of topography, desirable use, land pattern, accessibility and need for the land favor the one claimant----- 481

**PREFERENCE RIGHTS**

- 1. Where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith----- 481
- 2. The regulation requiring a corporate purchaser to furnish a copy of its articles of incorporation does not clearly require that the material be furnished within 10 days after the corporation is declared the purchaser, and a corporation will not be held to have lost its preference right for failure to submit the material within the 10-day period----- 481

**REGULATIONS**

**GENERALLY**

- 1. Where the regulation in effect when an oil and gas lease offer is filed in the name of a partnership requires a certified copy of the articles of association and showings as to the qualifications of the member partners to accompany the offer, the mere reference by serial number to another case record where showings have been filed is not adequate and the offer is properly rejected----- 156

**INTERPRETATION**

- 1. Where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith----- 481
- 2. Where an applicant is to be deprived of a statutory right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith----- 521

**VALIDITY**

- 1. When a Departmental regulation is inconsistent with, and without the provisions of, the law, it is invalid and will not be followed--- 473

**RELICION**

- 1. The rights acquired by the United States in the public domain are determined by the common law. Under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it is a littoral or riparian proprietor of public domain, has a vested right to future accretions and relicions. Because of the nature of the Federal system, and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its right to relicions or accretions ----- 27

**RES ADJUDICATA**

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1. The principle of *res judicata* or finality of administrative action will not be applied so as to prevent the Director of the Bureau of Land Management from reversing or correcting decisions of his subordinate officers where the matter remains within the jurisdiction of the Bureau----- 409

**RULES OF PRACTICE****GENERALLY**

1. An Indian's written authorization for payment of her funds to a creditor, which has been filed with the Bureau of Indian Affairs during the lifetime of the Indian and not revoked by the Indian or disapproved by the Bureau, need not be resubmitted by the creditor as the basis for a claim against the estate of the Indian after her death; and the authorization so filed removes it from the application of the probate regulation which prohibits the filing of claims against Indian estates after the conclusion of the probate hearing ----- 142
2. In Board of Contract Appeals procedures the "appeal file" consists of the notice of appeal, brief in support of the appeal, if any, all documents on which the contracting officer has relied in making his findings of fact or decision, statement of the Government's position and supporting brief, and reply by appellant, if any. The "appeal record" consists of all these documents and of the transcript of conference (43 CFR 4.9), oral and written evidence presented by the parties pursuant to 43 CFR 4.11(a), the transcript of hearing, if any, and post-hearing briefs, if any----- 488
3. One of the purposes of the "conference" provided in 43 CFR 4.9 is the determination of the completeness of the "appeal file" and to enable the parties to establish, preferably by agreement, the written "appeal record"----- 488

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1. Where the Board of Contract Appeals finds, upon the basis of newly discovered evidence presented at a rehearing, that its prior decision was based largely on testimony that has been discredited, the prior decision will be vacated and the appeal will be remanded to the contracting officer for appropriate action----- 222
2. The Director of the Bureau of Land Management is not limited in his consideration of an appeal from a land office decision to the particular question raised by that appeal. He may, even in the absence of an appeal, take up any matter pending in any land office and dispose of it without waiting for a decision by the local land office----- 409
3. While an appeal to the Director of the Bureau of Land Management is properly dismissed when it is prosecuted by an agent of the appellants who has not shown that he is authorized to practice before the Department, if the agent on appeal to the Secretary of the Interior states that he is a practicing attorney at law and the Director has also ruled on the merits of the appeal, the appeal may be considered on its merits----- 446

**RULES OF PRACTICE—Continued**

**APPEALS—Continued**

**Generally—Continued**

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- 4. Since Field Solicitors do not have authority to determine either Reclamation or Indian irrigation claims under the annual Public Works Appropriation Acts, claims which may involve administrative determinations under both the Federal Tort Claims Act and under annual Public Works Appropriation Acts should be referred to the appropriate Regional Solicitors. They have full authority concerning both types of claims. The purpose of this holding is to prevent the fragmentary consideration of claims..... 463

**Dismissal**

- 1. The mailing of a supporting brief in a contract appeal to the Board of Contract Appeals instead of to the contracting officer is not so fundamental an error as to necessitate dismissal of the appeal.... 479
- 2. Where a contract appeal presents a genuine issue of material fact over which the Board of Contract Appeals has jurisdiction (such as the issue of whether a changed condition was encountered) that has not been submitted for decision on the record without a hearing, the contractor is entitled to a hearing at which evidence may be offered with respect to such issue: A motion to dismiss the appeal for failure to state a case on which any relief could be granted by the Board will be denied..... 495

**Extensions of Time**

- 1. Where an appellant files a timely request for an extension of time to file a statement of reasons in support of his notice of appeal and files a statement within the extension of time requested, although the request for extension is misfiled and not acted upon prior to the filing of the statement, the request may subsequently be granted, thus making timely the filing of the statement of reasons and service of a copy of the statement on an adverse party..... 475

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- 1. An interlocutory decision upon a contract appeal denying a motion to dismiss the appeal for lack of timely notice or protest, or denying a motion for summary judgment, leaves the appeal open for the presentation of evidence upon all disputed question of material fact, including such a question as whether the Government was prejudiced by lack of timely notice or protest..... 434
- 2. Where a contract appeal presents a genuine issue of material fact over which the Board of Contract Appeals has jurisdiction (such as the issue of whether a changed condition was encountered) that has not been submitted for decision on the record without a hearing, the contractor is entitled to a hearing at which evidence may be offered with respect to such issue: A motion to dismiss the appeal for failure to state a case on which any relief could be granted by the Board will be denied..... 495

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thirtieth day falls on a Sunday or Federal holiday, unless the appeal involves only questions of law. Such limitation may not be waived or extended once the 30 days have run..... 352

2. Under a Government contract that contains the usual form of "disputes" clause, an appeal from a findings of fact and decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days specified in the contract..... 405

3. The timeliness of an appeal is governed by the time elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed by him to the contracting officer. The circumstance that the last day of the appeal period falls on a Saturday is immaterial and does not extend the appeal period..... 405

**EVIDENCE**

1. An appeal involving a claim for additional compensation based on the contract price for deleted work not performed will be denied where the contractor fails to submit evidence of the costs of materials and labor claimed to have been incurred in anticipation of the performance of the deleted work..... 84

2. Where the Board of Contract Appeals finds, upon the basis of newly discovered evidence presented at a rehearing, that its prior decision was based largely on testimony that has been discredited, the prior decision will be vacated and the appeal will be remanded to the contracting officer for appropriate action..... 222

3. The parol evidence rule does not preclude the introduction of parol evidence for the purpose of showing whether a particular document was or was not adopted as an integration of the contract between the parties. Nor does it preclude the introduction of parol evidence for the purpose of showing that prior to the date borne by the integration a contract had actually been made, which was subsequently merged into or discharged by the integration..... 426

**HEARINGS**

1. Where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing, and the ruling on each finding and conclusion is clear, there is no requirement that the examiner rule separately as to each of the proposed findings and conclusions individually..... 10

2. Where the factual findings upon which an examiner's decision are based are stated clearly in a decision, it is not essential that a separate part of the decision be designated "findings of fact".... 11

3. Where the Board of Contract Appeals finds, upon the basis of newly discovered evidence presented at a rehearing, that its prior decision was based largely on testimony that has been discredited, the prior decision will be vacated and the appeal will be remanded to the contracting officer for appropriate action..... 222

**RULES OF PRACTICE—Continued**  
**HEARINGS—Continued**

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4. There is no occasion for having a hearing on the question as to whether an oil and gas lease is saved from automatic termination for nonpayment of rental because it has a well capable of producing oil or gas in paying quantities where there is no indication that the lessee accepts the Department's interpretation as to what constitutes such a well and is prepared to submit evidence in accordance with that interpretation.....	375
5. When a contract appeal involves a disputed issue of fact, each party is entitled to a hearing for the purpose of offering evidence upon such issue, and, if either party does request a hearing, a decision upon the merits of the appeal without holding the requested hearing would be premature. The rules and procedures of the Board of Contract Appeals do not provide for summary judgment in favor of either party.....	426

**PRIVATE CONTESTS**

1. A contest brought against a homestead entry which alleges only facts reflected by the Bureau records to constitute a charge relied upon to invalidate the entry is properly dismissed as to such charge....	128
2. Although the rights of a homestead settler on public lands covered by an existing entry attach instantly on the relinquishment of the prior entry and are superior to those of settlers or applicants initiating their rights later, such a settlement is nevertheless subject to the superior right of a contestant who secures the cancellation of the entry.....	475
3. An allegation in a private contest complaint filed immediately after the end of the second entry year which charges that the entryman failed to have under cultivation 1/16 of the acreage meets the requirements of the regulation that a contest complaint must allege in clear and concise language the facts which constitute the grounds for the contest.....	475
4. A private contest brought against a desert land entry which alleges facts not reflected by records of the Bureau of Land Management at the initiation of the contest which, if proved, would invalidate the entry may be upheld notwithstanding some of the facts alleged may have been known to some Bureau personnel prior to the filing of the complaint.....	537
5. A contest may be dismissed if not properly corroborated, but such action will not prevent the consideration of a second contest complaint, properly corroborated, by the same party, even though the charges therein are the same as those contained in the first....	537
6. A desert land entry is properly canceled where the entryman fails to answer a complaint filed in a private contest against the entry which charges that the entryman has not met the reclamation requirements of the desert land law.....	537

**SCHOOL LANDS**

**INDEMNITY SELECTIONS**

1. Section (a) (3) of the Act of Aug. 27, 1958 (72 Stat. 928; 43 U.S.C., sec. 852), does not authorize the selection of lands which have been probed by core drilling and extensive exploration work to



**SCHOOL LANDS—Continued****INDEMNITY SELECTIONS—Continued**

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the extent that the boundaries and quantity of a valuable deposit of mineral are well defined and the mineral within such deposit is known to be of such quality as to warrant expenditure of funds for extraction-----

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**SCRIP****RECORDATION**

1. Where all the documents relating to a partial assignment of a soldiers' additional homestead right have been presented timely to the Director, Bureau of Land Management, by a land office in connection with applications seeking to exercise part of the right assigned and the right is found valid to the extent asked, the balance of the right is not to be denied validity several years later on the ground that the assignee had not presented it for recordation within the period prescribed by the statute and regulations-----

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**SPECIAL TYPES OF SCRIP**

1. The right to locate Sioux Half-Breed scrip is a personal right, not subject to transfer. Such scrip may, however, be located by an attorney-in-fact with authority from the scribee to locate the land in the name of the scribee-----
2. It is proper to reject an application to locate Sioux Half-Breed scrip where the party seeking to make the selection of land has not shown that he has authority to locate the land in the name of the scribee-----

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**SECRETARY OF THE INTERIOR**

1. Under the Act of Aug. 9, 1955 (69 Stat. 539; 25 U.S.C., sec. 415), which authorizes the Indian owners of restricted tribally or individually owned lands to lease such lands, with the approval of the Secretary of the Interior, for a term of not to exceed twenty-five years "for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary," the phrase "specialized crops" is not one of limitation, and the Secretary is authorized to approve such leases if, in order to produce the crop or crops proposed to be grown, he determines that a substantial investment in the improvement of the land is necessary for that purpose and the lessee is required to make such an investment-----
2. Although the Secretary of the Interior is by Executive Order No. 10355 authorized to exercise the power of the President to withdraw and reserve public domain and other lands owned or controlled by the United States, including the authority to modify or revoke past or future withdrawals or reservations, such power cannot be exercised over lands in a national forest without the approval or concurrence of the Secretary of Agriculture as required by Section 1(c) of the Executive Order-----

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**SOLDIERS' ADDITIONAL HOMESTEADS**

**GENERALLY**

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- 1. Where all the documents relating to a partial assignment of a soldiers' additional homestead right have been presented timely to the Director, Bureau of Land Management, by a land office in connection with applications seeking to exercise part of the right assigned and the right is found valid to the extent asked, the balance of the right is not to be denied validity several years later on the ground that the assignee had not presented it for recordation within the period prescribed by the statute and regulations-----

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**SOLICITOR, DEPARTMENT OF THE INTERIOR**

- 1. Since Field Solicitors do not have authority to determine either Reclamation or Indian irrigation claims under the annual Public Works Appropriation Acts, claims which may involve administrative determinations under both the Federal Tort Claims Act and under annual Public Works Appropriation Acts should be referred to the appropriate Regional Solicitors. They have full authority concerning both types of claims. The purpose of this holding is to prevent the fragmentary consideration of claims-----

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**STATE EXCHANGES**

**EQUAL VALUES**

- 1. Where land offered by a State in exchange for public land, pursuant to section 8 of the Taylor Grazing Act, as amended, has been used by the Department of the Navy for several years under leaseholds acquired through condemnation proceedings and the Navy's usage has depressed the value of the State's land, the value of the land for the purpose of determining whether the offered and selected lands are of equal value is to be the amount that would have to be paid for the land by the United States in proceedings brought to condemn the fee-----

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**STATE LANDS**

- 1. The rights acquired by the United States in the public domain are determined by the common law. Under the common law, as interpreted and applied by the Supreme Court, the United States, wherever it is a littoral or riparian proprietor of public domain, has a vested right to future accretions and relictions. Because of the nature of the Federal system, and by virtue of an express provision of the Constitution, no State can, by legislation or otherwise, deprive the United States of its right to relictions or accretions-----

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**STATE SELECTION**

- 1. Mere knowledge that land under lease or permit contains valuable mineral deposits does not render it in a "producible status" within the meaning of section 2276(a)(3) of the Revised Statutes (43 U.S.C., sec. 852(a)(3))-----

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**STATUTORY CONSTRUCTION**

**GENERALLY**

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1. The act of May 11, 1938, repealed only those parts of the act of Mar. 3, 1927, which were inconsistent therewith, and did not affect the authority established in the earlier act to lease, for oil and gas development, lands withdrawn by Executive order for Indian purposes or for the use and occupancy of Indians.....	166
2. Notwithstanding the requirements of the Colorado Storage Project Act for the protection of the national parks and monuments, the Congress, in enacting the Public Works Appropriation Acts for 1961, 1962, and 1963, manifested the intention that construction and initiation of storage behind Glen Canyon Dam should proceed on schedule without constructing proposed works for the protection of Rainbow Bridge National Monument, and therefore the Secretary would not be warranted in deferring closure of the water diversion tunnels at Glen Canyon Dam.....	201
3. Congress may supersede or suspend the provisions of a basic act by an appropriation act provision which is in the form of a limitation on the availability of funds, and inquiry must be had to the legislative history of any such appropriation act provision to determine the intentions of Congress in this regard.....	201

**LEGISLATIVE HISTORY**

1. The language and legislative history of the act of Mar. 3, 1927, together with the avowed purpose of establishing a uniform policy for leasing all Executive order reservations for Indian purposes, compel the conclusion that the 1927 act is applicable to lands in Alaska.....	167
2. Where Congress specifically prohibited the construction of works for the protection of Rainbow Bridge National Monument with funds appropriated for fiscal years 1961, 1962, and 1963 for the construction of Glen Canyon Dam and Reservoir, the legislative history related to the appropriation acts expresses the Congressional intention to suspend those provisions of sections 1 and 3 of the Colorado River Storage Project Act relating to the taking of protective measures to preclude impairment of the Monument and precluding the construction of any dam or reservoir within any national park or monument.....	200
3. Congress may supersede or suspend the provisions of a basic act by an appropriation act provision which is in the form of a limitation on the availability of funds, and inquiry must be had to the legislative history of any such appropriation act provision to determine the intention of Congress in this regard.....	201
4. Where the language of an act is silent on the question of interest, resort must be had to the legislative history of the applicable statute.....	515

**SUBMERGED LANDS ACT**

**GENERALLY**

1. Section 6(m) of the Alaska Statehood Act provided that the Submerged Lands Act of 1953 was applicable to Alaska.....	107
2. Since section 6(m) of the Statehood Act extended to the new State the provisions of the Submerged Lands Act, then the marine animal and plant life throughout the submerged lands, including those lands covered by the Alaska Tidelands Act, was granted to the State.....	107

**SUBMERGED LANDS ACT—Continued**

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**GENERALLY—Continued**

3. It is clear from the expressed language of section 6(m) of the Statehood Act that Congress intended the Submerged Lands Act to be applicable to Alaska in the same manner and to the same extent as all other States of the Union..... 107

**SURFACE RESOURCES ACT****APPLICABILITY**

1. The Surface Resources Act is applicable to mining claims located for sand and gravel prior to July 23, 1955, but not perfected by discovery prior thereto..... 213

**VERIFIED STATEMENT**

1. A verified statement filed pursuant to section 5 of the act of July 23, 1955, asserting surface rights in mining claims which does not designate the section or sections of the public land survey which embrace most of the claims and contains only metes and bounds descriptions of such claims ties to points on the boundaries of certain sections fails to meet the statutory requirement that it "shall set forth \* \* \* [t]he section or sections" which embrace the claims and must be rejected as an incomplete statement as to such claims..... 12

**SURVEYS OF PUBLIC LANDS****GENERALLY**

1. Where the high-water mark of a navigable lake is not capable of being deduced from physical evidence, the lake shall be meandered along the water's edge as of the time of the survey..... 27

**TIMBER SALES AND DISPOSALS**

1. A partnership is properly required to post a bond in the sum of unsettled trespass liability incurred by closely tied corporations which will directly benefit from a timber sale to the partnership as a condition precedent to the execution by the United States of a timber sales contract to the partnership..... 449

**TORTS****GENERALLY**

1. An accident cannot be considered an act of God simply because it is raining when the accident occurs. If the rainfall is ordinary, the accident cannot be considered an act of God..... 355

**AMOUNT OF DAMAGES**

1. The common law rule that the expenses of litigating a tort claim are not recoverable as damages is followed in California, and applies to the expenses of prosecuting a claim administratively under the Federal Tort Claims Act. Under this rule, the charge made by a physician for the preparation of a medical report to be used in establishing the nature or extent of an alleged injury, rather than to assist in its treatment, is not a proper element of damages... 509
2. Under the law of California, the trier of the facts is accorded a wide latitude and an elastic discretion in determining the amount of compensation to be awarded as general damages for pain and suffering, temporary disability, and the like. The only standard is that the amount awarded must be such as a reasonable person would consider fair compensation..... 509

**TORTS—Continued**

**ANIMALS AND LIVESTOCK**

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| 1. Under the laws of Montana, before a landowner can recover for damages caused by trespassing animals he is required to fence them out. This does not charge the landowner with the duty to keep animals lawfully at large from coming on his land, or make their entry rightful, so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, not wantonly or intentionally caused. Livestock wander at their own and their owner's risk of loss----- | 397  |

**LICENSEES AND INVITEES**

- |  |     |
|--|-----|
| 1. In accordance with Wyoming law, a visitor to Yellowstone National Park is held to be an invitee. The duty owed to the visitor by the Government is to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger. The Government is not an insurer of the safety of the visitor-----  | 188 |
| 2. In accordance with District of Columbia law, a visitor to a national memorial is a licensee by invitation. The duty owed to the visitor by the Government is to use reasonable and ordinary care and to provide reasonably safe premises, and to protect or warn the visitor against any danger known to the Government which a careful visitor might not discover-----   | 354 |
| 3. The duty owed by the Government to a visitor to a national memorial in the District of Columbia includes the duty to provide adequate lighting in order that the visitor may observe any part of the premises and any condition of the premises which may endanger the visitor-----   | 354 |
| 4. A child who while visiting a National Park Service area in Maryland enters a building which, because of conditions such as the darkness and dilapidation of its interior, a child of his age would realize was a place that visitors were not supposed to enter is not an invitee while inside the building, but is merely a licensee or trespasser to whom, under Maryland law, no duty is owed by the proprietor except that of avoiding wilful injury or entrapment----  | 457 |
| 5. A child who while visiting a National Park Service area in Maryland falls through an unguarded opening in the floor of a building, where the child has only the status of a licensee or trespasser, where conditions such as darkness and dilapidation exist to a degree that a child of his age would recognize as a warning of the possible presence of concealed hazards, and where the opening would have been visible to the child if he had used a flashlight or lantern, is not entitled to recover damages for the fall, since the "attractive nuisance" doctrine is not followed in Maryland, and since the concept of "entrapment" is narrowly applied in that State----- | 457 |

**MOTOR VEHICLES**

- |  |     |
|--|-----|
| 1. Skidding on an icy street or road does not, as a matter of law, establish that the driver of the skidding motor vehicle was guilty of a negligent or wrongful act or omission in the operation of the vehicle. However, the skidding may be caused or accompanied by negligence upon which liability may be predicated----- | 208 |
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## TORTS—Continued

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<b>MOTOR VEHICLES—Continued</b>	
2. If either party can avoid an accident by the exercise of proper care, the accident cannot be said to be unavoidable. The issue of unavoidable accident arises only when the evidence shows that the accident happened from an unknown or unforeseen cause or in an unexplainable manner, which circumstances rebut any alleged negligence.....	208
3. The operator of a motor vehicle is liable for damage or injury resulting from the casting of stones from the surface of the highway by such vehicle only when the damage or injury was caused by the negligent or wrongful operation of the vehicle.....	448

## PARKS

1. In accordance with Wyoming law, a visitor to Yellowstone National Park is held to be an invitee. The duty owed to the visitor by the Government is to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger. The Government is not an insurer of the safety of the visitor.....	188
2. The mere fact that loose stones or gravel are present on an outdoor walk in a national park, and cause a visitor to the park to fall, does not establish either that the walk is dangerous <i>per se</i> , or that the walk is maintained in a negligent manner. In the absence of facts showing that the Government employees had a reasonable opportunity to discover the presence of the stones or gravel on the walk, and to remove them, no negligent or wrongful act can be imputed to the Government employees.....	188
3. A child who while visiting a National Park Service area in Maryland enters a building which, because of conditions such as the darkness and dilapidation of its interior, a child of his age would realize was a place that visitors were not supposed to enter is not an invitee while inside the building, but is merely a licensee or trespasser to whom, under Maryland law, no duty is owed by the proprietor except that of avoiding wilful injury or entrapment....	457
4. A child who while visiting a National Park Service area in Maryland falls through an unguarded opening in the floor of a building, where the child has only the status of a licensee or trespasser, where conditions such as darkness and dilapidation exist to a degree that a child of his age would recognize as a warning of the possible presence of concealed hazards, and where the opening would have been visible to the child if he had used a flashlight or lantern, is not entitled to recover damages for the fall, since the "attractive nuisance" doctrine is not followed in Maryland, and since the concept of "entrapment" is narrowly applied in that State.....	457

## TRESPASS

1. A child who while visiting a National Park Service area in Maryland enters a building which, because of conditions such as the darkness and dilapidation of its interior, a child of his age would realize was a place that visitors were not supposed to enter is not an invitee while inside the building, but is merely a licensee or trespasser to whom, under Maryland law, no duty is owed by the proprietor except that of avoiding wilful injury or entrapment....	457
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**TORTS—Continued****TRESPASS—Continued**

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2. A child who while visiting a National Park Service area in Maryland falls through an unguarded opening in the floor of a building, where the child has only the status of a licensee or trespasser, where conditions such as darkness and dilapidation exist to a degree that a child of his age would recognize as a warning of the possible presence of concealed hazards, and where the opening would have been visible to the child if he had used a flashlight or lantern, is not entitled to recover damages for the fall, since the "attractive nuisance" doctrine is not followed in Maryland, and since the concept of "entrapment" is narrowly applied in that State -----

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**TRESPASS****GENERALLY**

1. A partnership is properly required to post a bond in the sum of unsettled trespass liability incurred by closely tied corporations which will directly benefit from a timber sale to the partnership as a condition precedent to the execution by the United States of a timber sales contract to the partnership -----

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**MEASURE OF DAMAGES**

1. Where there has been an innocent trespass in the mining and removing of coal belonging to the United States in a State which fixes the measure of damages as the amount which will compensate for all the detriment proximately caused thereby, it is proper to call upon the trespasser for the value of the coal in place and not merely the royalty that would have been derived by the United States for the coal mined had the coal been mined under a lease issued to the trespasser -----

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**WITHDRAWALS AND RESERVATIONS****GENERALLY**

1. Lands in Alaska which have been withdrawn by Executive order for Indian purposes or for the use and occupancy of any Indians or tribe, may be leased for oil and gas development pursuant to the act of Mar. 3, 1927 -----
2. Lands in the Tyonek Reserve (Moquawkie Reservation) in Alaska which were "\* \* \* withdrawn from disposal, and reserved for the U.S. Bureau of Education \* \* \*" by Executive Order No. 2141, Feb. 27, 1915, were "\* \* \* withdrawn for Indian purposes or for the use and occupancy of \* \* \* Indians \* \* \*" within the meaning of the act of Mar. 3, 1927 -----
3. Although a departmental regulation precludes the acceptance of oil and gas offers to lease lands within wildlife refuges and by departmental order certain lands within existing oil and gas leases are made a part of a refuge, applications for the five-year extension of such leases should not be rejected on the ground that such lands have been withdrawn, when none of the action taken by the Department with respect to the lands purports to be a withdrawal of such lands from the operation of the Mineral Leasing Acts -----

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## WITHDRAWALS AND RESERVATIONS—Continued

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| 4. Although the Secretary of the Interior is by Executive Order No. 10355 authorized to exercise the power of the President to withdraw and reserve public domain and other lands owned or controlled by the United States, including the authority to modify or revoke past or future withdrawals or reservations, such power cannot be exercised over lands in a national forest without the approval or concurrence of the Secretary of Agriculture as required by Section 1(c) of the Executive Order----- | 429  |

## WORDS AND PHRASES

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|--|-----|
| 1. Land in a "producible status" as that term is used in section (a) (3) of the act of Aug. 27, 1958 (72 Stat. 928; 43 U.S.C., sec. 852), includes mineral lands subject to lease or permit and which are known, at the time the application for selection is complete, to contain a valuable and accessible deposit of mineral in such quantity and of such quality as to warrant the expenditure of funds for extraction and production-----   | 71  |
| 2. Mere knowledge that land under lease or permit contains valuable mineral deposits does not render it in a "producible status" within the meaning of section 2276(a) (3) of the Revised Statutes (43 U.S.C., sec. 852(a) (3))-----   | 82  |
| 3. Under the Act of Aug. 9, 1955 (69 Stat. 539; 25 U.S.C., sec. 415), which authorizes the Indian owners of restricted tribally or individually owned lands to lease such lands, with the approval of the Secretary of the Interior, for a term of not to exceed twenty-five years "for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary," the phrase "specialized crops" is not one of limitation, and the Secretary is authorized to approve such leases if, in order to produce the crop or crops proposed to be grown, he determines that a substantial investment in the improvement of the land is necessary for that purpose and the lessee is required to make such an investment----- | 119 |
| 4. Lands in the Tyonek Reserve (Moquawkie Reservation) in Alaska which were "* * * withdrawn from disposal, and reserved for the U.S. Bureau of Education * * *" by Executive Order No. 2141 Feb. 27, 1915, were "* * * withdrawn for Indian purposes or for the use and occupancy of * * * Indians * * *" within the meaning of the act of Mar. 3, 1927-----  | 167 |
| 5. <i>Copies.</i> An oil and gas offer is not to be rejected on the ground that the requisite number of "copies" has not been filed merely because some of the copies are found to be illegible-----   | 484 |
| 6. <i>Furnished.</i> Where a regulation requires that in cases where an attorney in fact or agent signs an assignment of an oil and gas lease there must be "furnished" evidence of his authority to sign, the word "furnished" does not mean that such evidence must "accompany" the assignment-----  | 491 |
| 7. Reference to "costs of construction" or similar phraseology in Federal statutes do not in themselves necessarily impute an interest requirement-----  | 515 |