UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D. C. 20240

Secretary of the Interior -------- Donald P. Hodel

Office of Hearings and Appeals -------- Paul T. Baird, Director

Office of the Solicitor -------- Ralph W. Tarr, Solicitor

DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR

EDITED BY

RACHAEL CUBBAGE

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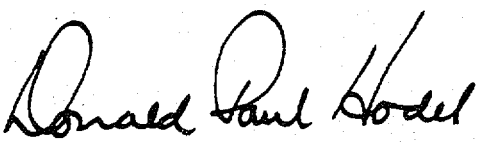
PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1 to December 31, 1988. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

The Honorable Donald P. Hodel served as Secretary of the Interior during the period covered by this volume; Mr. Earl Gjelde served as Under Secretary; Ms. Janet McCoy, Messrs. J. Steven Griles, William P. Horn, Ross O. Swimmer, Rick Ventura, and James W. Ziglar served as Assistant Secretaries of the Interior; Mr. Ralph W. Tarr served as Solicitor; and Mr. Paul T. Baird served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "95 I.D."



Secretary of the Interior

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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.
Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416.
Holden, Thomas A., 16 L.D. 493; overruled, 29 L.D. 166.
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Holman *v.* Central Montana Mines Co., 34 L.D. 568; overruled so far as in conflict, 47 L.D. 590.
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Hoy, Assignee of Hess, 46 L.D. 421; overruled, 51 L.D. 287.
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Humble Oil & Refining Co., 64 I.D. 5; distinguished, 65 I.D. 316.
Hunter, Charles H., 60 I.D. 395; distinguished, 63 I.D. 65.
Hurley, Bertha C., TA-66 (Ir.) (Mar. 21, 1952); overruled, 62 I.D. 12.
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Jacobsen *v.* BLM, 97 IBLA 182; overruled in part, (On Recon.), 103 IBLA 83.
Johnson *v.* South Dakota, 17 L.D. 411; overruled so far as in conflict, 41 L.D. 21.
Jones, James A., 3 L.D. 176; overruled, 8 L.D. 448.
Jones, Sam P., 74 IBLA 242; affirmed in part, as modified, & vacated in part, 84 IBLA 331.
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Kinney, E.C., 44 L.D. 580; overruled so far as in conflict, 53 I.D. 228.
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Knight *v.* Knight's Heirs, 39 L.D. 362; 40 L.D. 461; overruled, 43 L.D. 242.
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Kolberg, Peter F., 37 L.D. 453; overruled, 43 L.D. 181.
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La Follette, Harvey M., 26 L.D. 453; overruled so far as in conflict, 59 I.D. 416.
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L.A. Melka Marine Construction & Diving Co., 90 I.D. 322; vacated & dismissed, 90 I.D. 491.
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Lemmons, Lawson H., 19 L.D. 37; overruled, 26 L.D. 389.

Leonard, Sarah, 1 L.D. 41; overruled, 16 L.D. 463.

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Linhart *v.* Santa Fe Pacific R.R., 36 L.D. 41; overruled, 41 L.D. 284 (See 43 L.D. 536).

Liss, Merwin E., 67 I.D. 385; overruled, 80 I.D. 395.

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.

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

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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.

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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.

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Malone Land & 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.

Marathon Oil Co., 94 IBLA 78; vacated in part, (On Recon.), 103 IBLA 138.

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

Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, 53 IBLA 208, 88 I.D. 373.

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

Mather *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.

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McCord, W.E., 23 L.D. 137; overruled to extent inconsistent, 56 I.D. 73.

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

McCraney *v.* Hayes' Heirs, 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 *v.* Mountain View Mining & 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 & 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., 37 L.D. 243; overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).

McMicken, Herbert, 10 L.D. 97; 11 L.D. 96; distinguished, 58 I.D. 257.

McMurtrie, Nancy, 73 IBLA 247; overruled to extent inconsistent, 79 IBLA 153, 91 I.D. 122.

McNamara *v.* California, 17 L.D. 296; overruled, 22 L.D. 666.

McPeek *v.* Sullivan, 25 L.D. 281; overruled, 36 L.D. 26.

Mead, Robert E., 62 I.D. 111; overruled, 85 I.D. 89.

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Meeboer *v.* Schut's Heirs, 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 *v.* Brown, 15 L.D. 307 (See 39 L.D. 162).

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

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

Mikesell, Henry D., A-24112 (Mar. 11, 1946); overruled to extent inconsistent, 70 I.D. 149.

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

Miller, Duncan, A-20760 (Sept. 18, 1963); A-30742 (Dec. 2, 1966); A-30722 (Apr. 14, 1967); overruled, 79 I.D. 416.

Miller, Duncan, 6 IBLA 283; overruled to extent inconsistent, 85 I.D. 89.

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 & North Side R.R., 36 L.D. 488; overruled, 40 L.D. 187.

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Milwaukee, Lake Shore & Western Ry., 12 L.D. 79; overruled, 29 L.D. 112.

Miner *v.* Mariott, 2 L.D. 709; modified, 28 L.D. 224.

Mingo Oil Producers, 94 IBLA 384; vacated, (On Recon.), 98 IBLA 133.

Minnesota & Ontario Bridge Co., 30 L.D. 77; no longer followed, 50 L.D. 359.

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

Moore, Agnes Mayo, 91 IBLA 343; vacated, BLM decision *rev'd*, (On Judicial Remand), 102 IBLA 147.

Moore, Charles H., 16 L.D. 204; overruled, 27 L.D. 481.

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

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

Mountain Fuel Supply Co., A-31053 (Dec. 19, 1969); overruled, 79 I.D. 416.

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

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

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

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

Northern Pacific R.R. *v.* Marshall, 17 L.D. 545; overruled, 28 L.D. 174.

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

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

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

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

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Nyman *v.* St. Paul Minneapolis & Manitoba Ry., 5 L.D. 396; overruled, 6 L.D. 750.

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Olson *v.* Traver, 26 L.D. 350; overruled as far as in conflict, 29 L.D. 480; 30 L.D. 382.

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

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Opinion of Associate Solicitor, M-34999 (Oct. 22, 1947); distinguished, 68 I.D. 433.

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Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.

Opinion of Chief Counsel, 43 L.D. 339; explained, 68 I.D. 372.

Opinion of Deputy Ass't Secretary (Dec. 2, 1966); overruled, 84 L.D. 905.

Opinion of Deputy Solicitor, M-36562 (Aug. 21, 1959); overruled, 86 I.D. 151.

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

Opinion of Solicitor, D-44083 (Feb. 7, 1919); overruled, M-6397 (Nov. 4, 1921) (See 58 I.D. 158).

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

Opinion of Solicitor, 54 I.D. 517; overruled in part, M-36410 (Feb. 11, 1957).

Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, 88 I.D. 586.

Opinion of Solicitor, 55 I.D. 14; overruled so far as inconsistent, 77 I.D. 49.

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Opinion of Solicitor, M-28198 (Jan. 8, 1936); affirmed, 84 I.D. 1; overruled, 86 I.D. 3.

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Opinion of Solicitor, M-35093 (Mar. 28, 1949); overruled in part, 64 I.D. 70.

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Opinion of Solicitor, M-36051 (Dec. 7, 1950); modified, 79 I.D. 513.

Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled to extent inconsistent, 85 I.D. 433.

Opinion of Solicitor, M-36345 (May 4, 1956); overruled, 84 I.D. 905.

Opinion of Solicitor, M-36378 (Jan. 9, 1956); overruled to extent inconsistent, 64 I.D. 57.

Opinion of Solicitor, M-36410 (Feb. 11, 1957); overruled to extent of conflict, 88 I.D. 586.

Opinion of Solicitor, M-36434 (Sept. 12, 1958); overruled to extent inconsistent, 66 IBLA 1, 89 I.D. 386.

Opinion of Solicitor, M-36443 (June 4, 1957); overruled in part, 65 I.D. 316.

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Opinion of Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.

Opinion of Solicitor, M-36531 (Oct. 27, 1958); (Supp.) (July 20, 1959); overruled, 69 I.D. 110.

Opinion of Solicitor, M-36575 (Aug. 26, 1919); affirmed in pertinent part, 87 I.D. 291.

Opinion of Solicitor, 68 I.D. 433; distinguished & limited, 72 I.D. 245.

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Pace *v.* Carstarphen, 50 L.D. 369; distinguished, 61 I.D. 459.

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Pecos Irrigation & Improvement Co., 15 L.D. 470; overruled, 18 L.D. 168.

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

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Phillips, Cecil H., A-30851 (Nov. 16, 1967); overruled, 79 I.D. 416.

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

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

Pietkiewicz *v.* Richmond, 29 L.D. 195; overruled, 37 L.D. 145.

Pike's Peak Lode, 10 L.D. 200; overruled in part, 20 I.D. 204; 48 L.D. 523.

Pike's Peak Lode, 14 L.D. 47; overruled, 20 L.D. 204; 48 L.D. 523.

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

Prange, Christ C., 48 L.D. 448; overruled so far as in conflict, 60 I.D. 417.

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

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

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

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

Provinse, David A., 35 IBLA 221, 85 I.D. 154; overruled to extent inconsistent, 89 IBLA 154.

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

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

Puyallup Allotment, 20 L.D. 157; modified, 29 L.D. 628.

Ramsey, George L., A-16060 (Aug. 6, 1931); recalled & vacated, 58 I.D. 272.

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

Ranger Fuel Corp., 2 IBMA 163, 80 I.D. 708; set aside, 2 IBLA 186, 80 I.D. 604.

Rankin, James E., 7 L.D. 411; overruled, 35 L.D. 32.

Rankin, John M., 20 L.D. 272; *rev'd*, 21 L.D. 404.

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

Reed *v.* Buffington, 7 L.D. 154; overruled, 8 L.D. 100 (See 9 L.D. 360).

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

Reid, Bettie H., 61 I.D. 1; overruled, 61 I.D. 355.

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199; distinguished, 1 IBMA 71, 78 I.D. 362.

Relocation of Flathead Irrigation Project's Kerr Substation & Switchyard, M-36735 (Jan. 31, 1968); *rev'd* & withdrawn, 83 I.D. 346.

Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460; modified to extent inconsistent, 74 IBLA 170.

Rialto No. 2 Placer Mining Claim, 34 I.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 *v.* Atlantic & Pacific R.R., 6 L.D. 565; overruled so far as in conflict, 8 L.D. 165.

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

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

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

Rough Rider & Other Lode Claims, 41 L.D. 242; vacated, 42 L.D. 584.

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

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

St. Paul, Minneapolis & Manitoba Ry. *v.* Fogelberg, 29 L.D. 291; vacated, 30 L.D. 191.

St. Paul, Minneapolis & Manitoba Ry. *v.* Hagen, 20 L.D. 249; overruled, 25 L.D. 86.

St. Pierre *v.* Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132; overruled, 10 IBLA 464, 89 I.D. 609.

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

Santa Fe Pacific R.R. *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).

Schweite, Helena M., 14 IBLA 305; distinguished, 20 IBLA 162.

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

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

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

Shale Oil Co., 53 I.D. 213; overruled so far as in conflict, 55 I.D. 287.

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

Shaw Resources, Inc., 73 IBLA 291; reconsidered & modified, 79 IBLA 153, 91 I.D. 122.

Shillander, H.E., A-30279 (Jan. 26, 1965); overruled, 79 I.D. 416.

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; modified, 36 L.D. 205.

Simpson, Robert E., A-4167 (June 22, 1970); overruled to extent inconsistent, 31 IBLA 72, 84 I.D. 309.

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

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

Smith, M.P., 51 L.D. 251; overruled, 84 I.D. 54.

Snook, Noah A., 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.

South Dakota Mining Co. *v.* McDonald, 30 L.D. 357; distinguished, 28 IBLA 187, 83 I.D. 609.

Southern Pacific R.R., 15 L.D. 460; *rev'd* 18 L.D. 275.

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

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

Southern Pacific R.R. *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., 21 L.D. 57; overruled, 31 L.D. 151.

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

Sprulli, Leila May, 50 L.D. 549; overruled, 52 L.D. 339.

Standard Oil Co. of California, 76 I.D. 271; no longer followed, 5 IBLA 26, 79 I.D. 23.

Standard Oil Co. of California *v.* Morton, 450 F.2d 493; 79 I.D. 29.

Standard Shales Products Co., 52 L.D. 552; overruled so far as in conflict, 53 I.D. 42.

Star Gold Mining Co., 47 L.D. 38; distinguished, 71 I.D. 273.

State of (see State name).

Stevenson, Heirs of *v.* Cunningham, 52 L.D. 650; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

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

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

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

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

Streit, Arnold, T-476 (Ir.) (Aug. 26, 1952); overruled, 62 I.D. 12.

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

Stump, Alfred M., 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.

Superior Oil Co., A-28897 (Sept. 12, 1962); distinguished in dictum, 6 IBLA 318, 70 I.D. 439.

Sweeney *v.* Northern Pacific R.R., 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.P.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, Heirs of *v.* Hempfling, 2 L.D. 46; overruled, 14 L.D. 200.
Tate, Sarah J., 10 L.D. 469; overruled, 21 L.D. 209.
Taylor, Josephine, A-21994 (June 17, 1939); overruled so far as in conflict, 59 I.D. 258.
Taylor *v.* Yates, 8 L.D. 279; *rev'd*, 10 L.D. 242.
Teller, John C., 26 L.D. 484; overruled, 36 L.D. 36 (See 37 L.D. 715).
T.E.T. Partnership, 84 IBLA 10; vacated & *rev'd*, 88 IBLA 13.
Thorstenson, Even, 45 L.D. 96; overruled, 36 L.D. 36 (See 37 L.D. 258).
Tibbetts, R. Gail, 43 IBLA 210, 86 I.D. 538; overruled in part, 86 IBLA 215.
Tieck *v.* McNeil, 48 L.D. 158; modified, 49 L.D. 260.
Toles *v.* Northern Pacific Ry., 39 L.D. 371; overruled so far as in conflict, 45 L.D. 92.
Tonkins, H.H., 41 L.D. 516; overruled, 51 L.D. 27.
Towl *v.* Kelly, 54 I.D. 455; overruled, 66 IBLA 374, 89 I.D. 415.
Traganza, Mertie C., 40 L.D. 300; overruled, 42 L.D. 611.
Traugh *v.* Ernst, 2 L.D. 212; overruled, 3 L.D. 98.
Tripp *v.* Dunphy, 28 L.D. 14; modified, 40 L.D. 128.
Tripp *v.* Stewart, 7 C.L.O. 39; modified, 6 L.D. 795.
Tucker *v.* Florida Ry. & Navigation Co., 19 L.D. 414; overruled, 25 L.D. 233.
Tupper *v.* Schwarz, 2 L.D. 623; overruled, 6 L.D. 624.
Turner *v.* Cartwright, 17 L.D. 414; modified, 21 L.D. 40.
Turner *v.* Lang, 1 C.L.O. 51; modified, 5 L.D. 256.
Tyler, Charles, 26 L.D. 699; overruled, 35 L.D. 411.

Ulin *v.* Colby, 24 L.D. 311; overruled, 35 L.D. 549.
Union Oil Co. of California (Supp.), 72 I.D. 313; overruled & rescinded in part, 74 IBLA 117.
Union Pacific R.R., 33 L.D. 89; recalled, 33 L.D. 528.
U.S. Forest Service *v.* Milender, 86 IBLA 181, 95 I.D. 175; *rev'd* & modified in part, 104 IBLA 207, 95 I.D. 155.
United Indian of All Tribes Foundation *v.* Acting Deputy Ass't Secretary–Indian Affairs, 11 IBIA 226; vacated in part, 11 IBIA 276, 90 I.D. 376.
U.S. *v.* Aiken Builders Products, 95 IBLA 55; (On Recon.), 102 IBLA 70; vacated by memorandum decision of the Secy, 102 IBLA 85A.
U.S. *v.* Barngrover, 57 I.D. 533; overruled in part, 21 IBLA 363, 82 I.D. 414.
U.S. *v.* Bush, 13 L.D. 529; overruled, 18 L.D. 441.
U.S. *v.* Central Pacific Ry., 52 L.D. 81; modified, 52 L.D. 235.
U.S. *v.* Cohan, 70 I.D. 178; overruled in part, U.S. Forest Service *v.* Milender, 86 IBLA 181, 92 I.D. 175.
U.S. *v.* Dana, 18 L.D. 161; modified, 28 L.D. 45.
U.S. *v.* Edeline, 39 IBLA 236; overruled to extent inconsistent, 74 IBLA 56, 90 I.D. 262.
U.S. *v.* Feezor, 74 IBLA 56, 90 I.D. 262; vacated in part & remanded, 81 IBLA 94.
U.S. *v.* Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285; set aside & remanded, 12 IBLA 282, 80 I.D. 538.
U.S. *v.* Livingston Silver, Inc., 43 IBLA 84; overruled to extent inconsistent, 82 IBLA 344, 91 I.D. 271.
U.S. *v.* McClarty, 71 I.D. 331; vacated & remanded, 76 I.D. 193.
U.S. *v.* Melluzzo, 76 I.D. 181; 1 IBLA 37, 77 I.D. 172.
U.S. *v.* Mouat, 60 I.D. 473; modified, 61 L.D. 289.
U.S. *v.* O'Leary, 63 I.D. 341; distinguished, 64 I.D. 210.
U.S. *v.* Swanson, 34 IBLA 25; modified, 93 IBLA 1, 93 I.D. 288.
Utah, State of, 45 L.D. 551; overruled, 48 L.D. 97.
Utah Wilderness Ass'n (I), 72 IBLA 125; affirmed in part, *rev'd* in part, 86 IBLA 89.

Veach, 46 L.D. 496; overruled so far as in conflict, 49 L.D. 461 (See 49 L.D. 492).

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

Virginia-Colorado Development Corp., 53 I.D. 666; overruled so far as in conflict, 55 I.D. 287.

Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604; modified to extent inconsistent, 74 IBLA 170.

Vradenburg, Heirs of *v.* Orr, 25 L.D. 323; overruled, 38 L.D. 253.

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

Wahe, John, 41 L.D. 127; modified, 41 L.D. 636.

Walker *v.* Prosser, 17 L.D. 85; *rev'd*, 18 L.D. 425.

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

Wallis, Floyd A., 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22.

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

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

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

Wass *v.* Milward, 5 L.D. 349; no longer followed (See 44 L.D. 72 & Ebersold *v.* Dickson, D-36502 (Sept. 25, 1918)).

Wasserman, Jacob N., A-30275 (Sept. 22, 1964); overruled, 79 I.D. 416.

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., A-25128 (May 27, 1949); overruled in part, 62 I.D. 62.

Weaver, Francis D., 53 I.D. 179; overruled so far as in conflict, 55 I.D. 287.

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., 40 L.D. 411, 41 L.D. 599; overruled, 43 L.D. 410.

Western Slope Gas Co., 40 IBLA 280; recon. denied, 48 IBLA 259; overruled in pertinent part, 87 I.D. 27.

Wexpro Co., 90 IBLA 394; overruled, Celsius Energy Co., 99 IBLA 54, 94 I.D. 394.

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

Wheeler, William D., 30 L.D. 355; distinguished & overruled, 56 I.D. 73.

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

White, Sarah V., 40 L.D. 630; overruled in part, 46 L.D. 55.

Whitten *v.* Read, 40 L.D. 253; 50 L.D. 10; vacated, 53 I.D. 447.

Wickstrom *v.* Calkins, 20 L.D. 459; modified, 21 L.D. 533; overruled, 22 L.D. 392.

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

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

Wilkens, Benjamin C., 2 L.D. 129; modified, 6 L.D. 797.

Williamette Valley & Cascade Mountain Wagon Road Co. *v.* Bruner, 22 L.D. 654; vacated, 26 L.D. 357.

Williams, John B., 61 I.D. 31; overruled so far as in conflict, 61 I.D. 185.

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

Willis, Cornelius, 47 L.D. 135; overruled, 49 L.D. 461.

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

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

Winchester Land & Cattle Co., 65 I.D. 148; no longer followed in part, 80 I.D. 698.

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

Wolf Joint Ventures, 75 I.D. 137; distinguished, 31 IBLA 72, 84 I.D. 309.

Wostenberg, William, A-26450 (Sept. 5, 1952); distinguished in dictum, 6 IBLA 318, 70 I.D. 439.

Wright *v.* Smith, 44 L.D. 226; overruled, 49 L.D. 374.

Young Bear, Victor, Estate of, 8 IBIA 130, 87 I.D. 311; *rev'd*, 8 IBIA 254, 88 I.D. 410.

Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221, 1974-75 OSHD par. 19,638; overruled in part, 7 IBMA 85, 83 I.D. 574.

Zimmerman *v.* Brunson, 39 L.D. 310; overruled, 52 L.D. 714.

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, 1875 edition, 1 volume; 1882 edition, 2 volumes; 1890 edition, 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; and "I.D." to Decisions of the Department of the Interior, Vols. 53 to current volume.—Editor.

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

HIKO BELL MINING & OIL CO., *ET AL.* (ON RECONSIDERATION)

100 IBLA 371 Decided *January 15, 1988*

Petition for reconsideration of the Board's decision in Hiko Bell Mining & Oil Co., 93 IBLA 143 (1986).

Petition granted; prior decision sustained as modified.

1. Oil and Gas Leases: Discovery--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Unit and Cooperative Agreements--Words and Phrases

"Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

2. Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Unit and Cooperative Agreements

Under 30 U.S.C. § 226(f) and (j) (1982), a unitized oil and gas lease will not expire for lack of production at the end of its term if there is a unit well capable of producing oil or gas in paying quantities. Such a well must be in physical condition to produce and is not in such condition if the casing has not been perforated.

3. Administrative Authority: Estoppel--Estoppel--Federal Employees and Officers: Authority to Bind Government--Oil and Gas Leases: Extensions

A lessee's reliance upon the erroneous statements of a BLM employee does not estop the Department from denying an extension of an oil and gas lease if the lease did not qualify for an extension under the Mineral Leasing Act.

APPEARANCES: Robert E. Musgraves, Esq., and Wayne F. Forman, Esq., for the Dirty Devil Limited Partnership; Dwight I. Bliss, Esq., C. M. Peterson, Esq., and Laura Payne, Esq., Denver, Colorado, for other petitioners; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

In *Hiko Bell Mining & Oil Co.*, 93 IBLA 143 (1986), we affirmed a decision by the Utah State Office, Bureau of Land Management (BLM), declaring that certain oil and gas leases[1] had terminated effective August 16, 1984, because production was not established within the Dirty Devil unit area prior to that date. Petitions for reconsideration of this decision have been filed by the appellants in the case and the Dirty Devil Limited Partnership (Dirty Devil).[2] Each lease was within the Dirty Devil unit at the time of its expiration. All of the leases had a common expiration date because they received the same 2-year extension upon elimination from a prior unit effective August 16, 1982. Appellants, however, had contended that they had discovered gas in paying quantities under the Dirty Devil unit plan prior to lease expiration, and that such discovery was sufficient to extend the leases pursuant to the following provision of 30 U.S.C. § 226(j) (1982):

> Any other lease [other than one for a term of 20 years] issued under any section of this chapter which has heretofore or may hereafter be committed to any such [unit] plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease.* [Italics supplied.]

This language, they argued, should be interpreted differently than that of 30 U.S.C. § 226(e) (1982), which provides that an individual lease "shall continue so long after its primary term as oil or gas *is produced* in paying quantities." (Italics added.)

The essential facts were set forth in our prior decision as follows:

> [T]he initial Dirty Devil unit obligation well, the Dirty Devil 22-27, * * * was commenced on August 5, 1984, and reached a total depth of 4,377 feet on August 8. On that same day, the well had a "substantial gas kick," appellants state, and seven stands of drill pipe were removed from the hole. Well reports show that the well flowed gas through its safety manifold at the rate of 2.475 MMCFGPD (Exh. 2 to appellant's statement of reasons). Appellants observe that on subsequent days the gas flow continued and the operator attempted to "kill" the well so that casing could be run. Casing was eventually run on August 15 and 16, and electric logs were also run. Finally on August 17, 1984, at 0230 hours, four intervals of the Wasatch formation were perforated and the rig was released at 9 a.m. that day.

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[1] These leases are:

IBLA Docket No.	Appellant	Lease No.
85-102	Hiko Bell Mining & Oil Co.	U-14233
85-103	Natural Gas Corporation of California	U-9215 and U-13370
85-104	Sheridan McGarry	U-23265
85-105	Natural Gas Corporation of California and Enserch Exploration, Inc.	U-0148651, U-148653-A, U-1206, U-2557, U-3443 U-14656, U-23156, U-23282, and U-38433

[2] On Aug. 27, 1986, the Board received a petition for reconsideration of the *Hiko Bell* decision filed by Dwight I. Bliss and C. M. Peterson on behalf of all the appellants in the consolidated appeal. By letter dated Sept. 4, 1986, the Board was informed that the Dirty Devil Limited Partnership had acquired all of Hiko Bell's interest in the leases involved in the appeal, and the Board allowed Dirty Devil to file a separate petition.

Appellants acknowledge that the Dirty Devil 22-27 was not physically capable of producing at midnight on August 16, 1984, but contend, nevertheless, that the well had *discovered* gas in paying quantities under the Dirty Devil unit plan prior to lease expiration. Gas production was achieved on August 8, appellants state, and this production continued until the well was killed. Drilling reports reflect that gas was flared on August 13 and 15. In the opinion of Robert E. Covington, an officer of and geologist for Hiko Bell Mining and Oil Company, the recovery of natural gas during drilling, the evaluation of electric logs, and other data prior to August 17, 1984, clearly reflected that subsequent sustained production would confirm that the well was capable of producing gas in paying quantities under the unit agreement. Appellants argue, therefore, that their leases were entitled to an extension under 30 U.S.C. § 226(j) (1982), regulation 43 CFR 3107.3, and article 18(e) of the unit agreement. [Italics in original.]

93 IBLA at 144.

Citing *Yates Petroleum Corp.*, 67 IBLA 246, 89 I.D. 480 (1982), we rejected appellants' argument that extension of a lease subject to a unit agreement should be governed by a different standard than an individual lease:

For purposes of an extension under section 17(j) [30 U.S.C. § 226(j) (1982)], a well subject to a unit agreement must be capable of producing sufficient hydrocarbons to recover the costs of operating and marketing, but need not recoup the cost of drilling. *Id.* at 258, 89 I.D. at 487. An identical standard applies to an extension of an individual lease at the end of its primary term.

93 IBLA at 145. We affirmed BLM's determination that the leases expired and were not extended by virtue of section 226(j).

Petitioner Dirty Devil contends that the "production is had" language of section 226(j) is ambiguous, and that we should interpret it in accordance with congressional intent in enacting it in 1954 to encourage exploration and development of oil and gas; that our decision would discourage exploration and production activity during the later months of unitized oil and gas leases; that requiring the well casing to be in place and perforated before the lease expires in order to extend its term will encourage "slap-dash" measures that might not be in the best interests of safety or conservation; and that our previous decision ignores several references to "discovery" in the Dirty Devil Unit Agreement. The other petitioners contend in addition that *Yates* construed only the meaning of "in paying quantities" as the same for purposes of subsections 226(e) and (j) and that the *Yates* decision itself provides a reason for a more liberal standard for extending a lease in a unit than an individual lease, namely, that the holder of a unitized lease surrenders his exclusive right to drill on his lease in favor of the coordinated drilling plan authorized under the unit agreement.

BLM responds that the Department has historically required, for both individual leases and leases subject to a unit agreement, "that before a finding of production in paying quantities on a well may be found, the well must be drilled, cemented, perforated, and tested positively for oil and gas." BLM contends that the language of section 226(j) is not ambiguous and that the legislative history does not support interpreting it differently from section 226(e). BLM points out

that the deadline for achieving production is statutory and may not be varied by the terms of a unit agreement or waived by the Department. Finally, BLM argues that petitioners have provided no substitute for the current rule that production in paying quantities be proved by the drilling of a well which is cemented and perforated and shows the presence of oil or gas in paying quantities. To this, Dirty Devil replies:

> [W]here a well hole is completely drilled and the well is physically demonstrated to be capable of producing gas in paying quantities, the requisites of § 226(j) are met for purposes of obtaining an extension under that provision without regard to the question of whether or not the well has been cased and perforated.

Reply in Support of Petition for Reconsideration filed June 11, 1987, at 6. It refers to this as an "open hole test" or an "open well test." *Id.*

We will discuss petitioners' arguments seriatim.

Dirty Devil argues that to construe 30 U.S.C. § 226(j) (1982) to require production instead of discovery would be contrary to the intent of Congress as evidenced by the legislative history of the amendments to the Mineral Leasing Act made by the Act of July 29, 1954, ch. 644, 68 Stat. 583, and cites various portions of H.R. Rep. No. 2238, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 *U.S. Code Cong. & Ad. News* 2695-2704. BLM contends that the language of the statute is unambiguous and does not require examination of its legislative history.

The Supreme Court has considered the "plain language" of statutes in recent decisions construing public lands legislation:

> Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning. "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States* v. *Locke*, 471 U.S. 84, 95 . . . (1985) (*quoting Richards* v. *United States*, 369 U.S. 1, 9 . . . (1962)).

AMOCO Production Co. v. *Village of Gambell, Alaska*, _____ U.S. _____, 107 S. Ct. 1396, 1406 (1987); *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). In these cases the Court also examined the legislative history of the statutes involved and determined that "nothing in the Act's structure or relationship to other statutes calls into question this plain meaning." *AMOCO Production Co.* v. *Village of Gambell, Alaska, supra* at 1408.[3] The petitions for reconsideration in this case similarly require us to examine the structure of the Mineral Leasing Act and to construe the provision under consideration along with related provisions. Further, we must reconcile differences between the language of section 226(j) and some of its legislative history.

In *Celsius Energy Co.*, 99 IBLA 53, 69, 94 I.D. 394, 403 (1987), we recently restated our principle for construing the provisions of 30 U.S.C. § 226(j) (1982): "[T]here can be no departure from the text of

[3] The Court's approach to statutory interpretation in this regard is similar to that employed by Chief Justice John Marshall in *United States* v. *Fisher*, 2 Cranch (6 U.S.) 358 (1804).

the statute in order to apply 'the policy in favor of unitization' without careful examination of what Congress intended when it enacted the specific provision pertaining to a particular event affecting the tenure of a lease." In *Celsius* we were required to consider in the context of a different issue the same legislative history cited by Dirty Devil in its petition. In *Celsius*, as in this case, we were confronted with language in this Department's report on proposed amendments to the Mineral Leasing Act which differed from the text of the amendments which was also drafted by the Department. We observed:

> Although the emphasized language was not part of the statutory text proposed by the Department, it nevertheless describes the intended meaning and effect of the proposed statutory language which Congress adopted *verbatim* when it enacted the statute into law. * * * Although the emphasized language appears only in the Interior Department's report, this report was appended to the House Report, and courts have generally accepted such appended reports and letters from officials of this Department as evidence of legislative intent. *See e.g., Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 50, 55-56 (1983); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 407 n.1 (1917); *United States* v. *Union Oil Co.*, 549 F.2d 1271, 1277 (9th Cir.), *cert. denied sub nom. Ottoboni* v. *United States*, 434 U.S. 930 (1977). So has this Board. *E.g., Western Nuclear, Inc.*, 35 IBLA 146, 157, 85 I.D. 129, 135 (1978), *aff'd, Watt* v. *Western Nuclear, Inc., supra; Cecil A. Walker*, 26 IBLA 71, 76 (1976). Inasmuch as such reports represent views of senior officials of this Department which served as the basis for legislative action, this Board is not generally disposed to apply enacted legislation in a manner inconsistent with such statements. *Id.* Such a conclusion is especially compelling where, as here, Congress enacted *verbatim* the statutory language proposed by the agency. [Italics in original.]

99 IBLA at 76-77, 94 I.D. at 407-08.

Nevertheless, we also recognized in *Celsius* we could not totally disregard the text of the statute and substitute the legislative history in its place. In fact, we declined to give full effect to the language of the legislative history over the language of the statute. Instead, we chose to give the word being construed in that decision the same meaning it had when it was used elsewhere in the statute. The same methodology may legitimately be used here: in addition to examining the legislative history of section 226(j), we will consider the use of the word "production" elsewhere in the Act as an aid to ascertaining its meaning in this case.[4]

It is important to recognize that the pertinent language of the provision in 30 U.S.C. § 226(j) (1982), was amended once after it was originally enacted. On several occasions, this Board has examined the evolution of statutory provisions pertaining to unit agreements, starting with the enactment of the first measure establishing temporary authority for approving unit agreements in 1930. *See*

[4] Had we looked merely to the legislative history in *Celsius*, we might have been led to the conclusion that there were no circumstances under which a nonunitized portion of a lease segregated by partial commitment to a unit can be extended by production from the unitized portion. Instead, we held that when a lease is segregated upon partial committment to a unit agreement pursuant to 30 U.S.C. § 226(j) (1982), production on the unitized portion can extend production on the nonunitized portion if the segregation occurs when the base lease is in an extended term because of production, but not if such lease is in a fixed term of years. In reaching this conclusion, we were called upon to construe the word "term" as it appears in 30 U.S.C. § 226(j) (1982), and we concluded that the most authoritative construction of the word could be achieved by comparing it with other uses of the word in the text of the statute.

Celsius Energy Co., supra; Anne Burnett Tandy, 33 IBLA 106, 109-10 (1977). For the purposes of this case, it is sufficient to note that, prior to 1946, only 20-year leases could enjoy extension beyond their terms for the life of the unit. No other leases could be extended pursuant to this provision. Leases with primary terms of 5 years could be extended by production, and if such a lease was allocated production from a producing unit, the lease was considered to be extended by production under the provisions of the individual lease, not by any statutory provision relating to unitized leases. *See General Petroleum Corp.*, 59 I.D. 383, 387 (1947).

By section 5 of the Act of August 8, 1946, P.L. 696, 60 Stat. 953 (1946), however, Congress provided, as the second sentence of the fourth paragraph of section 17(b), that leases other than 20-year leases could be extended by virtue of their commitment to a unit plan:

> Any other lease [other than a 20-year lease] issued under any section of this Act which is committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan, provided oil or gas is *discovered* under the plan prior to the expiration date of the *primary term* of such lease. [Italics added.]

The Department's report on the bill that became P.L. 79-696, S. 1236, stated:

> There is no specific provision either in the present law or in the bill which expressly provides for the *extension of* 5- and 10-year *leases which have been committed to any such plan upon which a discovery has been made.* In my opinion, any leases which are committed to a unit or cooperative plan should be given a like extension *provided that oil and gas is being produced from some part of the unitized area.* In fact, the Department has been following the practice of recognizing such extensions. The proposed substitute has been so drafted as to expressly sanction this practice (sec. 17(b)). [Italics added.]

Report of the Department of the Interior to the Senate Committee on Public Lands and Surveys, S. Rep. No. 1392, 79th Cong., 2d Sess., at 10.

Although this report recommended both extending leases "committed to any * * * plan upon which *a discovery has been made*" and doing so "provided that oil and gas *is being produced* from some part of the unitized area," it was the former alternative that made its way into the 1946 Act. (Italics supplied.)

The 1946 statute, however, posed one particular difficulty. At that time, individual leases were issued for primary terms of 5 years and were eligible for extension for 5-year secondary terms. If such a lease were committed to a unit but the discovery of oil and gas under a unit agreement did not occur until after the primary term of the lease, the lease could not be extended by the above-quoted provision. This problem was identified by the industry, which sought to change the legislation:

> Coming now to the fourth amendment to S. 2380, it touches upon a problem which many unit operators have faced in the Rocky Mountain region where again, under a departmental interpretation of the expression "primary term," they have limited it to mean the first 5 years of a noncompetitive lease, so that in order to keep a 5-year

noncompetitive lease alive under a unit plan, there must be discovery under the unit plan within the first 5 years of the lease. This placed that particular type of lease at a disadvantage with other types of committed leases which are kept alive by virtue of production in the unit at any time.

Of course, that resulted in great operating difficulties when you had, for example, a 5-year noncompetitive lease in its secondary term and you attempted to unitize that lease and you found you couldn't keep it alive by unitization.

It is a technical problem, but it is one we have encountered many times in the Rocky Mountains.

To amend the Mineral Leasing Act: Hearing before the Subcom. on Public Lands of the Senate Comm. on Interior and Insular Affairs on S. 2380, S. 2381, and S. 2382, 83d Cong., 2d Sess. 22 (1954) (Statement of Howard M. Gullickson, Chairman, Legal Committee, Rocky Mountain Oil and Gas Association) (hereinafter *Hearing*).

Senator Frank A. Barrett of Wyoming introduced a bill which would have amended the 1946 provision simply by striking out "of the primary term." S. 2382, 83rd Cong., 1st Sess. (1953), *reprinted in Hearing, supra* at 2. Thus, Senator Barrett's bill would have retained the discovery standard established by the 1946 Act. However, Senator Barrett explained that the Assistant Secretary of the Interior made a report on S. 2380 and S. 2382 (dated April 20, 1954), "and recommended many changes in the bills, as introduced. He also recommended a proposed substitute consolidating the two bills." *Hearing, supra* at 2. This report subscribed to the objective of S. 2382, described the limitation of the existing law, and discussed one of the amendments proposed by the Department, as follows:

My Dear Senator Butler: This is in reply to the request of your committee for a report on S. 2380, a bill to amend section 17 of the Mineral Leasing Act of February 25, 1920, as amended, and on S. 2382, a bill to amend section 17b of the Mineral Leasing Act of February 25, 1920, as amended, in order to promote the development of oil and gas on the public domain.

I fully agree with the objectives of both of these bills, but believe they should be consolidated into a single bill, and with certain amendments, I recommend the enactment of such a consolidated bill.

These bills would encourage exploration and development for oil and gas on the public-domain lands by liberalizing the provisions of the Mineral Leasing Act as to the extension of oil and gas leases.

* * * * * * *

(4) Section 17 (b), paragraph 4, sentence 2.–S. 2382 would provide for extension of any oil or gas lease which is committed to a cooperative or unit plan of development for operation of an oil or gas pool. *At present, any lease other than a 20-year term lease may be extended only if oil and gas is discovered under the plan during the primary term of the lease.*

There is no reason to limit the extension privilege to the case where discovery is made during the primary term of the lease. Since the rights of individual leaseholders to drill on leases committed to a plan are severely curtailed, none of them should be penalized because of necessary delays in obtaining production from the unit area. The enactment of this legislation would not delay development since unit plans have their own development requirements. In fact, these requirements are intended to be substituted for, and they customarily are far more rigorous than those contained in the individual

leases. The amendment proposed in this report would provide for segregation of any portion of a lease not committed to the plan and for continuance of such a segregated lease for at least 2 years after segregation and so long thereafter as oil or gas is produced in paying quantities on the segregated portion of the lease. [Italics supplied.]

Hearing, supra at 2-4.

The language of the proposed substitute bill combining S. 2380 and S. 2382 contained an amendment revising the proviso in the second sentence of the fourth paragraph of section 17(b), however, as emphasized below:

(4) Strike out the second sentence of the fourth paragraph of section 17 (b) and insert in lieu thereof the following language:

Any other lease under any section of this Act which has heretofore or may hereafter be committed to any such plan that contains a general provision for allocation of oil and gas, shall continue in force and effect as to the land committed, so long as the lease remains subject to the plan: *Provided, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease.* Any lease hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: Provided, however, That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. [Italics added.]

Id. at 5.

Senator Barrett stated at the hearing that the Senate committee "had a committee print set up which followed the language recommended by the Secretary of the Interior," *id.* at 6, and the language of the April 23, 1954, committee print corresponds to that proposed by the Department.

The only discussion of this provision that occurred at the Senate committee's May 12, 1954, hearing was the following among Senator Barrett, Gullickson, and Lewis Hoffman, Chief of the Mineral Division of the Bureau of Land Management:

Mr. Gullickson [concluding his remarks quoted above]. That amendment is designed to remedy that inequity which now exists between those two classes of leases.

Senator Barrett. It puts a noncompetitive lease within a unit on a par with another lease on which production has been encountered; is that right?

Mr. Gullickson. Yes. For example, on a type of Federal lease such as a 20-year lease, if production is encountered anywhere in the unit it will keep such a lease alive.

Senator Barrett. I should have qualified, the noncompetitive lease in the same unit. They are both protected in the same fashion.

Mr. Gullickson. That is right.

Mr. Lewis E. Hoffman (Chief, Minerals Division, Bureau of Land Management). It keeps those leases alive which are in their second 5-year extended term. The present law being that they would terminate.

Hearing, supra at 22-23.

It should be noted that Gullickson began his testimony with the following statement:

We have had an opportunity in recent days to examine carefully the report and recommendations by the Secretary of the Interior to this Senate committee with respect

to 2380, and we are prepared to say that we are entirely in accord with the analysis and views expressed in the Interior Department's report.

Hearing, supra at 20.

After the hearing, at the request of Senator Barrett, Hoffman filed a report explaining the Department's proposed consolidated bill. This report begins by referring to the proposed substitute attached to Assistant Secretary Wormser's April 20, 1954, report for "[the] language of proposed amendments." Curiously, however, the explanation itself reverts to the word "discovery" instead of "production" as the event within a unit plan that would extend 5-year leases committed to a unit:

> (4) Section 17 (b), paragraph 4, sentence 2.–Under present law, leases committed to an approved unit plan of operation are extended beyond the 5-year term and coextensive with the life of the unit plan if oil and gas is discovered under the plan. This extension is limited to leases in their first 5-year period. If discovery is made beyond the 5-year period, such leases do not get the benefit of being committed to a unit plan and a discovery in such unit plan. The proposed amendment would extend all leases, whether in their primary term or secondary term, or of whatever nature they are committed to an approved unit plan of operation, upon discovery of oil and gas anywhere within the boundaries of such plan. Also, this amendment would provide for segregation of any portion of a lease not committed to the plan, and such segregated portion would be extended for at least 2 years after segregation to enable the lessee for the lands outside the unit plan to drill and, if he discovers oil or gas in paying quantities, it would continue indefinitely as long as oil or gas is produced.

Hearing, supra at 40.

This language was incorporated into both the Senate and House reports on the bill. *See* H.R. Rep. No. 2238, 83rd Cong., 2d Sess. at 4, *reprinted in* 1954 *U.S. Code Cong. & Ad. News* 2695 at 2698; S. Rep. No. 1609, 83rd Cong., 2d Sess. at 3. Also included in the Senate and House reports was Assistant Secretary Wormser's April 20, 1954, report with its proposed substitute language.

During the debate on the bill Senator Barrett made the following statement concerning this provision:

> Under present interpretation of the law noncompetitive leases in a unit will be extended if production is encountered in the unit during the first 5 years of the lease. Under this provision all leases within the unit will be extended during the secondary term, when production is encountered within the unit * * *

100 Cong. Rec. 10035 (July 8, 1954).

There are several possible explanations for the inconsistency in the legislative history of this provision. Most plausible is that Hoffman's explanation submitted to the Senate committee after the hearing mistakenly employed the language of the 1946 Act rather than the Department's proposed amendment of that language that was adopted by the committee. It is possible that the use of "discovery" was intentional, since Hoffman told the committee that his report would be "on the suggested changes with which we go along with the industry." *Hearing, supra* at 39. The fact that Hoffman's report begins by

referring to the language of the April 20 substitute bill makes this unlikely, however.

In any event, our conclusion is that it is the language of the Act that must control, not only because the majority of the references in the legislative history are to "production" rather than "discovery" but more importantly because "Congressmen typically vote on the language of a bill." *United States* v. *Locke, supra* at 95. Our conclusion that the Congress replaced the 1946 discovery standard with a production standard does not contravene the congressional purpose of liberalizing the provisions of the Mineral Leasing Act in 1954, however. That liberalization was effected by allowing an extension of a lease committed to a unit after its primary term. Thus, the 1954 amendment liberalized the 1946 provision by providing that a unitized lease would be extended by unit production at any time during the term of the lease, rather than only by a discovery during its primary term.

The words "production" and "discovery" are not used interchangeably in the Mineral Leasing Act, and it is important to maintain a difference in their meanings. 30 U.S.C. § 226(d) (1982) requires a lessee to pay annual rental of $.50/acre for a lease until "a discovery of oil or gas in paying quantities," after which a minimum royalty of $1 per acre in lieu of rental is due. Both competitive and noncompetitive leases are conditioned upon payment of a royalty of 12-1/2 percent in amount or value "of the production removed or sold from the lease" under 30 U.S.C. § 226(b) and (c) (1982), respectively. Section 226(f) addresses the circumstances under which a lease subject to termination "because of cessation of production" may be terminated. That subsection also provides that a lease on lands on which "there is a well capable of producing oil or gas in paying quantities" shall not "expire" for failure to produce unless the lessee does not place the well in producing status within 60 days of notice to do so or unless, having done so, "production is discontinued" without the Secretary's permission. If "discovery" were interpreted as tantamount to "production" a lessee could pay the minimum royalty of $1/acre rather than 12-1/2 percent of the value of the oil or gas he removed, for example, or could hold a lease simply by having a well capable of production on it. Neither of these possibilities conforms to the structure of the Act, however, and we will not construe "production" in section 226(j) in a manner that would undermine that structure.

[1] If Congress had intended for petitioners' leases to be extended by discovery instead of by production, Congress would have employed language in the law to give effect to such an intent. In 30 U.S.C. § 187a (1982), for example, Congress expressly provided that certain leases created by a segregation resulting from a partial assignment could be extended by a discovery. This provision was first introduced by the 1946 amendments of the Mineral Leasing Act, the same amendments which provided that a unitized lease could be extended for the life of a plan if there were discovery under the plan before the end of the primary term of the lease. If the 1954 amendments had left

intact the discovery requirement for unitized leases as they did for assigned leases, the result in this case might well be different. Given the fact that the word "production" was substituted for "discovery," however, and given the absence of any basis in the structure of the Act to support the notion that these terms can be used interchangeably wherever they appear, we conclude that for a lease committed to a unit to be extended, there must be production of oil and gas in paying quantities on that unit.[5]

It is clear that neither of the production requirements of subsections 226(e) and (j) can be satisfied merely by the presence of a well capable of production because when Congress repealed the discovery requirement of section 226(j) and replaced it with a production requirement in 1954, the same statute added the provision of section 226(f) referred to previously governing the tenure of a lease in which there was no actual production but only a well capable of production:

> No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter.

Act of July 29, 1954, *supra, as amended*, 30 U.S.C. § 226(f) (1982). If a production requirement could be satisfied by anything less than actual production, the foregoing provision would be superfluous. Petitioners' suggestion that a discovery should be sufficient to extend a unitized lease under section 226(j) would have this effect, contrary to the structure of the statute.

[2] Although section 226(f) does not expressly refer to unit wells on unitized leases, *cf.* 30 U.S.C. § 226(e) (1982), we have no reason to doubt that unitized leases were intended to enjoy the benefit of this provision. After referring to the various provisions under which leases could be held beyond their expiration dates, including production under section 226(e) and a well capable of production under section 226(f), the Solicitor commented on the applicability of these provisions to unitized leases:

> Section 17(j) of the Act, 30 U.S.C. § 226(j), allows leases to be combined under unit, cooperative, or communitization agreements. *Leases committed to these agreements are subject to the same requirements as regular leases, that is, the leases expire at the end of the primary term unless they qualify for a statutory extension or unless actual production*

[5] 43 CFR 3107.3-1; *see* 43 CFR 192.122(b) (1954). If any doubt remains as to whether a "discovery" or "production" standard should be applied, the following observation from our decision in *Celsius*, 99 IBLA at 75-76, 94 I.D. at 407, is pertinent:

"In resolving the perceived ambiguities, we must remember that the 1954 amendments to § 226(j) were among several changes in the Mineral Leasing Act made by Congress at that time. The general intent of those amendments was 'to close all possible loopholes in the administration of the law * * *, such as, for example, a possibility that a lessee might avoid production requirements * * *.' " H. Rep. No. 2238, *supra, reprinted in* 1954 *U.S. Code Cong. & Ad. News, supra* at 2696."

or a well capable of production in paying quantities exists at the end of the primary term. The difference is that production or a well capable of production, under the terms of the unit, cooperative, or communitization agreement satisfies the requirements for all committed leases regardless on which lease (or non-Federal property) the well is located. 30 U.S.C. § 226(j). [Italics added.]

Solicitor's Opinion, Oil and Gas Lease Suspension, 92 I.D. 293, 294-95 (1985). The Board's decisions concerning section 226(j) are consistent with this statement, and a unitized lease will not expire for lack of production at the end of its term if there is a unit well capable of producing oil or gas in paying quantities. *See Yates Petroleum Corp.*, 67 IBLA at 249, 89 I.D. at 482; *Burton/Hawks, Inc.*, 47 IBLA 125 (1980), *aff'd, Burton/Hawks, Inc.* v. *United States*, 553 F. Supp. 86 (D. Utah 1982); *Corrine Grace*, 30 IBLA 296 (1977).[6]

There is no suggestion that these leases were extended by actual production under the unit, nor may the leases be extended by drilling activities under section 226(e) because they had already enjoyed one such extension and were not eligible for another. *See Enfield* v. *Kleppe*, 556 F.2d 1139 (10th Cir. 1977). Nor did the lessees seek a suspension under sections 209 or 226(f). Thus, unless the well at issue was capable of production within the meaning of section 226(f), BLM properly held that the subject leases expired.

The meaning of the phrase "well capable of production" has been clearly established for at least 30 years. After quoting from *H. K. Riddle*, 62 I.D. 81 (1955), the Solicitor observed in *United Manufacturing Co.*, 65 I.D. 106, 113 (1958):

> It is quite apparent that the Department has construed the phrase "well capable of producing" to mean a well which is actually in a condition to produce at the particular time in question. This accords with the literal meaning of the phrase and is therefore adopted as the proper meaning of the phrase as used in the automatic termination provision.

The automatic termination provision to which the decision refers is codified at 30 U.S.C. § 188(b) (1982), and was also enacted as a part of the Act of July 29, 1954, that contained the provisions of 30 U.S.C. § 226(f), quoted earlier. *United Manufacturing* makes it clear that a well is not in physical condition to produce if the casing has not been perforated. *Id.* at 114-15. This rule was followed in *Arlyne Landsdale*, 16 IBLA 42 (1974). *See also Hancock Enterprises*, 74 IBLA 292, 294 (1983).

Petitioners acknowledge that the Dirty Devil 22-27 well had not been perforated and was not physically capable of producing before August 17, 1984. Although this well might have qualified the segregated portion of a lease for an extension under the discovery

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[6] In *Yates Petroleum Corp.*, 67 IBLA at 249, 89 I.D. at 482, we stated:

"[T]he presence of a well capable of producing oil or gas in paying quantities completed anywhere in the unit, subsequent to the effective date of the unit agreement but prior to the expiration date of a unitized lease, will continue that lease beyond its primary term. *Burton/Hawks, Inc.*, 47 IBLA 125 (1980); *Corrine Grace*, 30 IBLA 296 (1977)."

In *Grace* we said that "at a minimum" extension under sec. 226(j) "requires the successful completion of a well capable of producing unitized substances." 30 IBLA at 300. In *Burton/Hawks* we granted the appellant's request for a hearing to demonstrate the wells were capable of producing. Although the decisions do not expressly refer to sec. 226(f), they would not be correct if that provision did not apply to leases unitized pursuant to sec. 226(j).

standard in 30 U.S.C. § 187a (1982), *see Joseph I. O'Neill, Jr.*, 1 IBLA 57 (1970), it cannot qualify a unitized lease under section 226(j).

We cannot accept petitioners' arguments that requiring a well physically capable of production to extend unitized leases will discourage exploration during the later months of such leases and encourage careless efforts to complete wells before the leases terminate. Neither consequence can be excused if lessees plan their activities well before the established expiration dates; if they do not, they must console themselves.

Dirty Devil contends that our decision disregards the clear terms of the unit agreement which provides that the agreement shall automatically terminate 5 years from its effective date unless a valuable discovery of unitized substances in paying quantities has been made. Petitioners cite repeated references to the word "discovery" in the unit agreement, and contend that the language of the unit agreement ought to govern the construction of the statute. Dirty Devil contends that it is anomalous to assert that the discovery of unitized substances in paying quantities is enough to extend the unit agreement past its expiration date, but is insufficient to similarly extend an individual lease committed to a unit.

We see no anomaly. The provisions of 30 U.S.C. § 226(j) (1982), both establish and limit this Department's authority with respect to unit agreements; the Department cannot by contract exceed the scope of authority conferred by the statutory provision. The agreements must be subject to the statute; the construction of the statute cannot be subject to the agreements. Although a discovery may extend the life of the agreement pursuant to the agreement's provisions, it does not extend the life of the leases because the terms of the leases are governed by the statute and the statute requires production. In *Corrine Grace, supra*, the Board made repeated acknowledgements of the existence of the word "discovery" in the unit agreements, yet recognized that the statute requires, at a minimum, a well capable of producing oil or gas in paying quantities in order for the leases committed to a unit to be extended. As we noted above, this requirement cannot be met without perforation of the casing.

Petitioners contend that the " 'perforated casing rule' leads to inequitable and absurd results" (Petition at 10). Dirty Devil cites a BLM decision, *Richard M. Ferguson*, Riverside 0540 (June 5, 1963), in which BLM determined that the fact that oil was flowing around the casing of a well did not prevent the well from being deemed "in production" prior to the expiration of a lease. The decision held that "the cementing of the casing [after the expiration date] is considered as repairing, not completing the well." *Id.* at 2. In this respect, *Ferguson* is wrongly decided. As we indicated above, an individual lease can be extended only by actual production, not by a well capable of production. *Compare* 30 U.S.C. § 226(e) (1982) *with* § 226(f). The

Ferguson decision missed this important distinction. Of course, if the well had been capable of production, 30 U.S.C. § 226(f) (1982) would have prevented the lease from expiring. The difficulty with the *Ferguson* decision, however, is that the well at issue would not have been deemed capable of production under Departmental precedents which BLM failed to follow. *See United Manufacturing Co., supra.* *Ferguson* was a BLM decision, so it does not carry the authority of Departmental precedents. In any event, *Ferguson* was reversed on appeal to the Secretary. *Richard M. Ferguson*, A-30090 (Sept. 22, 1964). We have previously observed: "[T]his Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates." *Pathfinder Mines Corp.*, 70 IBLA 264, 278, 90 I.D. 10, 18 (1983), *aff'd, Pathfinder Mines Corp.* v. *Clark*, 620 F. Supp. 336 (D. Ariz. 1985), *aff'd*, 811 F.2d 1288 (9th Cir. 1987).

Dirty Devil contends that an extension was required pursuant to paragraph 25 of the Dirty Devil unit agreement which provides for a suspension of obligations contained in the unit agreement for the period during which the unit operator is prevented by a *force majeure* from meeting such obligations. Appellant contends that it was prevented by natural causes from installing a well casing in the Dirty Devil well. Dirty Devil misunderstands the effect of this provision. For example, if there had been no discovery of unitized substances within the unit prior to the fifth year after the effective date of the agreement, the unit agreement would terminate pursuant to paragraph 2(c) as petitioners recognize. If a suspension under paragraph 25 were in effect on that date, however, the unit agreement would not terminate. The effect of such an event on the term of a unitized lease, however, depends on whether there has been production of unitized substances under the agreement prior to the expiration of the term of that lease. If so, the lease remains in effect for so long as it remains committed to the unit plan. If not, the lease will expire unless it is suspended pursuant to 30 U.S.C. § 209 (1982), or is entitled to an extension pursuant to some other statutory provision. Dirty Devil has cited no other statutory provision for an extension, and does not assert that an application for a suspension was filed.

Finally, we must consider an allegation set forth at the beginning of Dirty Devil's petition:

> A critical fact absent from the IBLA's decision is that late on August 16, 1984, an official of the BLM present at the well site indicated to Hiko Bell personnel that there was no concern regarding expiration of the leases. Given this indication from the BLM official, Hiko Bell pursued completion of the well in a safe and prudent manner, even though they were aware that the well casing would not be perforated prior to midnight. However, according to Robert W. Covington, officer and exploration manager for Hiko Bell, Hiko Bell could have and would have undertaken extraordinary measures to install and perforate the well casing prior to midnight, absent the indications from the BLM official that such steps were not necessary.

(Petition for Reconsideration at 2). Dirty Devil neither identifies the official nor explains the form or manner by which he "indicated * * *

that there was no concern regarding expiration of the leases." Appellants do not allege that the BLM official affirmatively made this statement to them, or whether the alleged indication was nothing more than an inference drawn by the operator. The need for perforation of the casing, *inter alia*, to make a well capable of production is a requirement that is well established in Departmental practice and precedent. If a BLM official indicated otherwise, he acted beyond his authority in doing so.

[3] This issue was presented in *Burton/Hawks* v. *United States, supra*, when the plaintiff contended that the Department's district engineer had agreed that drilling operations within a unit would prevent a lease from terminating at the end of its primary term. The plaintiff contended that it detrimentally relied on the district engineer's assurances. The court held: "The weakness of plaintiff's position is apparent, after even a cursory examination of the relevant statutory and case law." *Id.* at 92. After quoting Departmental regulation 43 CFR 1810.3, the court further held:

> Section 1810.3 establishes the principle that plaintiff's reliance on the erroneous statements of the district engineer could not estop the IBLA from denying a two-year extension of the lease where the lease did not qualify for the extension under the terms of the agreement or the MLLA [Mineral Lands Leasing Act]. The proposition that the erroneous statements of its employees do not bind the United States is well accepted in the case law. *E.g., Federal Crop Ins. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947); *United States v. California*, 332 U.S. 19, 39, 67 S.Ct. 1658, 1668, 91 L.Ed. 1889 (1947); *Clair R. Caldwell, et al.*, 42 IBLA 139, 141 (1979); *Paul S. Coupey*, 35 IBLA 112, 116 (1978). Thus, despite plaintiff's reliance on assurances made by the USGS district engineer, the IBLA was free to reach an independent decision on whether or not the lease expired by operation of law.

Id.

Although a majority of the Supreme Court have acknowledged that the Government may be estopped upon a showing of "affirmative misconduct," among other things, we are not aware of any case in which the Court has found affirmative misconduct, even where the circumstances for making such a finding were far more compelling than those asserted by appellant in the instant appeal. *See Heckler* v. *Community Health Services of Crawford County, Inc.*, 451 U.S. 51 (1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1980); *see also Phelps* v. *Federal Emergency Management Administration*, 785 F.2d 13 (1st Cir. 1986).

Although petitioners complain about the arbitrariness of BLM's decision, it is merely the result of the arbitrariness inherent in any deadline. *See United States* v. *Locke, supra* at 94; *United States* v. *Boyle*, 469 U.S. 241, 249 (1985). Petitioners or their predecessors-in-interest have held these leases for many years during which the production requirements of the Mineral Leasing Act could have been satisfied. The particular date at issue was known 2 years in advance. Thus, the arbitrariness of which petitioners complain results from no

act of BLM but must be attributed to the timing of lessees' activity shortly before the expiration date of these leases. When a landowner agrees to a mineral lease, he does so with the expectation of receiving a production royalty for the deposits which underlie his land. While the typical oil and gas lease contains a number of provisions under which satisfaction of this expectation might be delayed, the lease also contains specific deadlines that may be enforced. Such provisions are not subject to the familiar rule that forfeitures are viewed with disfavor and will be enforced only when circumstances require it. The courts have held that in connection with oil and gas leases, forfeitures are favored by the law so that such leases are to be construed liberally in favor of the lessor and provisions for forfeiture strictly enforced. *KernCo Drilling Co.*, 71 IBLA 53, 58 (1983), *citing Bert O. Peterson*, 58 I.D. 661, 666 (1944); *aff'd, Peterson* v. *Ickes*, 151 F.2d 301 (D.C. Cir.), *cert. denied*, 326 U.S. 795 (1945); *see also*, 38 *Am. Jur. 2d*, Gas & Oil, § 99 (1968).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted and our prior decision in this case is sustained as modified.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

ALPINE CONSTRUCTION CORP. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

101 IBLA 128 Decided *February 8, 1988*

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming the issuance of Notice of Violation No. 84-03-023-3. TU 4-29-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The requirement of 30 CFR 715.17(a)(1), that all surface drainage from the disturbed area be passed through a sedimentation pond before it leaves the permit area is a preventive measure; a showing of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of the regulation.

February 8, 1988

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The elements of proof of a violation of the sedimentation pond requirement are: (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left or will leave the permit area.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Under 30 CFR 715.17(a), the regulatory authority may grant exemptions from the requirement that drainage from disturbed areas be passed through a sedimentation pond, but only on the basis of a permittee's showings (1) that the disturbed drainage area within the total disturbed area is small, and (2) that a sedimentation pond is not necessary to meet effluent limitations and to maintain water quality in downstream receiving waters.

Avanti Mining Co., 4 IBSMA 101, 89 I.D. 378 (1982); *Consolidation Coal Co.*, 4 IBSMA 227, 89 I.D. 632 (1982); and *Turner Brothers, Inc.* v. *OSMRE*, 98 IBLA 395 (1987), *overruled to extent inconsistent.*

APPEARANCES: Ed Edmondson, Esq., Muskogee, Oklahoma, for appellant; Nell Fickie, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, and Glenda H. Owens, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

INTERIOR BOARD OF LAND APPEALS

Alpine Construction Corp. (Alpine) has appealed the decision of Administrative Law Judge Frederick A. Miller, dated July 17, 1985, Docket No. TU 4-29-R, affirming the issuance of Notice of Violation (NOV) No. 84-03-023-3 for "failing to pass all drainage from the disturbed area through a sedimentation pond prior to leaving the permit area" in violation of 30 CFR 715.17(a).

On July 13, 1984, Reclamation Specialist David Agnor of the Office of Surface Mining Reclamation and Enforcement (OSMRE) inspected the Rose Hill Mine No. 11 in Haskel County, Oklahoma. This mine was originally permitted by Garland Coal Co. (Garland) under State permit Nos. 78/79-063, 79/81-2059, and 80/81-3070. Alpine had agreed to reclaim this site in consideration of mining rights to other Garland property.[1] As a result of his July 13, 1984, inspection, Agnor issued

[1] Alpine and OSMRE stipulated before the hearing that Garland completed its surface mining activities on these three permit areas before Oklahoma's permanent program was approved by OSMRE. Accordingly, Inspector Agnor

Continued

NOV 84-03-023-3 because he discovered that surface drainage from four separate areas of the reclamation site would flow off the permit area without passing through a sedimentation pond. Alpine filed an application for review of the NOV on August 10, 1984, and requested an evidentiary hearing pursuant to 43 CFR 4.1164. A hearing was held in Tulsa, Oklahoma, on March 28, 1985, following which Judge Miller issued the decision appealed herein.

The basic facts giving rise to the NOV are not in dispute in this case. A gas well is located on the first area of concern. Inspector Agnor stated that the "drainage was designed to flow north from the gas well area and enter what is known on the map as existing pond number 7" (Tr. 19). This gas well, constructed by SPEC, Inc., after Garland had obtained an approved permit and had started mining, altered the flow of the surface drainage so that it now flows to the east of the well "and off the permit and into the Sans Bois Creek" (Tr. 20). This drainage pattern is evidenced by the "rills and gullies forming in this area, flowing–or running east-west towards the edge of the permit" (Tr. 20).

The second area encompassed land east of the county road on the 9-10 section line near proposed pond 5 and west of the road down to the Owl Creek diversion. The drainage from the area near proposed pond 5 would flow to the south and west, go through culverts underneath the road, continuing west and into the Owl Creek diversion (Tr. 26). Inspector Agnor stated that some of the drainage would enter sedimentation pond 6 which is west of the road, but that all drainage would not flow into the Owl Creek diversion (Tr. 27). Ronald Neafus, an expert witness for Alpine, stated that "there was no sediment control to the west of the road" in September 1984 (Tr. 73). Shannon Craig, Director of Environmental Quality Control for Alpine, testified that surface drainage would leave the second area without passing through a sedimentation pond (Tr. 82-83).

The third area involves the region where a dike once been had located, but which was removed in 1982 (Tr. 84). Inspector Agnor testified that without the dike the surface drainage flowed to the southeast into a grassy field and off the permit area without passing through a sediment pond (Tr. 32). The testimony of Alpine's witnesses, Neafus and Craig, was that the surface drainage would flow to the southeast of where the dike was located and off the permit without first going through an approved sediment pond or series of ponds (Tr. 71, 92).

The fourth area involved two topsoil stockpiles in the S 1/2 of sec. 3. Inspector Agnor testified that the part of surface drainage from the stockpile in the SW 1/4 of sec. 3 would "leave the permit without first passing through a sedimentation pond" (Tr. 42). He also testified that

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cited Alpine with a violation of 30 CFR 715.17(a), an initial program regulation. His action was consistent with *Citizens for the Preservation of Knox County*, 81 IBLA 209 (1984), in which the Board ruled that an operator who has ceased all coal mining operations prior to the approval of a state's permanent program is not required to obtain a permanent program permit to conduct only reclamation activites, and that such reclamation activities are subject to the Department's initial program regulations.

the surface drainage from the stockpile in the SE 1/4 of sec. 3 would flow off the permit area without passing through a sedimentation pond (Tr. 45). Neafus and Craig essentially corroborated Inspector Agnor's testimony (Tr. 71, 72, 92).

Alpine emphasized before Judge Miller, and now on appeal to the Board, that it did not mine the subject permit area, but was engaged in reclaiming an area already mined by Garland. The issuance of the NOV, in Alpine's view, is an "over-zealous and unreasonable application of technical rules on reclamation procedures" (Alpine's Posthearing Brief at 2). Further, Alpine argued before Judge Miller that it has been caught "in the middle" of differences between OSMRE and the Oklahoma Department of Mines (ODOM) on the subject of sediment control. Alpine's major contention is that the third area, where the dike had been located, was the "major area" cited in the NOV, and that Inspector Agnor's requirement that Alpine replace the dike, while the mine plan approved by ODOM required the dike's removal, invalidates the NOV. Alpine's reasoning in this regard is set forth below:

> The flat slopes in the area where the dike was removed required sediment control measures other than a pond * * * and the fact that OSM personnel later approved the alternative, filter fence approach supports [Alpine's] position that the NOV from the outset was defective. It arbitrarily demanded dike replacement when the dike's mission from the first had been to prevent Sans Bois flooding of the mine area, rather than sediment control * * *.

(Alpine's Posthearing Brief at 3). As to the other three areas cited in Inspector Agnor's NOV, Alpine simply asserts that "only 'minor rills and gullies' were found in an otherwise remarkable 600-acre reclamation program that had been deferred more than two years through no fault of [Alpine]." *Id.* at 4.

The fact that Alpine did not mine the permit area is irrelevant to the question of whether Inspector Agnor properly issued the NOV. Alpine undertook to reclaim the Rose Hill mine in exchange for the right to mine other coal property owned by Garland. Section 701(27) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(27) (1982), defines "surface coal mining and reclamation operations" as "surface mining operations *and all activities necessary and incident to the reclamation of such operations* after August 3, 1977." (Italics added.) Regulation 30 CFR 715.11 provides that "[a]ll surface coal mining *and reclamation operations* conducted on lands where any element of the operations is regulated by a State shall comply with the initial performance standards of this part * * *." (Italics added.) Those initial performance standards, which are set forth at 30 CFR Part 715, require the permittee to "plan and conduct coal mining *and reclamation operations* to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal

mining *and reclamation operations*, both on- and off-site." 30 CFR 715.17 (italics added). Regulation 30 CFR 715.17(a) specifically requires all surface drainage to pass through a sedimentation pond before leaving the permit area.

[1] We will first consider whether Inspector Agnor properly cited the third area, described *supra*, as violating 30 CFR 715.17(a). In previous cases, the Board has enunciated clear standards to be applied in determining whether there has been a violation of the sedimentation pond requirement embodied in 30 CFR 715.17(a). The requirement that a permittee pass surface drainage from areas disturbed in the course of mining and reclamation operations through a sedimentation pond is a preventive measure, and OSMRE need not make a showing of the harm the requirement is intended to prevent in order to establish a violation of that requirement. *E.g., Consolidation Coal Co.*, 4 IBSMA 227, 237, 89 I.D. 632, 637 (1982); *Avanti Mining Co.*, 4 IBSMA 101, 106-07, 89 I.D. 378, 380-81 (1982). Accordingly, a violation of the requirement can be proven independently of a violation of the effluent limitations prescribed for discharges of drainage from the disturbed area. *E.g., Consolidation Coal Co.*, 4 IBSMA at 237, 89 I.D. at 637.

[2] The elements of proof of a violation of the sedimentation pond requirement have been characterized by the Board as straightforward: (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that such drainage left the permit area. *Consolidation Coal Co.*, 4 IBSMA at 237, 89 I.D. at 637; *Avanti Mining Co.*, 4 IBSMA at 107, 89 I.D. at 381. Based upon the facts before us, we conclude that OSMRE established a prima facie case that the third area cited by Inspector Agnor in the subject NOV evidenced a violation of 30 CFR 715.17(a). Thus, Alpine had the ultimate burden of persuasion that the NOV was invalidly issued. 43 CFR 4.1171. Alpine fell short of meeting this burden.

Alpine's principal argument with regard to the third area is that the NOV resulted from a

> breakdown in cooperation between the Secretary of Interior and the states * * * in the fact that NOV No. 84-03-023-3 seeks to penalize and punish [Alpine] for the removal of a dike when the mining plan approved by the State of Oklahoma required its removal, and the landowner had made formal demand that it be removed.

(Statement of Reasons at 1).

At the hearing, Alpine introduced into evidence the section of the mine plan which is entitled "Plan to Minimize the Hydrologic Impact." The purpose of this plan was stated as follows:

> This plan * * * provides for temporary diversions to control upland stream run-off; construction of flood protection dikes for protection of the mine area *and containment of run-off within the mining area*; sedimentation basins to control run-off water quality after reclamation; and other specific techniques to assure that no hydrologic impacts occur during or after the area is mined. [Italics added.]

(Mine Plan at 57). Alpine asserts in its posthearing brief that the purpose of the dike "from the first had been to prevent Sans Bois

flooding of the mine area, rather than sediment control" (Alpine's Posthearing Brief at 3). One of the stated purposes of the mine plan was to "minimize the hydrologic impact" of the mining operation. Construction of a system of dikes was proposed for at least two purposes: (1) to protect the mine area from flooding, and (2) to contain "run-off within the mining area." Under the section of the mine plan entitled "Flood Protection," measures were prescribed to control erosion of the outslope of the dikes, including "[s]wales * * * located on the foot of the dike * * * to catch any sediment eroding from the face of the dike" (Mine Plan at 65). In addition, Figure No. 21 of the mine plan depicted the "excavated sediment channel" which would control surface runoff and sediment for the series of eight "subwatersheds" embraced by the mine area. The "excavated sediment channel" was to be "located on the downslope perimeter of the proposed mine area." *Id.* at 68. A pump system to remove excess water from the sediment channel was proposed, with "[a] detention period of 24 hours after the storm * * * to insure that quality of pumped water will be within the limits set by the Office of Surface Mining." *Id.* The proposed excavated sediment channel, extending the length of the mine area, was bordered by the system of dikes. Those dikes, planned for construction "to a top elevation of 500 feet, [would] increase the amount of sediment storage possible within the isolated mine area." *Id.* at 65. The dike itself was one feature of the plan, the purposes of which were to protect the mine area from flooding *and* to contain sedimentation within the permit area. We therefore reject Alpine's argument that the dike system was not intended for sediment control.

Inspector Agnor discovered that the dike had been removed when he visited the Rose Hill mine area. There were no sedimentation ponds to control the surface drainage from this disturbed area. Inspector Agnor testified at the hearing that the surface drainage "will flow off into either the slough [just east of the area where the dike was removed] or into Sans Bois Creek" (Tr. 35). The Sans Bois Creek is located off the permit area (Tr. 35). Both Alpine's witnesses, Neafus and Craig, testified that the surface drainage would flow to the southeast of the dike and off the permit without first passing through a sedimentation pond (Tr. 71, 92).

Such evidence satisfies OSMRE's burden of establishing a prima facie case that this area was in violation of 30 CFR 715.17(a). In *Consolidation Coal Co.*, 4 IBSMA at 237, 89 I.D. at 637, the Board stated that OSMRE must establish, as the third element of a prima facie case, that surface drainage "left the permit area." *See Avanti Mining Co.*, 4 IBSMA at 106-07, 89 I.D. at 380-81. The inspector testified in *Consolidation Coal* that he did not actually see water flowing through the breach in a berm and then off the permit area. However, the Board concluded that

the conditions shown in the photograph, in combination with the topographic features of the area shown in applicant's exhibit A and with the inspector's testimony, amply constitute a prima facie showing that surface drainage from the disturbed area of the refuse pile had flowed over the southwestern slope of the refuse pile and off the permit area.

4 IBSMA at 238, 89 I.D. at 638.

In *Turner Brothers, Inc.* v. *Office of Surface Mining Reclamation and Enforcement*, 98 IBLA 395, 400 (1987), the Board interpreted *Consolidation Coal* to require "proof that drainage has in fact not been passed or is not passing through a sedimentation pond before leaving the permit area," and concluded that "[p]roof that drainage might at some future time flow off the permit area would not suffice." We now reject that interpretation for the following reasons.

On reflection, we find that the Board's ruling in *Consolidation Coal*, followed by the Board in *Turner Brothers, Inc.*, that OSMRE must prove that surface drainage has actually left the permit area, is inconsistent with 30 CFR 715.17, which was promulgated to prevent disturbances to the hydrologic balance resulting from drainage flowing from lands subject to mining and reclamation operations. Requiring an OSMRE inspector to prove that surface drainage has, in fact, left the permit area, would amount to requiring him to wait until adverse impacts resulting from the absence of sedimentation ponds have taken place. This case underscores the dilemma. Inspector Agnor inspected the Rose Hill mine during a dry season. To invalidate his NOV on the basis that he did not see surface drainage leave the permit area would effectively require him to wait for a rain before conducting an inspection for sedimentation pond compliance. We reject that approach. *Avanti Mining Co., Consolidation Coal Co.*, and *Turner Brothers, Inc.* are hereby overruled to the extent inconsistent herewith.[2]

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[2] In these cases, the Board followed *Black Fox Mining & Development Corp.* v. *Andrus*, Civ. No. 80-913 (W.D. Pa. Jan. 21, 1981), in which the U.S. District Court for the Western District of Pennsylvania ruled that because OSMRE had failed to establish that surface drainage had actually left the permit area, OSMRE had improperly issued an NOV for failure to pass all surface drainage from the disturbed area through a sedimentation pond or ponds before allowing it to leave the permit area. With the exception of these efforts to comply with *Black Fox Mining & Development Corp.* v. *Andrus, supra*, the Department has from the beginning consistently interpreted 30 CFR 715.17, and its counterpart 717.17, so as to avoid the necessity of prescribing the cure for the dangers they were designed to prevent. *Island Creek Coal Co.*, 1 IBSMA 285, 86 I.D. 623 (1979); *Kaiser Steel Corp.*, 2 IBSMA 158, 87 I.D. 324 (1980); *Black Fox Mining & Development Corp.*, 2 IBSMA 277, 87 I.D. 437 (1980); *Belva Coal Co., Inc.*, 3 IBSMA 83, 88 I.D. 448 (1981); *Amax Coal Co.*, 74 IBLA 48 (1983).

In *Oregon Portland Cement Co. (On Judicial Remand)*, 84 IBLA 186, 190 (1984), in expressly declining to follow the decision of the U.S. District Court for Alaska in *Oregon Portland Cement Co.* v. *U.S. Department of the Interior*, 590 F. Supp. 52 (D. Alaska 1984), the Board stated:

"The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain."

The logical result of *Turner Brothers, Inc.* is to require an OSMRE inspector to reinspect certain minesites after a rain in order to show that surface drainage has actually left the permit area. The purpose of the sedimentation pond requirement is to prevent environmental harm. *Turner Brothers, Inc.* requires an OSMRE inspector to wait until the harm has taken place before issuing as NOV under 30 CFR 715.17(a). Such an approach is disruptive to OSMRE's inspection responsibilities and inconsistent with the purpose of the regulation. For such reasons, we believe other Federal courts might disagree with the court in *Black Fox*.

Accordingly, we now respectfully decline to follow the ruling in *Black Fox. See Bernos Coal Co.* v. *OSMRE*, 97 IBLA 285, 297 n.2, 94 I.D. 181, 188-89 n.2 (1987).

Alpine does not argue in this case that surface drainage had not left the permit area. In fact, Alpine's witnesses conceded that surface drainage "would flow" or "flows" off the permit area, given its elevation (Tr. 71, 92). The obvious and critical question in these cases is what constitutes a violation of 30 CFR 715.17(a). We do not think a showing that surface drainage actually left the permit area is necessary to establish a violation of 30 CFR 715.17(a). The proper emphasis must be placed upon whether, given the topography, a sedimentation pond is necessary to *prevent* surface drainage from leaving the permit area. When the evidence establishes that there are no sedimentation ponds, and that surface drainage has left or will leave the permit area, a violation of 30 CFR 715.17(a) is established.

In the NOV, Inspector Agnor required the following corrective action: "(1) pass all drainage through a sedimentation pond, and (2) rebuild the central dike in section 3 in the approved location." Subsequently, on October 31, 1984, Steven L. Colvert of OSMRE modified the NOV to require the following corrective action: "Pass all drainage through a sedimentation pond. Rebuild the control dike in sections 3 and 10 in the approved location or submit proper information for alternative sediment control to the Oklahoma Dept. of Mines and secure approval from ODOM for these controls and implement them."

We observe that the modified NOV did not relieve Alpine of the obligation to meet the sedimentation pond requirement; instead, it specifically reiterates Alpine's obligation to "[p]ass all drainage through a sedimentation pond." This directive applies not only to the third area, but also to the other three areas cited in Inspector Agnor's NOV as well. Moreover, the sedimentation pond requirement is independent of the remedial steps ordered in connection with the dike. In the modified NOV, Inspector Colvert leaves Alpine with two options for correcting the drainage control problems resulting from removal of the dike: either (1) rebuild the dike; or (2) submit proper information for alternative sediment control to ODOM, secure ODOM's approval of such controls, and implement them. The construction of sedimentation ponds might qualify as "alternative sediment control" measures, in lieu of replacing the dike. This "alternative sediment control" language was not intended to exempt Alpine from the general requirement of 30 CFR 715.17(a). In our opinion, the modified NOV affirms rather than invalidates the propriety of the NOV issued by Inspector Agnor.[3]

[3] By letter dated Sept. 11, 1984, Neafus confirmed findings which he and Shannon reached during an inspection of the Rose Hill minesite on Sept. 9, 1984. This letter recommends "alternative sediment control" measures with regard to "the topsoiled areas in Sections 3 and 10 and the area in Section 10 where the dike has been removed. These areas are characterized by extremely flat slopes and will require sediment control measures other than a pond." Neafus confirms their "plan for controlling sediment from these areas utilizing berms." Alpine constructed a berm using "a siltation fabric fencing * * * in conjunction with * * * straw in the areas that were named in the NOV." The file does

Continued

[3] Alpine argued that the remaining three areas cited in the NOV were "small," with "[t]he area of the dike's removal * * * admittedly the only major area involved in the NOV" (Tr. 50; Posthearing Brief at 2). These three "drainage areas * * * were small acreage – under 5 acres or 6 to 7 acres in one instance (Tr. 64, 66, 82) – on which ponds were not required or appropriate on uncontradicted testimony" (Posthearing Brief at 4). Again, Alpine does not argue that surface drainage from the remaining three areas had not left the permit area. As with the third area cited in the NOV, OSMRE did not establish with regard to these small areas that surface drainage had left the permit area. However, the photographs and testimony establish that surface drainage from these three areas will leave the permit area. Given the preventive purposes of 30 CFR 715.17(a), as discussed *supra*, we rule that OSMRE established a prima facie case with regard to these remaining areas.

Judge Miller construed Alpine's assertions to be an argument that these areas were exempt from the requirements of 30 CFR 715.17(a). That regulation provides in part:

> The regulatory authority may grant exemptions from [the sedimentation pond] requirement only when the disturbed drainage area within the total disturbed area is small and if the permittee shows that sedimentation ponds are [not] necessary to meet the effluent limitations of this paragraph and to maintain water quality in downstream receiving waters.

30 CFR 715.17(a). Judge Miller's application of this provision is set forth below:

> However the applicant has not presented any testimony, evidence or even argument that the sedimentation ponds are not necessary to maintain water quality of downstream receiving waters. [4] OSM has approved alternative sedimentation control but has not exempted the applicant from all sediment control. The applicant has the ultimate burden of persuasion with respect to review of the notice of violation under 43 C.F.R. § 4.1171(b). In order to qualify for an exemption the applicant has to prove that the affected area is small and the downstream water quality is protected. The applicant has carried its burden for the first part but has failed to carry its burden for the second part of this exemption. Therefore the notice of violation is upheld as properly issued.

(Decision at 4).

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not indicate whether this alternative control measure was submitted to ODOM, as directed in the modified NOV, and if so, whether ODOM approved.

The relevance of the modified NOV to this discussion was placed into perspective by counsel for OSMRE at the hearing before Judge Miller. Fickie emphasized that the Sept. 11, 1984, letter from Neafus to Shannon, and Alpine's actions in accordance with that letter, relate to abatement of the violation specified in the NOV. She properly phrased the issue as whether "there [was] a violation of the regulation 30 CFR 715.17(a) on the date July 13, 1984, not how [Alpine] tried to or abated the violation" (Tr. 80). She pointed out that evidence of such abatement efforts "would be more appropriate in a penalty hearing, but that is not what we have before you today" (Tr. 80).

[4] We note that by letter to ODOM dated Aug. 11, 1983, Alpine requested a "small area exemption" with regard to two areas cited in the NOV: (1) the gas well area, and (2) an area located in the SE 1/4 NE 1/4, sec. 9 on the outside of the haul road/berm. This request appears to relate to what we have designated earlier as areas one and two, cited by Inspector Agnor in the NOV. In this letter, Alpine explains that "[t]here are two small areas which do not drain so that runoff passes through a sediment pond."

By letter dated July 13, 1984, ODOM responded to Alpine's request, stating that "[t]o date, a total of 108 revisions need to be reviewed." ODOM requested numerous items of information to complete its evaluation of the requested exemption. July 13, 1984, was the date on which Inspector Agnor visited the Rose Hill minesite and issued the subject NOV. The file contains no indication that Alpine submitted the information requested by ODOM.

We conclude that Judge Miller correctly found that appellant was not entitled to an exemption under 30 CFR 715.17(a). *See Avanti Mining Co.*, 4 IBSMA at 108, 89 I.D. at 381.

We therefore conclude Judge Miller correctly found that OSMRE established a prima facie case that each of the four areas cited in the NOV were in violation of 30 CFR 715.17(a), and that Alpine failed to meet its ultimate burden of persuasion that the violations did not occur.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOHN H. KELLY
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

WILL A. IRWIN
Administrative Judge

APPEAL OF MINGUS CONSTRUCTORS, INC.

IBCA-2117 Decided *February 9, 1988*

Contract No. 3CC-01230, Bureau of Reclamation.

Denied.

Contracts: Differing Site Conditions (Changed Conditions)--Contracts: Disputes and Remedies: Burden of Proof

Where a contractor seeks to prove that the actual site conditions varied from contract indications respecting the width and shape of sealant to be removed and replaced between concrete panels of an aqueduct system, and notice to the Government is given after the entire 600,000 feet of joints had been mechanically extruded to partially remove the old sealant, the evidence offered by appellant is found to be inadequate to show a comparison between actual and contract indicated conditions necessary to prove the existence of a differing site condition.

APPEARANCES: Ernest R. Baldwin, Attorney at Law, Gill & Baldwin, Glendale, California, for Appellant; Daniel L. Jackson, Department Counsel, Phoenix, Arizonia, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant, Mingus Constructors, Inc. (hereinafter Mingus), was awarded a contract for lining repair on the Granite Reef Aqueduct Canal. A primary task under the contract involved the partial removal of a sealant material in 600,000 feet of transverse joints in reaches 2 and 3, and resealing with a different material. This task was completed by Hunt Contracting Co. (hereinafter Hunt), a subcontractor. A claim filed by Mingus for $993,175.80 alleged a differing site condition was encountered because the transverse joints were wider than indicated in the contract documents, requiring extra work by Hunt to remove and clean out the old sealant and extra sealant material for the resealing. Mingus furnished the sealant material. After the claim was denied by the contracting officer, this appeal was taken by Mingus on behalf of Hunt for the reduced amount of $544,096.30. The portion of the claim involving the extra sealant material used by Mingus was not included in the appeal, and parties have asked that the Board decide the entitlement issue alone. A hearing was held on July 8 and 9, 1986, in Phoenix, Arizona.

Background

The contract with Mingus was awarded on November 15, 1983, for cleaning, repair, or replacement of sealant in reaches 1 through 12 of the Granite Reef Aqueduct. This appeal involves only reaches 2 and 3 where the work involved the removal of an existing preformed elastomeric-shaped sealer to the depth of 1/2 inch and replacing it with a new elastomeric-sealer material in liquid form. Reaches 2 and 3 extend for a distance of approximately 22 miles, with 90-foot transverse joints every 15 feet. Initially, Mingus awarded a subcontract for this work on November 21, 1983, to Interstate Markings, Inc. (hereinafter Interstate), in the approximate amount of $1,877,833 with payment for various tasks to be at specified amounts per foot.

The preformed sealant material had been installed in 1979 by Ball, Ball and Brosamer, Inc. (also operating as Ball, Ball and Brosamer, Inc., and G.H.B. Co., A Joint Venture, and 4 B Constructors) (hereinafter Ball) (AX 4, 7, and 8). During most of 1979, the Government and Ball exchanged correspondence and had discussions concerning the responsibility for the preformed material failing to adhere fully to the concrete surfaces (AX 1-8). Mr. Dolyniuk, a Government construction engineer involved in reaches 2 and 3 during the Ball contract, testified that the preformed sealant was installed in fresh concrete by an insertion machine. This machine threaded the material into the joint and vibrated it until it was flush with the concrete with only a slurry of concrete covering the installed seal (Tr. 116-17). Finally, on November 28, 1979, the Government and Ball agreed to share the responsibility equally for the unacceptable

transverse joints in reaches 2 and 3 (AX 9). The Mingus contract required that the transverse joints deemed unacceptable for failure of the sealant to bond to the concrete be cleaned to a depth of 1/2 inch and replaced with a liquid sealant.

The contract specifications provide in section 2.1.4 a.: "General.- The Contractor shall remove the preformed elastomeric shape, or remnants thereof, in existing canal transverse joints, in reaches 2 and 3, except for a few isolated areas as directed, and place elastomeric sealer in accordance with these specifications and the details shown on drawing 1 (344-D-10338)." Section 2.1.4 b. provides in pertinent part:

> Cleaning joints. -Prior to placing elastomeric sealer in transverse joints, the Contractor shall clean the joints to bare concrete, removing the preformed elastomeric shapes and defective elastomeric sealer and any other deleterious material. These materials shall be removed by hand where required, and by hosing or compressed air, both, at the Contractor's option. The method for removal of joint material will be the Contractor's responsibility.

Drawing 334-D-10338 is entitled "Typical Joint and Random Crack Repair for Unreinforced Concrete Lining." In the upper left portion of the drawing, there is a portrayal entitled: "Existing Groove-Type Joint With Preformed Elastomeric Shape Transverse Joint-Reaches 2 and 3." Depicted is a V-shape labeled "[e]xisting preformed elastomeric shape" with 5/8 inch ± shown across the top and 1-1/4 inches ± shown for the total depth of the shape. Instructions state: "Remove existing thin layer of concrete mortar above joint material" and "[r]emove existing preformed elastomeric shape in groove to bare concrete to a minimum depth of 1/2" below the top of concrete surface, sandblast and clean existing concrete groove surfaces, and place elastomeric sealer to top of concrete surface. Locations as directed."

Interstate began work to remove the sealer from the joints using a machine referred to as a joint extruding jumbo. It is a rubber-tired vehicle with a carbide bit affixed at the end of an arm which is drawn down the joint to extrude or plow the joint. As Interstate proceeded with the work, Mingus frequently wrote to advise that the work was going slow as to endanger timely completion. One such letter dated March 26, 1984, includes the statement:

> It appeals to us that too much time is being spent trying to sandblast off heavy sealant materials not removed by the extruder. This lengthy attack of the joint by the sandblast operation is creating a much wider joint (up to 1-1/2") than shown on the project drawings which can only result in a quantity overrun. Something we all wish to avoid.

By letter of May 2, 1984, Mingus advised Interstate that Mingus would commence providing assistance on the joint cleaning using hand-operated saws and grinders and later a sandblaster. Finally, Mingus terminated the Interstate contract by letter dated June 4, 1984, for failure to properly and diligently prosecute the work. At this time, Interstate had used the joint extruding jumbo over the entire 600,000 feet of joints with the joints still within specification of 5/8 to 3/4 inch

according to Mr. Heintz, the Government inspector on the project (Tr. 145). Additionally, they had fully cleaned 50,000 linear feet and sealed about 20,000 feet. The report of Mr. Madson, one of the Government inspectors on the project, for May 5, 1984, indicates in part: "The extruding jumbo started cleaning about 60% of the joint down to concrete. The second pass with a wider bit is getting another 30%, leaving very little to be sandblasted off."

By letter dated June 14, 1984, in response to a show-cause order, Mingus advised that they were negotiating a contract with Hunt and that Hunt had already been brought on the job on a cost-plus basis to speed up the joint cleaning and resealing task. According to Mr. Hand, Hunt's Saw and Seal Division manager, Hunt planned to replow all joints and to sandblast lightly to clean the joints (Tr. 25). Mr. Hand had visited the site in April and May 1984 to determine the condition of the joints (Tr. 21-28). He testified that the plowed joints measured 5/8 to 3/4 inches in width, and were all approximately 1/2 inch deep with sealant material remaining. Hunt started cleaning transverse joints in reaches 2 and 3 in early June using the same extruder or plow that Interstate had been using starting with 5/8-inch bit. This plowing would remove all the sealant on one side of the joint, but not the other. Sandblasting did not remove all the seal material unless it widened the joint to 1 to 1-1/4 inches. Hunt started plowing three to four passes per joint which widened the joint, but never removed the seal to the full depth to determine its shape (Tr. 29-31). Mr. Hand testified that Hunt began designing special bits for the plow to fit the shape of the hole, but that their specially built jumbo sandblaster had so much power that it would deteriorate the concrete before removing the seal material (Tr. 40-41). This widened joints to 1-1/4 inches. Additionally, Hunt's project superintendent, Mr. Ulibari commenced using hand sandblasters and power hand saws in areas where concrete covered the sealant. Mr. Hand said the twisting of the sealant was not evident when first looked at, but described the preformed sealant as similar to a triangle lying on the side (Tr. 42, 56). Mr. Hand returned to the site in January 1986 to bid on the sealing of certain viaduct panels being replaced by another contractor in reach 2. He testified regarding pictures showing sealant buried in concrete and twisted in place (AX 10, Tr. 57-63). He agreed that one could not control the depth of the cut when using pipe saws to clean the joints (Tr. 72). He said that he repeatedly talked to Mingus and to superiors of Hunt about the twisted material, but agrees that the claim letter of July 11, 1984, does not mention twisted material as the source of the difficulty of cleaning the transverse joints (Tr. 74). Similarly, he reviewed the Mingus letter to the Government dated November 2 advising that the transverse joint removal work would be complete within 2 or 3 weeks and inviting a site inspection of the widened joints without mention of twisted sealant material. (Tr. 76).

Mr. Ulibari, the project superintendent for Hunt, testified that they made two or four passes with the plow and then had to use hand saws

sometimes to clean the transverse joints (Tr. 83). He said that he had talked to the Government chief inspector, Mr. Heintz in late July 1984 regarding the need to widen the joints to get the sides clean as required by the specifications. Mr. Ed Hughes, president of Hunt, testified that he had visited the site with Mr. Hand in April 1984 and again in late June or early July. He stated that they presumed that the sealant was shaped as shown in the contract (Tr. 94). When asked whether he recalled any discussions with Bureau personnel asking them to investigate the alleged differing site condition, his answer was unresponsive to the question and related to another matter (Tr. 95).

The Government moved to dismiss the case on the grounds of untimely notice of a differing site condition at the commencement of the hearing, after appellant had presented its case and at the conclusion of the hearing. The Government claims that it was prejudiced by the failure of timely notice regarding the twisted material until after the cleaning operations had changed the condition at the site. The Government states that the first notice in which the contractor claimed the shape of the sealant was not as depicted in the contract was in AF 34, Mingus' letter of January 31, 1985. This letter enclosed a copy of Hunt's letter of January 23, 1985, showing pictorial renderings of two shapes encountered other than expected. The two shapes were "rectangular joints, or joints with rounded edges" and "joints with a concret [sic] lip which required removal in order to remove the 'trapped' sealant below." Countering the alleged untimely notice, appellant claims that the Government had actual knowledge of the differing site condition through conversations of Hunt personnel with the Government inspectors and the inspectors witnessing the difficulties of progress on the job.

Mr. Heintz, chief inspector for the Government, testified about the methods Hunt used to clean the transverse joints citing the use of pipe saws (Tr. 131), pipe saws and carpet knives (Tr. 141), and plowing and sandblasting (Tr. 142). However, he indicated that the method of cleaning the transverse joints was chosen by the contractor, without approval or direction by the Government (Tr. 142). He advised that the extruding operation did not permit seeing whether the seal was twisted or not (Tr. 145), but recalled that Mr. Ulibari had talked to him regarding the bonding of the seal to the sides of the joint and under the lip of concrete over the joint (Tr. 139-40). He agreed that had the seal not been twisted it would not have been captured under the lip of the joint (Tr. 140).

Mr. Boulanger, an inspector under Mr. Heintz, observed that before Hunt started work, much of the sealant had been removed, but that a bulk of it still adhered to the side (Tr. 149). He observed Hunt's work methods involving multiple passes with the extruder, then pipe and power saws, then the jumbo sandblaster and finally individual hand blasters. (Tr. 150). He challenged the validity of joint measurement

data submitted by Mingus in a memorandum of February 5, 1985 (AF 35), on the ground that joint width measurements had been taken after completion of extrusion, sandblasting, and power saw operations, and that 70 percent of such measurements involved joints that did not contain preformed sealant (Tr. 150-52).

Discussion and Findings

Appellant's claim of differing site conditions initially involved an allegation that the joints were wider than shown on the contract drawings, and later incorporated the alleged twisted configuration of the sealant material to explain the difference between the conditions encountered and the typical joint shown in the contract drawings. The Government relies primarily on the lack of timely notice of any changed condition before the site conditions were disturbed. Additionally, the Government contends that the second subcontractor, Hunt, took the joint cleaning and sealing task "as is," with full knowledge of the actual conditions regardless of the indications of the contract drawings.

Regarding the latter question concerning how much Hunt can rely on the joint configuration shown in the contract drawings after the entire 600,000 feet of joints had been opened by Interstate, we can only conclude that Hunt must stand in the same position as Mingus. Mingus was the contractor with the Government who must show it was misled by the contract indications and had the obligation of giving timely notice of the actual conditions differing from those indicated in the contract. Hunt's responsibilities to examine the exposed joints to determine the difficulty of the task it then undertook as replacement subcontractor, are a matter to be determined by its contractual relationship with Mingus. The issues confronting us is whether Mingus timely informed the Government of a differing site condition at the time that it gave such notice on behalf of Hunt, and whether a differing site condition was encountered by appellant.

The standard "Differing Site Conditions Clause" of Standard Form 23-A is included as Clause 4, as follows:

4. Differing Site Conditions

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (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 unencountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

A supplementary clause involving the administration of the clause also is included as follows, in pertinent part:

4A. ADMINISTRATION OF THE DIFFERING SITE CONDITIONS CLAUSE

(a) Nature of the clause. The Differing Site Conditions clause provides for an equitable adjustment to the Contractor or the Government which reflects the increases or decreases in a Contractor's cost of and time for performance that result from a differing site condition (as that term is defined in the clause) encountered by the Contractor. However, an equitable adjustment is only available to the Contractor if he gives the Contracting Officer a prompt notice in writing before disturbing the conditions (or secures an extension of the time for giving such notice) and asserts the claim before final payment under the contract.

(b) Notice of differing site conditions. When a Contractor believes that a differing site condition has been encountered, the clause requires that a prompt written notice be given to the Contracting Officer so that the condition of the site can be investigated, the facts can be ascertained, and a determination can be made regarding the presence or absence of a differing site condition. The prompt notice requirement enables the Government to examine the condition of the site, and, if necessary, (1) to modify the contract so that it will reflect the increased or decreased cost of and time for performance or (2) to develop records concerning any increase or decrease in the cost of and time for performance. Cost and time information is essential for independent Government judgment regarding an equitable adjustment of the contract. A failure to give a timely notice could seriuosly prejudice the Government's ability to determine the extent to which the Contractor or the Government is entitled to an equitable adjustment. Since the existence of a differing site condition is not always recognizable immediately, the clause provides that the Contracting Officer may extend the time for the submission of the required notice. The purpose of the authority to extend the time for the notice is to ensure that Contractors are not deprived of the remedy provided by the clause because of an inadvertent failure to give the required notice. However, this authority to extend the time for the notice does not entitle a Contractor to a time extension beyond the time when he knew, or reasonably should have known, of the existence of the differing site condition. If the Contractor gives the required notice at the time he knew, or reasonably should have known, of the existence of the differing site condition, he is entitled to an equitable adjustment which reflects the increased costs and time required for performance that result from the differing site condition. If the Contractor fails to submit the required notice to the Contracting Officer by the time he knew, or reasonably should have known, of the existence of a differing site condition, he is not entitled to an equitable adjustment which reflects the increased costs and time required for performance prior to the time when he gave the notice or the time when the Government had actual notice of the existence of a differing site condition.

Appellant relies on the last sentence of Clause 4A for entitlement to costs attributed to the alleged differing site condition on the ground that the costs claimed were all incurred after notice was given. This approach seeks to avoid the bar to such claims without timely notice contained in Clause 4(b) above. Appellant contends that the Government had actual knowledge of the twisted configuration of the sealant to be removed, citing chief inspector Heintz' testimony that the 600,000 feet of transverse grooves were within specification tolerance at the completion of Interstate's efforts, and the opinion expressed that the sealant would not have been captured under the lip of the joints had it not been twisted (Tr. 139-40).

In the July 11, 1984, letter claiming a differing site condition, appellant relied on the contention that the width of the joints exceeded

that depicted in the drawings (AF 21). Subsequently, during the hearing, the cause of the widened joints was attributed to the contention that the preformed sealant material had twisted during its installation and required widening of the joint to remove it. Appellant alleges that the construction methods used by both Interstate and Hunt were good construction practice.

From November 1983 until June 1984, Mingus observed the efforts of Interstate to clean the sealant from the transverse joints with the router, sandblaster, and various hand methods. During this period, the concern expressed by Mingus related to the inadequate progress of Interstate. In May 1984, Mingus supplemented the efforts of Interstate with personnel of its own to speed up the task. Mingus expressed concern over the excessive width of the joint resulting from the cleaning process. These efforts culminated in a partial cleaning of all of the 600,000 feet of transverse joints. When Hunt took over to complete the cleaning process, there appears to be agreement with Mr. Heintz' statement that the joints were still within specification tolerances. However, sealant material remained adhering to the sides of the routed joints. Hunt proceeded with the cleaning task using the same equipment and methods that had been used by Interstate, and filed its claim for wider than expected joints in July 1984.

The crucial threshold issue in this appeal is whether there was timely notice given by appellant to the Government of the alleged differing site condition. Appellant's reliance on Clause 4A allowing only those costs occurring after notice of a differing site condition is given does not negate the basic premise of such notice that it be given before the conditions are disturbed as stated in Clause 4. In fact, Clause 4A(a) repeats the admonishment: "However, an equitable adjustment is only available to the Contractor if he gives the Contracting Officer a prompt notice in writing before disturbing the conditions * * *." The notice is required in order to permit the contracting officer to investigate the site to determine whether a differing site conditoin actually exists. If the site conditions are disturbed to the extent that an examination cannot provide a comparison of actual conditions with those depicted in the contract, then the notice is untimely and will not support a claim for an equitable adjustment. *See Mingus Constructors, Inc.* v. *United States*, 10 Cl. Ct. 173 (1968), and *Schnips Building Co.* v. *United States*, 645 F.2d 950 (1981), both cited by the Government.

It is clear from the evidentiary presentation here that Mingus allowed Interstate to rout all 600,000 feet of transverse joints, and to participate in such efforts, with the only expressed concerns that the work was progressing too slow and that the work was resulting in a wider joint than expected. Even after Hunt commenced the joint-cleaning task, the record does not disclose any attempt by Mingus to determine the cause of the widened joints. In the communications from Mingus to Interstate, the cause of the widened joint was attributed to the lengthy attack of the extruder and sandblast operations. Mr. Hand

of Hunt testified that they commenced plowing each joint three or four times, but that the seal was never removed to its full depth to determine its shape. He also indicated that their specially built jumbo sandblaster had so much power it would deteriorate the concrete before removing the seal material. The Mingus letter of November 2, 1984, forecasting completion of the joint cleaning task within 2 or 3 weeks invited a site inspection of the widened joints without mention of twisted sealant material.

At the time that Interstate was terminated and Hunt came on the job, the entire 600,000 feet of transverse joints had been opened. The width of the opened joints were then within specification requirements but sealant remained to be removed from the side of the grooves. Mr. Hand testified that the plowing operation would remove all the sealant from one side of the groove, but not the other (Tr. 30). Whether this resulted from sealant wider than that depicted in the contract, or whether it resulted from excessive removal of concrete by the extruder on the side of the groove opposite, the remaining sealant cannot be determined from the record. We find no evidence that sealant remained on both sides of the joints after plowing with a 5/8-inch wide bit. Prior to the July 11, 1984, letter claiming a differing site condition, both the prime contractor, Mingus, and the Government representatives attributed the widened joints to the cleaning methods being employed. These methods were not required by the contract, but left to the discretion of the contractor. Interstate supplemented the extruder and sandblast machine operations with the use of hand saws, the cutting action of which could not be accurately controlled. Hunt continued with the same methods.

Appellant's exhibits 10, 11, 12, and 13 are pictures of joint with sealant shown. Exhibit 10 is a serious of pictures taken January 8, 1986, of joint seals on canal panels removed for repair work in reach 2 by another contractor. The pictures appear to show twisted sealant at varying depths in the concrete in wavy and nonuniform joints. The pictures have little value because they were taken 2 years after the joint cleaning of the instant contract was completed. The location and relative position on the transverse joint of the scenes portrayed is not provided. If they portray the upper portion of transverse joints, such joints were sealed by a cap-seal method by agreement of the parties. If they show lower portions of the transverse joints, they were either not plowed and resealed, or the condition shown results from the plowing and resealing by the contractor. Similarly, exhibits 11, 12, and 13 are photographs taken for Government records showing measurements being taken of sealed joints, and the record does not locate the joints portrayed in relation to the joints that are in issue.

The joint measurement data submitted by Mingus (AF 35) lacks probative value of a differing site condition. Mr. Boulanger, a Government inspector, testified that 70 percent of the measurements

involved joints that did not contain the preformed sealant. Additionally, the information submitted under date of February 5, 1985, was derived from measurements taken after completion of the cleaning operations according to the unrebutted testimony of Mr. Boulanger.

Conclusion

In the above discussion, the difficulties of comparing the actual site conditions with the contract indications results directly from the fact that the entire 600,000 feet of transverse joints were opened before notice was given of the alleged differing site condition. This extensive disturbance of the site conditions prior to notice to the Government provides substantive support for the Government's claim of untimeliness of notice. However, having a complete record before us on the merits of the differing site condition claim, we find that the record fails to show that actual site conditions differed from the contract indications. The delay of appellant in determining and documenting the cause of the difficulties encountered in the joint cleaning task results in reliance of meager and inadequate evidence to show that a differing site conditon did exist. Therefore, we conclude that appellant has failed to prove the existence of a differing site condition. The appeal is denied.

RUSSELL C. LYNCH
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

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March 7, 1988

APPEAL OF COLUMBIA ENGINEERING CORP.

IBCA-2351 & 2352 Decided: *March 7, 1988*

Contract No. 5-CC-30-02960, Bureau of Reclamation.

Sustained.

Contracts: Construction and Operation: Contracting Officer--Contracts: Construction and Operation: Labor Laws--Contracts: Contract Disputes Act of 1978: Interest--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction

Where a contracting officer voluntarily withholds a clearly excessive amount from a construction contractor's final disbursement in order to provide adequate funds for alleged Davis-Bacon wage underpayments, and the contractor subsequently files a claim under the Contract Disputes Act to recover both the principal and the Prompt Payment Act interest involved, the contractor is entitled to CDA interest from the date of the claim as to both principal and PPA interest on the amount of the excessive withholding, even though the CO was in good faith at the time of the withholding and had no way of knowing, prior to the Labor Department's investigation, that the amount he had withheld was excessive.

APPEARANCES: Bruce Yetter, Esq., Columbia Engineering Corp., El Paso, Texas, for Appellant; Daniel L. Jackson, Esq., Government Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Background

These are appeals by Columbia Engineering Corp. (CEC/contractor/appellant) from an April 14, 1987, decision of the contracting officer (CO), which (a) denied interest on $50,000 previously retained (IBCA-2351) and (b) refused to release the $50,000 being withheld (IBCA-2352), in connection with the alleged underpayment of employee wages contrary to the Davis-Bacon Act, 40 U.S.C. § 276a (1982). The contractor appealed the decision to the Board on July 2, 1987.

On September 2, the Government moved to dismiss the appeal on the ground that the Board lacked authority to decide it. Counsel argued that the dispute arose out of the contract's labor provisions and cited the Board's previous refusal to exercise jurisdiction in such cases (*Blueline Excavating Co.*, IBCA-1990, 24 IBCA 43, 94 I.D. 21, 87-1 BCA par. 19,592). After issuing a show cause order and considering appellant's reply, the Board denied the Government's motion in an unpublished Order dated December 21, 1987, concluding that the appeals concerned the reasonableness of the amounts voluntarily withheld by the CO because of possible labor law violations, rather

than determinations concerning the existence of labor law violations as such.

The appeal arose under Bureau of Reclamation (BOR/Bureau/Government) contract No. 5-CC-30-02960, dated April 24, 1985 (the contract), which provided for penstock rehabilitation and switchyard removal at the Coolidge dam, near Globe, Arizona, on San Carlos Lake, in the original amount of $2,832,000 (the project). On July 10, 1986, the Bureau released the contract's retainages except for the $50,000; and the project was declared substantially completed on or about September 23, 1986, several days ahead of schedule.

A year later, on September 25, 1987, the Department of Labor (DOL) finally determined that the contractor owed additional Davis-Bacon wages totaling $5,965.34, which CEC then paid to DOL in the form of checks made out to the individual former employees involved. On or about November 4, 1987, the Bureau released the contractor's $50,000, which was deposited into CEC's bank account on that date. That action rendered the issues in IBCA-2352 moot, except as they may relate to the Bureau's interest liability.

Since the facts of the case are generally not in dispute, the appeal was submitted for our decision on the record. As discussed below, the Board holds that the contractor is entitled to interest both under the Prompt Payment Act, 31 U.S.C. § 3901 (1982) (PPA), and under the Contract Disputes Act, 41 U.S.C § 601 (1982) (CDA).

General Facts

Notice to proceed under the contract was received by the contractor on May 2, 1985. According to the contractor's Amended Complaint, labor compliance questions and alleged deficiencies were raised by BOR early in the project. A "Declaration" supplied by Joseph W. Edge, Sr., BOR's Labor Compliance Specialist, states that he investigated CEC's activities as early as February - March 1985 (Edge Declaration, No. 12; hereafter, ED 12). Specifically, he states that he visited the work site on February 13, 1986, and interviewed several CEC employees (ED 15 & 16). However, at the beginning of his Declaration, Edge says that he completed DOL's compliance officer training in Washington, D.C., during February - March 1986 (ED 10). Elsewhere he states that he observed an employee working as a crane operator for appellant on February 13, 1983 (ED 28). For the purpose of this decision, we will assume that February 13, 1986, was the actual date of this investigator's visit, which presumably was a date when he was not taking training.

These date variations, though needlessly confusing, would normally be relatively unimportant, except that: (1) February 13, 1986 (or '83 or '85) was apparently the *only* date on which this investigator claims, in his 10-page, single-spaced declaration, to have visited appellant's work site; and (2) the Government essentially bases its entire case as to the reasonableness of the CO's actions on this one investigator's findings, conclusions, and recommendations. Edge's subsequent visits to the site,

of which there were apparently several, appear to have been only for the purpose of enforcing compliance with BOR's wage decisions.

CEC did not agree with BOR's conclusions but, rather, attempted to rely on DOL's Dictionary of Occupational Titles (DOT) and on the nature of the jobs it considered its employees actually, rather than nominally, to be performing. The Bureau deemed this approach unsatisfactory, informing the contractor that local practice, rather than DOT definitions, controlled its wage determinations.

Correspondence concerning this dispute went on for nearly 15 months, commencing in June 1985 and lasting until September 1986, when BOR finally informed CEC that it would no longer respond to questions because the matter had been formally referred to DOL for investigation (Appeal File VII, No. 8; hereafter, AF VII-8).

The Bureau had in fact referred the matter to DOL on April 7, 1986, without telling the contractor that it was doing so. CEC did not learn of the referral to DOL until it received the Bureau's July 11, 1986, reply to its June 30 letter (AF VII-10). As of June 30, CEC thought it was still engaged in negotiations with the Bureau. It wrote to BOR that, "Per your letter of June 17, 1986, we have made payment to the employees involved for unintentional underpayment deficiencies," and it asked to be advised of "any other alleged deficiencies" (AF VII-11).

Meanwhile, on July 10, 1986, the Bureau released all of the contract's retainage, except for $50,000 that was being held to cover Davis-Bacon underpayments (Amended Complaint, Pars. 9 and 10; hereafter, AC 9-10). On October 29, the contractor sought release of the $50,000, suggesting that if any retainage was needed, less than $1,000 would be appropriate (AF VII-7). On November 21, the Construction Engineer denied CEC's request as to all funds (AF VII-6).

On January 17, 1987, the contractor submitted a formal claim (containing a proper CDA certification) to the CO for the funds being withheld, seeking interest on that amount under both the PPA and the CDA (AF I). The CO responded on April 14, 1987, asserting that the $50,000 being retained could not be released until the completion of DOL's investigation, and stating:

> The Contract Disputes Act, the Prompt Payment Act and any other contract clauses do not apply as the Department of Labor investigation is separate from this contract. The Bureau of Reclamation has no control over disbursement of the funds until so advised by the Department of Labor. Therefore, there is no entitlement to interest.

(AF VII-5).

The contractor wrote once more to the CO on May 15, 1987, recapitulating the parties' Davis-Bacon negotiations; arguing that, at a minimum, "the Government should immediately place the entire amount into an interest bearing escrow account so that future damages to Columbia can be mitigated"; and complaining that the entire matter had been "unreasonably delayed." The contractor's analysis, appended to the letter, asserted in part:

At this time, there is no rational basis upon which the Government can support its claim of $50,000 to be withheld from Columbia's earnings. The $50,000 is entirely arbitrary and excessive. As of January 26, 1986, Columbia had only expended about $333,000.00 for all of its payroll on the project. Assuming the Government is correct in every allegation that it has made since the beginning of the project in the method or manner of payment of employees, the total amount, in our estimation, would not exceed $10,000 to $15,000. Furthermore, there are several means of assuring a source of funds to the Government that would be less burdensome, less punitive, and less contrary to fair play and justice.

Besides violating the terms of the contract, we believe that this long delay and the manner and method of handling this matter has been a violation of the Prompt Payment Act which requires prompt payment of funds due to contractors. Furthermore, the Prompt Payment Act does call for and require the payment for interest for all funds not paid promptly.

We believe that the long delays, amounts withheld, and entire handling of this matter has the net effect of using the Government's superior bargaining position to unfairly and improperly force Columbia into capitulation to the Government's point of view.

(AF VII-4).

The CO responded on June 19, 1987, with a six-line letter, stating that the $50,000 amount had been "estimated" to cover potential violations and that the Bureau had no control over the funds "until so advised by the Department of Labor" (AF VII-3).

It is not clear from the record to what extent DOL actually conducted a field investigation of CEC's alleged wage deficiencies; but in its Final Brief (FB) dated January 27, 1988, appellant alleges that a DOL investigation took place between July 30 and September 25, 1987 (FB, par. 10 at 3).

In any event, on September 25, 1987, under cover of an informal, handwritten routing slip signed by Mike Piekarski of the Wage and Hour Division of its Phoenix office, DOL transmitted to CEC its calculations of the gross amounts of additional payments CEC was required to make, with a notation that CEC should make its checks (for those amounts) out either to each employee concerned or else to the U.S. Department of Labor (AC, Exh. D).

CEC apparently received DOL's determinations on October 1, 1987. On October 2 it transmitted to Piekarski its individual payroll checks totaling $5,965.34, together with a disclaimer that it did not consider the amounts requested to be just or true, and stating that it had never received any employee complaint that was not immediately adjusted or satisfied (AC, Exh. F). The retained $50,000 was transmitted to CEC sometime after October 21 (ED 37), and deposited into CEC's bank account on November 4, 1987 (Appellant's Jan. 14, 1988, submission, Exh. B).

Facts Concerning Basis for Amount Withheld

In his December 6, 1988 (presumably 1987), Declaration accompanying the Bureau's January 7, 1988, final submission to the Board, BOR Labor Compliance Specialist Edge summarizes his February 13, 1986, wage investigation (referred to above), and provides 10 exhibits, in order to explain the basis for the $50,000 amount

withheld by the Government. The first exhibit is his report to BOR, and the other nine are his reports of interviews with CEC's employees (each entitled, Labor Standards Interview). In essence, the Declaration alleges that Edge's calculations were conservative estimates of deficiencies based on actual underpayments to employees who were physically present at the work site on February 13, 1986.

Edge states that his estimates did not take into consideration anticipated underpayments (1) to former employees, (2) to absent employees, (3) to subsequent employees, (4) for subsequent periods of employment on the project, or (5) for any overtime--past, present, or future (ED 29-33). Edge concludes:

> 34. Based on the foregoing, I determined and thereafter reported to the BOR Contracting Officer in charge of Columbia's contract that I believed that Columbia had underpaid its workers on this contract approximately fifty thousand dollars.
>
> 35. Based on my investigation, findings and recommendations, the BOR Contracting Officer withheld from payment to Columbia $50,000.00 on the ground that it appeared that Columbia had violated the labor payment provisions of the contract and *thereafter* referred the matter to the Department of Labor *for determination* and action as appropriate. [Italics added.]
>
> 36. The sum of the amounts noted on specific cases above where I found evidence of wage underpayments by Columbia to its workers is $37,090.86.

After the contractor had filed its July 2, 1987, appeal to the Board, BOR's Regional Director apparently asked for verification of the amount of the withholding, for on August 5, the project's Construction Engineer wrote a memorandum to clarify what had caused the labor compliance investigation and how the amount of retention for back wages had been determined. The gist of this memorandum was that there had been a disagreement between Edge and the contractor on several matters relating to the labor standards provisions of the contract, job definition, the controlling nature of area labor practice, and the contractor's attitude toward BOR's interpretations.

The matter had therefore been referred to DOL for "investigation as appropriate." However, before doing so, Edge had conferred with the Wage and Hour Director of the "Phoenix Department of Labor" on February 19, 1986, in order to assure that his proposals were reasonable (AF III-2). The Construction Engineer's memorandum describes this meeting as follows:

> At the time of the review of the contract and the contractor's certified payrolls with [DOL's] Richard Habura, an informal estimate of wages due employees was made and the potential to meet or exceed $50,000 was found *as almost all employees were affected.* This estimate was based on the information available at that time, and *concrete figures were not used, but was a judgment estimate only,* as all previous employees would have to be interviewed by the Department of Labor. [Italics added.]

(AF III-1).

Applicable Law and Regulations

The contract contains the standard Davis-Bacon Act labor standards provisions applicable to contracts in excess of $2,000 (7/18/83). The pertinent clauses are as follows:

I.7.5 Withholding. - The Contracting Officer shall *upon his/her own action or upon written request of an authorized representative of the Department of Labor* withhold or cause to be withheld from the Contractor * * * so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics * * * the full amount of wages required by the contract.

I.7.8 Disputes Concerning Labor Standards. - Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. *Such disputes shall be resolved in accordance with the procedures of the Department of Labor* set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Contractor * * * and the contracting agency * * *.

I.7.9 Compliance with Davis-Bacon and Related Act Requirements. - *All rulings and interpretations* of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 *are herein incorporated by reference* in this contract. [Italics added.]

Government counsel also calls our attention specifically to 29 CFR 5.9, which states:

§ 5.9 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1, *the Federal agency*, upon its own action or upon written request of an authorized representative of the Department of Labor, *shall take such action as may be necessary to cause the suspension of the payment*, advance or guarantee of the funds until such time as the violations are discontinued or *until sufficient funds are withheld to compensate employees for the wages to which they are entitled* and to cover any liquidated damages which may be due. [Italics added.]

In its Original Complaint, appellant states that the provisions of the PPA and of OMB Circular A-125 were also made applicable to the contract by Clauses I.5.11 and I.5.12, although the CO did not include these contract provisions in the Appeal File he transmitted to the Board. Government counsel does not deny their inclusion, but only their applicability.

According to appellant, Clause I.5.12 is as follows: "Payments under the contract will be due on the 30th calendar day after the later of: (1) The date of actual receipt of a proper invoice in the office designated to receive the invoice, or (2) The date the supplies or services are accepted by the Government."

Appellant also quotes the policy section (Sec. 3) of A-125 to the effect that: "*Agencies will pay interest penalties automatically, without the need for business concerns requesting them*, and will absorb interest penalty payments within funds available for the administration or operation of the program for which the penalty was incurred." Appellant notes that in the Supplementary Information section accompanying the latest A-125 revision, OMB states that: "*The revised circular emphasizes the requirement that interest penalties must be paid automatically without a request by the firm. While this is existing*

policy, some agencies are ignoring it" (Original Brief, No. 29 at 6, citing 52 FR at 21927 (June 9, 1987)).

The PPA itself, cited by both parties, limits interest entitlement to a maximum of 1 year or until a CDA claim is filed; permits CDA interest to accrue on both principal and interest that are unpaid as of the date of the CDA claim; and does not require an interest penalty to be paid where there is a dispute between the agency and a business concern over the amount of payment or compliance with the contract. 31 U.S.C. § 3906.

Arguments by the Parties

The legal arguments of the parties present an interesting contrast: The Government argues lawfulness; whereas, appellant argues reasonableness.

Appellant alleges that it was cooperating fully with the Bureau from the inception of the contract in attempting to resolve the parties' differences concerning proper job classifications and wages. Appellant found it difficult to believe, however, that it could not rely on the DOT, which it considered a universal and accepted manual for job classification.

One of the Bureau's defenses is that CEC itself requested that the dispute be turned over to DOL for resolution, citing a statement in the contractor's February 5, 1986, letter, as follows:

> In sum, we still have reservations about the merits of the Bureau's positions and contentions on many of the above-mentioned items. We are not taking frivolous or meritless positions in opposition; rather we are concerned that the Wage Decision be administered fairly and as correctly as possible. We believe several of the Bureau's interpretations of the Wage Decision are not appropriate. We want to resolve these outstanding issues once and for all, to all of our satisfactions. If we can reach an agreement or compromise to end these issues, we are all for it. *However, if we are unable to reach such an agreement, we must request that these matters be turned over to the next step in the appeals process which I believe to be the Department of Labor.* [Italics added.]

Appellant responds that not only was the request conditional, but since it was made before the Edge investigation on February 13, 1986, it could hardly have been a request to refer the results of that investigation to DOL. Besides, the Bureau continued to negotiate directly with CEC for several more months on other matters after the April 7 referral was made.

Once the results of the Edge investigation had been referred to DOL, appellant states that it could obtain no information on the status of DOL's inquiry. It cites its inquiry letters of September 1986 (about the time the project was completed), May 1987, and July 1987, in support of this contention. CEC's complaint here is not that DOL did nothing with the referral but, rather, that for nearly 15 months BOR failed to follow up on it. In fact, once DOL began its inquiry, the matter was resolved in approximately 60 days.

Appellant argues that, since the time required to resolve the dispute was entirely unreasonable and indefensible, and since the Government benefitted from the use of CEC's funds while the matter dragged on, the Government should pay interest on the funds it retained during that period.

Appellant further contends that while the CO has some authority to withhold money from contractors for alleged Davis-Bacon violations, the amounts should be reasonably related to the labor issues questioned. Appellant states that it had never previously seen the results of the Edge investigation before they were submitted with the Government's final pleading and that, in any event, they should have been part of the appeal file.

Finally, appellant states that the excessiveness of the $50,000 withholding is shown by the fact that this amount represents over 9.33 percent of the $535,790.22 of wages, including overtime, ultimately paid for the entire project. Broken down into detail, the amount BOR actually calculated came to $36,091.86, as compared with DOL's computation of $5,965.34 for the same violations, an overstatement of 600 percent. "And to compound matters," appellant observes, "an additional $14,000 was inexplicably thrown in for good measure by the BOR's Contracting Officer. The result was that the BOR's amount withheld from Columbia was over 838% too much!" (FB at 5).

The Government's Supplemental Brief (SB) recapitulates a number of issues previously raised, including its arguments that DOL, rather than the Board, has exclusive jurisdiction over the case (an issue we have already decided against the Government); that Columbia had agreed in the contract that the CO could withhold such amounts for Davis-Bacon violations as he found appropriate; that the CO's decision to withhold did not constitute an abuse of discretion; that Columbia's "claim" was not cognizable under the CDA because it never specifically requested a CO's decision; and that its claim for PPA interest was invalid both because the claim involved a matter in dispute and because Columbia had not submitted a proper invoice to the CO as the PPA requires.

In its final arguments, the Government contends that there was nothing untimely about the Bureau's final payment because it was made (according to the Edge Declaration) on October 21, 1987, within 30 days after BOR received DOL's October 8 authorization to release the money.

As to the propriety of withholding $50,000, the Government argues that BOR's labor compliance specialist (Edge) had determined that $50,000 was a conservative figure, not reflecting numerous other possibilities for underpayment. The Government also suggests that a possible reason for the low assessment of additional wage compensation by DOL was the fact that, by the time it made its investigation in August 1987, the affected employees were no longer available.

Finally, the Government reiterates its view that the matter under consideration should have been resolved by DOL rather than by this

Board, since DOL is the proper forum for deciding wage disputes uner the contract. One basis for the Government's position is undoubtedly that CEC also appealed to the DOL Wage Board and to its Chief Administrative Judge 5 days after appealing to this Board, in an effort to recover its $50,000 more quickly. There is no indication in the record that DOL has ever responded to those appeals; but in view of the final settlement of the Davis-Bacon investigation, it would no longer seem necessary that they do so. Government counsel nevertheless asserts:

> The Board is invited to address BOR's motions to dismiss for failure to state a claim and motion to dismiss as premature in both IBCA 2351 & 2352. In the contract, the parties agreed that disputes such as the ones involved in these appeals would be resolved before the Department of Labor. Undertaking to decide the claims presented in the instant appeals is not in accord with the agreements of the parties. Additionally, if the Board decides in this and future cases to decide such issues in contravention of the contract provisions, the Board is headed toward potential jurisdictional conflicts, inconsistent decisions in the same case involving the same facts, forum shopping and duplicative or inconsistent awards or denials of awards. BOR submits that obedience to the agreements of the parties as to the forum to resolve such issues avoids such undesirable results.

(SB at 12-13).

Discussion

Taking the last argument first, we believe that the position of the Government is wide of the mark. (*See A&J Construction Co.*, IBCA-2376-F, 25 IBCA 73 (Feb. 4, 1988), 88-1 BCA par. .) Commentators dealing with the Davis-Bacon Act generally regard its requirements as an imposition by the Government in its sovereign capacity. But the PPA interest requirement also involves an intervention by the sovereign because it constitutes a waiver of sovereign immunity. In our view, neither Act takes precedence over the other.

The Congress, in its wisdom and as a matter of public policy, has seen fit to enact both statutes. Neither enactment involves strictly contractual matters, although both the courts and the Comptroller General sometimes appear to wish that the Davis-Bacon Act did. *See, e.g., Universities Research Assn.* v. *Coutu*, 450 U.S. 754 (1981); *Collins International Service Co.*, 744 F.2d 812 (CAFC 1984); and GAO Report, The Davis-Bacon Act Should Be Repealed, B-146842, April 27, 1979. The PPA, being of more recent vintage, obviously has involved fewer cases. But that does not make it any less important.

Consistent with long-established norms of interpretation, it is not for the courts or for the boards lightly to decide that either enactment is superior to the other. It is rather for us to try, fairly and impartially, to enforce *both* statutes. Set forth below are some of the principal considerations we have taken into account in reaching our decision.

First, appellant is not complaining about Davis-Bacon enforcement as such; it is complaining that the CO arbitrarily, and on his own initiative, withheld money that was due to it under the contract, without any formal DOL direction or involvement whatsoever. Second,

it is complaining that the DOL referral was apparently decided upon by the Bureau at a time when appellant had reason to believe that the parties were negotiating, in good faith, their Davis-Bacon differences. Third, it is complaining that BOR did not even tell it that there had been a referral, thus breaching its duty of fairness to the contractor in its performance of the contract.

Fourth, it is complaining that $50,000 was withheld, when less than $6,000 was needed. Fifth, it is complaining that the $50,000 was withheld for an inordinate length of time, again without explanation. Sixth, it is complaining that BOR refused to deposit the money into an interest-bearing account. Seventh, it is complaining that BOR made no effort whatsoever to speed up the DOL decision process. Eighth, it is complaining that once the Davis-Bacon matter had been resolved, BOR refused to pay interest when the $50,000 was released, despite the fact that the Government had had the use of the money in the interim, and despite the requirements of the PPA.

These are not matters of great concern to DOL, which presumably was fully satisfied once the Davis-Bacon matter had been resolved. But they are matters of great concern to the contractor and, because of the PPA, to us. In summary, this is neither a Davis-Bacon case nor a case arising out of any of the other labor standards provisions of the contract.

We also note that, ultimately, it is for this Board to determine both the issues in the appeals before it and the nature and scope of its own jurisdiction, consistent with established precedent. In our Order of December 21, 1987, we concluded that we not only have jurisdiction over this case, but the authority to decide it.

In doing so, we conclude that although the Government's arguments are not persuasive, three of them merit discussion: *first*, that the CO was entitled to withhold the amount that he did; *second*, that the PPA does not apply because the matter was in dispute; and *third*, that the CDA interest provision does not apply because the contractor's January 17, 1987, letter setting forth a CDA certification did not request a CO's decision. Finally, it is also necessary to determine the dates from which PPA and CDA interest will commence.

1. Reasonableness of Amount Withheld.

As we made clear in *Blueline, supra*, DOL's recently revised regulations vest authority over all DOL Davis-Bacon decisions and directives exclusively in the Department of Labor; and this Board will not arrogate to itself the right to question them. If the CO had withheld the $50,000 in this case at the request of DOL pursuant to Davis-Bacon authority, even in circumstances where DOL's request seemed arbitrary and capricious, this Board might deplore the occurrence but it would decline to assert jurisdiction over the case because, in our view, only DOL now has the authority to resolve the dispute.

Such are not the facts of the case before us. Here, the CO, in effect, *volunteered* to withhold substantial contractor funds at the behest of a

relatively inexperienced BOR labor specialist, on the basis of only one site visit and of only the most mimimal and informal conversation with DOL (both solely by the labor specialist), at a time when, from every external appearance, the contractor was trying in good faith to comply with the contract's labor standards provisions. We do not know what legal standard DOL's appeals board might apply to this situation; but in our view, *BOR's* CO takes such inadequately justified actions at his own peril. If it turns out that he was right, the Government wins. If it turns out that he was wrong, the Government loses.

Here, the Government loses. Government counsel primarily cites an Armed Services Board case, *Steven E. Jawitz*, ASBCA No. 33610, 87-3 BCA par. 20,011. In that case, the board decided it had no jurisdiction over a wage classification case until DOL had made its decision, after which the contractor was entitled to PPA interest if a release of the contractor's excess funds did not then promptly occur. However, the board in *Jawitz* expressly relied on the fact that the amount withheld was determined to be reasonable--namely, $4,500 withheld in connection with a liability ultimately assessed at $1,188. Also, in *Jawitz*, the investigation was commenced at DOL's request, not at the contracting officer's initiative (87-3 BCA at 101,329).

In the case before us, despite the grave concerns alleged by BOR's labor compliance specialist that he had uncovered only the tip of an iceberg, DOL's ultimate conclusion was that less than $6,000 was owed, despite a $50,000 withholding. Certainly, one test of propriety would be whether the withholding was so excessive as to have been arbitrary or capricious. *Cf. Orbas & Associates*, ASBCA No. 32922, 87-3 BCA par. 20,051, citing *Darwin Construction Co.* v. *United States*, 811 F.2d 593, 598 (Fed. Cir. 1987) (87-3 BCA at 101,525). In *Darwin*, the court said:

> [The cited decisions] make it abundantly clear that when a contractor persuades a court to find that the contracting officer's default decision was arbitrary or capricious, or that it represents an abuse of his discretion, the decision will be set aside. *There is nothing in these decisions to support the Government's contention that the aggrieved contractor must add another layer of proof by demonstrating that the decision was also made in bad faith.* [Italics added.]

(811 F.2d at 598).

We think that the same test should apply to other types of CO decisions as well. (*See, e.g., Martin Marietta Corp.*, ASBCA No. 31248, 87-2 BCA par. 19,875; *aff'd on recon.*, Dec. 14, 1987, BCA .) Here, we do not really know the reason for the substantial discrepancy between the amount the BOR labor compliance specialist estimated and the amount DOL later determined, but that is immaterial. Under the facts of this case, we find that the amount of the CO's withholding was clearly excessive.

2. Applicability of the Prompt Payment Act.

Despite numerous clear expressions of Congressional intent in the CDA and PPA; numerous recently proposed amendments (*see, e.g.*, OMB's preamble to A-125 at 52 FR 21926, June 9, 1987); OMB's acceptance of the principle; and contractors' general awareness of these laws, many contracting officers still do not appear to recognize interest for what it is--namely, a legitimate and inevitable cost of doing businss (on either side).

We think, and we think the Congress thinks, that interest should be paid whenever it legally can be, in any circumstances in which the Government either has the beneficial use of an individual's money or else withholds money that is otherwise due. The Internal Revenue Service, for example, has long since accepted that principle: When it wins, it wants its money with interest; when it loses, it pays back the money withheld with interest. Contractors should be treated in like manner.

Moreover, we reiterate that, despite the Government's dire concerns about our emasculating the Davis-Bacon Act, this is essentially an interest entitlement case, nothing more.

Interestingly, the very case cited by the Government as controlling here--namely, *Jawitz, supra*--provides a basis for dealing with the arguments being raised by the Government in this case. There, the Government argued that PPA interest was not payble: "First, because of a disagreement over the withholding, interest penalty did not accrue on the invoiced amount. Second, the contracting officer had a contractual right to withhold that amount for labor violations and thus the interest penalty provision did not apply." The board decided that, while the CO had the right to withhold a reasonable sum for Davis-Bacon violations, once the amount of the wage underpayment had been determined, only the latter amount was "in dispute" and thus not subject to interest; but interest was payable on the remaining (undisputed) amount (87-3 BCA at 101,332).

The difference between *Jawitz* and the present case that is relevant here, however, is that in *Jawitz* the amount initially withheld by the CO was found to be reasonable; whereas, here we have specifically found that the amount withheld by the CO was unreasonable. That being the case, we decline to speculate on how much money the CO *might* reasonably have withheld in this case; rather, we find that, of the $50,000 withheld, only the $5,965.34 that was ultimately determined to be owed should be considered reasonable, and that therefore only that amount was in dispute. Accordingly, PPA interest is payable on the $44,034.66 difference from July 10, 1986, when all other funds were disbursed, until January 17, 1987, when the contractor submitted its certified CDA claim.

As is evident from the foregoing, we find no merit in the Government's argument that no interest is payable under the PPA because the contractor never submitted a valid invoice. The simple responses to that contention are, first, that if there was no valid invoice, or the equivalent, on what basis did the CO make payment to

the contractor on July 10, 1986, of all contract funds other than the $50,000 being withheld for Davis-Bacon purposes? Second, the PPA provides another basis, besides a proper invoice, for the commencement of interest; namely, "the date payment is due under the contract for the item of property or service provided" (31 U.S.C. § 3903(1)(A)).

While the contractor here was apparently not required to submit formal invoices, it was receiving regular progress payments based on work completed. Thus, although the CO had some discretion as to when these payments should be made, once he exercised his discretion to make the final payment on July 10, interest began to accrue on any amount thereafter improperly withheld. *See Zinger Construction Co.*, ASBCA No. 31,858, 87-3 BCA par. 20,043 at 101,476.

3. Applicability of Contract Disputes Act.

As we have noted, the PPA provides that interest ceases to accrue after a claim is filed under the CDA (31 U.S.C. § 3906(b)(1)(A); *Zinger, supra*). It also provides that interest may be paid under the CDA on both principal and interest owed under the PPA (§ 3906(b)(2)); *Jawitz, supra*).

In the case before us, CEC filed its CDA claim on January 17, 1987, complete with proper certification--even though it might be argued that no certification was needed where the underlying claim was for no more than $50,000 (*Sol-Mart Janitorial Services, Inc.*, ASBCA No. 32,873, 87-3 BCA par. 20,120). In that January 17 letter, appellant stated in part:

> In your letter of November 21, 1986, you denied our request, dated October 29, 1986, for final payment and release of retainage of 1.62% on the above-described project. *Please be advised that we formally make claim, under the Contract Disputes Act* and the Prompt Payment Act which entitles us to interest on the unpaid amount, for the release of any and all funds payable to our company retained by you. [Italics added.]

(AF I).

The Government contends that this letter was insufficient to constitute a CDA claim because it does not specifically request a CO's decision. No authority is cited for this proposition, and we find none that is persuasive.

On the contrary, the law appears to be well settled that a letter containing a proper CDA certification is, by its very nature, a request for a CO's decision. *Aqua-Fab, Inc.*, ASBCA No. 34,283, 87-2 BCA par. 19,851. *See also Contract Cleaning Maintenance, Inc.* v. *United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) and this Board's decisions in *A&J Construction Co.*, IBCA-2269, 24 IBCA 141, 94 I.D. 211, 87-3 BCA par. 19,965, and *G. A. Western Construction*, IBCA-1550, 89 I.D. 365, 82-2 BCA par. 15,895. In fact, in another recent case, *Sol-Mart, supra*, the board accepted, as a CDA claim for PPA interest, a letter detailing the dispute and requesting payment, written not to the CO but to a

depot commander (87-3 BCA at 101,877 & 101,879). Thus, there is no valid basis for the Government's position.

As to the CDA claim, interest accrues on the total amount of principal and interest owed under the PPA (for the period July 10, 1986, through January 17, 1987) during whatever time that total amount remained unpaid. Here, the period involved, with respect to the $44,034.66 plus PPA interest, was from January 17, 1987, until November 4, 1987, the date appellant received the amount that had been withheld.

In addition, since the contractor's Davis-Bacon deficiency was paid not out of the $50,000 withheld but by individual contractor checks, appellant is entitled to simple CDA interest on the retained $5,965.34 deficiency amount from October 5, 1987 (the date we will assume that DOL received the contractor's October 2 deficiency checks) until the date CEC received the Government's $50,000 refund check--*i.e.*, November 4, 1987.

To the extent that our interest payment periods differ from those in *Jawitz, supra*, it is primarily because the facts of the two cases differ. In that case, the board determined that the amount withheld by the CO was reasonable; thus, PPA interest did not commence until the Davis-Bacon matter had been completely settled. Here, where no invoices were involved and the amount withheld was found to be unreasonable, we find that appellant was entitled to PPA interest on the amount improperly withheld from the date all other retainages were released (viz., July 10, 1986) until a CDA claim was filed, under 31 U.S.C. § 3906(b)(1)(A), and under § 3903(1)(A) rather than § 3903(1)(B).

We also consider all interest entitlement after appellant's January 17, 1987, claim to be authorized under the CDA rather than under the PPA. For these reasons, we conclude that there is no 30-day interval before interest entitlement begins, and that entitlement should cease only when the contractor receives payment, rather than when the check was dated, as would have been the case under the PPA (*cf.* 31 U.S.C § 3901(a)(5) and 41 U.S.C. § 611).

Decision

In summary, we hold in IBCA-2351 that appellant is entitled to PPA interest on $44,034.66 between July 10, 1986, and January 17, 1987; to CDA interest (on the total of $44,034.66 plus PPA interest) between January 17, 1987, and November 4, 1987; and to CDA interest on $5,965.34 between October 5, 1987, and November 4, 1987. IBCA-2352 is hereby dismissed as moot.

Appellant has also requested attorney fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1985). That request is hereby dismissed without prejudice until all appeal rights of the parties have expired (*Yazzie Construction Co.*, IBCA-2104, 86-2 BCA par. 18,964).

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

STATE OF IDAHO

101 IBLA 340 Decided *March 23, 1988*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, dismissing protest against mineral patent applications I-16043 and I-16044.

Reversed, hearing ordered.

1. State Grants

The Idaho Admission Act of July 3, 1890, granted the State secs. 16 and 36 in every township in Idaho for the support of the common schools. For sections already surveyed, this grant was immediately effective. For land surveyed after admission, title did not pass to the State until approval of the survey of the affected section. If land was mineral in character on the date of survey, title did not pass to the State until Jan. 25, 1927, when Congress extended school grants to lands that were mineral in character, excluding lands "subject to or included in any valued application, claim, or right * * * unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled."

2. Evidence: Presumptions--State Grants

There is a presumption which exists, until the contrary is shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character is concerned.

3. State Grants

Because an application for a mineral patent falls within the circumstances enumerated in the statute providing for the grant of mineral lands to states for school sections, 43 U.S.C. § 870 (1982), the filing of such an application provides the Secretary of the Interior jurisdiction to determine the mineral character of land subject to a state grant.

4. State Grants

A mineral return upon the filing of the survey of a state school section does not have effect to establish the character of the lands as chiefly valuable for mineral, and cannot of itself operate to take school lands out of the grant to the state. A mining claimant, not the state, bears the ultimate burden of proving the land was mineral in character at the date of admission or the date of survey.

5. State Grants

Before a mineral classification can become conclusive to a state's interest in a school section, notice and an opportunity for a hearing must be provided.

6. Mining Claims: Contests--Mining Claims: Patent--Rules of Practice: Private Contests--School Lands: Mineral Lands--State Selections

If a mineral patent application filed after Jan. 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private contest proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

APPEARANCES: Robert J. Becker, Esq., Boise, Idaho, for appellant; Michael K. Branstetter, Esq., Wallace, Idaho, for Big Creek Apex Mining Co.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

The State of Idaho has appealed from the December 19, 1984, decision of the Idaho State Office, Bureau of Land Management (BLM), dismissing the State protest against mineral patent applications I-16043 and I-16044, filed by Big Creek Apex Mining Co. to patent the Snow Storm and Snow Slide lode mining claims. The patent applications were filed on September 24, 1979. The Snow Storm claim was located on January 1, 1890, and is described by M.S. 3325 as situated in secs. 15 and 16, T. 48 N., R. 3 E., Boise Meridian, Idaho. The Snow Slide claim, located on January 1, 1892, is described by M.S. 3341 and is situated in sec. 16 of the same township.

[1] Idaho's interest in this matter arises from section 4 of the Idaho Admission Act of July 3, 1890, ch. 656, 26 Stat. 215, which granted secs. 16 and 36 in every township of the State to Idaho for the support of common schools. For sections already surveyed, this grant was immediately effective. For land surveyed subsequent to the enactment of this provision, title did not vest until approval of the survey of the section. *See United States* v. *Wyoming*, 331 U.S. 440, 443-44 (1947), and cases cited therein. A survey of sec. 16, T. 48 N., R. 3 E., was approved on November 29, 1912. The character of the land in sec. 16 on that date is significant, since if the land was mineral in character on the date of survey, title did not pass to the State until January 25, 1927, when Congress extended grants in aid of the common or public schools to lands that were mineral in character, 43 U.S.C. § 870 (1982). Subsection (c) of section 870 provides: "[a]ny lands * * * subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, * * * are excluded from the provisions of this section." Thus, the Snow Storm and Snow Slide mining claims were not excluded from this grant unless they were shown to be valid on January 25, 1927. Even if the claims were valid before that date, they could have become invalid by mining out the discovered mineral or by a market change making the mineral unmarketable at a profit. Under the clear provision of the 1927 Act, the State's title would attach at such time.

Patent applications for the subject claims were filed on September 24, 1979. On November 8, 1979, the State of Idaho filed a

request that it be notified of the publication of any mineral application concerning these claims. No notice of mineral application was published until February 1982, and on March 31, 1982, the State submitted a letter for the purpose of declaring its interest in the matter but indicated that the letter was not intended as a protest. The letter was accompanied by a copy of a decision by the Director, BLM, dated November 27, 1953, concerning a State indemnity selection application in which the State had assigned as base-land part of sec. 16, T. 48 N., R. 3 E., Boise Meridian, alleging that such land was lost because mineral land had been patented. The 1953 BLM decision stated:

> All lands outside the patented mining claims may be presumed to have passed to the state under the original granting act on the acceptance of the plat of survey, if not then known to be mineral in character. If the lands were then known to be mineral in character, they passed to the state under the Act of January 25, 1927 * * *.

Accordingly, the 1953 decision considered only land which had already been patented to be lieu land; title to land within unpatented mining claims was presumed to have passed to the State.

In its March 31, 1982, letter to BLM, the State refers to a memorandum from the Chief, Branch of Mining, Division of Minerals, to the Director, BLM, dated November 25, 1953, indicating that the State owns 31.85 acres in lot 12 and 38.27 acres in lot 11, the same lands encompassed within the Snow Storm and Snow Slide patent applications. The State's letter acknowledges that issuance of a patent could be proper if the applicant could prove a valid location prior to the Act of 1927, but, the State contends, if patents are issued then the State would be entitled to lieu selections mineral in character for the patented land. Mineral entry final certificates were issued by BLM on December 7, 1982. Both mineral entry certificates are made subject to later verification of discovery of valuable mineral on the claim.

On February 4, 1983, the State filed a protest against issuance of patent followed by an amended protest filed on July 21, 1983. The amended protest asserts title to mineral rights under the Act of January 25, 1927, also refers to the prior BLM decision that title to the land is in the State, and asserts that the patent applicants are required to demonstrate the following:

> a. That their claims were properly located with valid discoveries thereon prior to January 25, 1927, and if relying on claims by alleged predecessors in title, the validity of their chain of title to such claims.
>
> b. An actual discovery of minerals on the surface of these claims at the date of filing of the applicant's earliest claim and/or (sic) prior to January 25, 1927, and that such actual discovery, continued from the date of filing of the applicants' earliest claim to the present date.
>
> c. That said actual discovery satisfied both of the following tests continuously from the date of filing of their earliest claim to the present date:
>
> 1. That the discovery is of such a character that a person of ordinary prudence would expend time and money to develop the minerals for a profit; and
>
> 2. That the minerals can be extracted and marketed at a profit.

d. That the lands under these claims were mineral in character as of November 19, 1912, which is the date of survey of this Section 16.

The State requested a hearing and that all proceedings be stayed until after hearing and a determination on the merits by a proper officer.

In its answer to the State's protest, Sunshine Mining Co. (Sunshine), the successor in interest to Big Creek Apex Mining Co.'s patent applications, stated that the Department had classified the land as mineral in 1898, 14 years before the section was surveyed and returned as mineral in character by the survey approved on November 29, 1912. In response to the State's assertion that the land would otherwise have passed to the State under the 1927 statute, the claimant contends that the claims were valid at that time, citing testimony from private litigation, *Sunshine Extension Mines, Inc.* v. *Coeur d'Alene Big Creek Mining Co.*, No. 1296 (D. Idaho 1936).

In rejecting Idaho's assertion that the land was granted under the Enabling Act, BLM held:

The survey for T. 48 N., R. 3 E., B.M., was approved November 29, 1912. The State argues the lands were nonmineral in character on the date of survey and title vested to the State.

* * * * * * *

The history of the area demonstrates section 16 was mineral in character on the date of survey. The Department of the Interior classified the land as mineral in character on February 5, 1898. Classification of section 16, T. 48 N., R. 3 E., B.M., as mineral in character was made under the provisions of the Act of February 26, 1895, 28 Stat. 683, whereby Congress provided for "the examination and classification of certain mineral lands in the states of Montana and Idaho." A March 30, 1898, report to the Commissioner, General Land Office in Washington, D.C., indicated no protests were filed against the classification of section 16 as mineral in character. On August 22, 1898, the Secretary of the Interior approved the classification. In addition, numerous patented and unpatented mining claims existed in section 16 in 1912.

The State argues that if the land was mineral in character in 1912, title vested to the State under the Act of January 25, 1927. The act did grant mineral-in-character, numbered school sections to the States. However, excluded from the provisions of the act were those lands "subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled..." Snow Storm and Snow Slide were excluded from the provisions of the act because they were lands "subject to or included in any valid application, claim, or right."

In view of the fact that BLM's mineral report recommended a patent for each claim, BLM's decision held the State of Idaho had the burden of proving that no valid discovery existed on the claims, citing *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 90 I.D. 352 (1983), and 2 *Am. Law of Mining, § 9.26 at 354 (1982).* The BLM decision then dismissed the State's protest finding that the State had not shown the patent applicant had failed to make a valid entry. The question on appeal, therefore, is whether BLM correctly dismissed Idaho's protest for failure to show that title to the land encompassed by these two claims had vested in the State in 1912 or 1927.

We will first discuss the effect of the Enabling Act and the 1927 Act. These statutes purport to convey title, and because Idaho's protest

raises an issue concerning title to sec. 16, it necessarily raises a question concerning this Department's jurisdiction to adjudicate this matter. If title to the land in question was conveyed either by the Statehood Act or by the Act of January 1927, the Department lacks jurisdiction to consider a mineral patent application to this land.

[2] In *Margaret Scharf*, 57 I.D. 348 (1941), Assistant Secretary Chapman stated that there is a presumption, which exists until the contrary is clearly shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character was concerned, and that title to a school section identified by survey has passed to the state. In that case, it was held that mere allegations to the effect that land granted for school purposes was mineral in character and that title therefore did not pass to the state, unsupported by evidence rebutting the presumption that title had passed to the state as nonmineral land, will not warrant this Department, upon an application for an oil and gas lease, to entertain proceedings for a determination of the mineral character of the land. (It must be kept in mind that the appeal now before us, however, involves an application for a mineral patent, not an oil and gas lease.)

[3] The *Scharf* decision further observed that the Department has jurisdiction to make conclusive determinations respecting the known mineral character of school lands at the effective date of the grant. The decision stated, however, that such determinations will be made only pursuant to an application for a patent by the state or in the exercise of certain of the Department's functions. Those functions would be properly exercised in (1) determining whether the title to any lands which were clearly excepted from the 1927 Act had passed or failed to pass under the original school grant where sufficient evidence had been shown to rebut the presumption that title had passed under the original school grant, or (2) in passing on any dispute as to whether or not any of the circumstances enumerated in the 1927 Act actually existed or were sufficient to prevent title, which otherwise would pass under that Act, from passing thereunder. The *Scharf* decision held that a request for a determination of the mineral character of the land under any other circumstance would merely be a request for an advisory opinion which the Department will not usually render. Therefore, because an application for mineral patent falls within the circumstances enumerated in the 1927 Act, we have jurisdiction to determine this question.

[4] In considering whether BLM properly held that the land including the claims was mineral in character on November 29, 1912, we must first consider the effect of this classification. In *State of Utah*, 32 L.D. 117 (1903), the Department held that a mineral return by the Surveyor General does not establish the character of the lands as chiefly valuable for mineral, and cannot, of itself, operate to take lands

out of the grant to the State.[1] That decision also established that the mining claimant, not the State, carries the burden of providing evidence of mineral character at the date of admission or the date of survey.

[5] Before a mineral classification can become conclusive as to a state's interest in a school section, notice and an opportunity for a hearing must be provided. *See State of Utah* v. *Bradley Estates*, 223 F.2d 129 (10th Cir. 1955). It is not necessary that a hearing actually be held in such a matter; it is sufficient that a state be notified of the matter and be given an opportunity to be heard. *Mahoganey No. 2 Lode Claim*, 33 L.D. 37, 38 (1904).[2]

There have been relatively few reported decisions involving mining claims located on lands described by grants to states under their enabling statutes or the 1927 Act. One such case is *Mangan & Simpson* v. *State of Arizona*, 52 L.D. 266 (1928). In that case, it is clear that the original classification of the land as mineral in character did not by itself operate to preclude passage of title under the Enabling Act. It was only when, "[A]fter due notice, the State failed to deny the charges and apply for a hearing" that the mineral character of the land would be established. *Id.* at 267. In order to provide a basis for BLM's determination here, that the land in sec. 16 was mineral in character at the time of acceptance of the plat of survey, the case record transmitted with the appeal should include the record of proceedings by which the State was given notice and an opportunity for a hearing on this question and should show that a final determination of this issue was made for the Department.

In the *Mangan* case, it had been established that the N 1/2 N 1/2 of the granted section was mineral in character. The decision stated: "If the claim is within the limits of the N 1/2 N 1/2, is valid, and was located prior to January 25, 1927, the area of the claim is excepted from the force and effect of the grant of the later date, and the area is still public land of the United States, subject to an application for mineral entry." *Id.* at 268. The decision then states the procedures applicable in such a situation:

> If and when an application to make mineral entry is filed the State will have an opportunity to proceed against the entry if of the opinion that the claim is not based on a valid discovery made prior to January 25, 1927; or if the mineral claimants continue in

[1] In *United States Mining Laws and Regulations Thereunder*, 44 L.D. 247, 310 (1915), it is stated that "public land returned by the Surveyor-General as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the matter here and after described." Subsequent paragraphs of the regulation, however, make clear that this presumption applies against one who seeks to enter the land under an agricultural land law, and does not address the circumstance where the land at issue is subject to a present grant such as a railroad grant or a school grant. *Id.* at 310, 311. In other words, this is a circumstance presented when the classification is challenged by one seeking to enter the land, not by one who claims legal title to the land.

[2] The *Mahoganey No. 2 Lode Claim* decision involved a mineral location made prior to the admission of Utah to the Union. The Secretary noted that the location itself was not sufficient to establish the mineral character of the land so as to defeat the grant of school lands to the State. The decision also referred to the well-established presumption that such land passes to the State under the statutory grant. The General Land Office held that the applicants for the mineral patent were required to apply for a hearing on the matter, but the Secretary reversed this decision, on the ground that the State had been given an opportunity to protest and failed to do so.

possession of claim or claims, the State may institute proceedings to declare the claims invalid * * * .

Id. at 269.

Here, to support their conclusion the land in sec. 16 was mineral in character, BLM and the claimants rely on an 1898 classification made pursuant to the Act of February 26, 1895, ch. 131, 28 Stat. 683-86. That statute authorized the examination and classification of land within the land grant and indemnity land grant limits of the Northern Pacific Railroad Co. Specifically, this 1895 Act authorized examination of land in four districts of Idaho and Montana, one of which covered the area in which the subject claims are located, to ascertain the mineral character of the lands. Sunshine contends the decision of the Commissioners dated February 5, 1898, determined that all of sec. 16 embracing the subject claims was of mineral character. A notice was published, and on August 22, 1898, the Register reported to the Secretary the fact of publication and of failure to receive any protests. Sunshine contends that on that date, the Commissioners transmitted their report to the Secretary, making it a final determination that the lands were mineral in character.

Indeed, section 6 of the Act provides:

> That as to the lands against the classification whereof no protest shall have been filed as here and before provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification.

(28 Stat. 685).

Although section 7 of the Act makes it clear that Congress intended primarily to preclude issuance of patents for mineral lands to the railroad, the requirement in section 6 that all plats and records be made to conform to the classification was intended to have broader effect. Nevertheless, the 1898 classification could not be binding on the State of Idaho. Idaho had no interest in the land that could be affected by a mineral classification until approval of the official survey in 1912. Idaho was therefore under no obligation to protest the 1898 classification, and any failure to do so could not constitute a waiver of its right to notice and an opportunity for a hearing on the mineral character of the section involved in this appeal.[3]

[3] Sec. 13 of Idaho's Enabling Act, which expressly states that all mineral land shall be exempted from the grants by the Act, further provides:

"But if sections sixteen and thirty-six, or any subdivision, or *portion of any smallest subdivision thereof* in any township shall be found by the Department of the Interior to be mineral lands, the said state is hereby authorized and impowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said State, in lieu thereof, for the use and benefit of the common schools of said State." (26 Stat. 217 (1890), italics added). It appears that, pursuant to this provision, the State of Idaho may have accepted lands in lieu of certain mining claims located in the same section involved in this appeal. In view of the evident intent that the determination of lands mineral in character was to be based on the smallest legal subdivision, it follows that if Idaho has accepted a lieu selection on the basis of any patented mining claim intruding into the smallest legal subdivisions, embracing the claims involved in this appeal, the State has therefore acquiesced in the determination concerning the mineral character of these lands. The record before us does not indicate, however, whether any such selection has been made.

The State of Idaho contends that although the claims were located in 1890 and in 1892, no assessment work was performed from 1909 to 1918. Amended locations were not made until December 1935, after the enactment of the 1927 Act. Idaho contends that, consequently, title to the land in question vested in the State in 1912 because of the lapse in assessment work between 1909 and 1918 and because the land had not been determined to have been mineral in character. Although the lapse of assessment work would leave the land open to adverse locations, it does not support the conclusion that the land is nonmineral in character. Thus, assuming for the moment that assessment work was resumed in 1918 and that the claims were otherwise valid, title to the land would not have passed to the State in 1927.

Indeed, the evidence relied upon by the patent applicant and BLM were ample to establish a prima facie showing that the land was mineral in character at the time of the approval of the plat of survey. In *Diamond Coal & Coke Co.* v. *United States*, 233 U.S. 236, 239-40 (1914), the Supreme Court set forth the following test to determine the mineral character of land: "[I]t must appear that the known conditions * * * were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." The Court further observed:

> There is no fixed rule that lands become valuable * * * only through * * * actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

Id. at 249. Further, the evidence relied upon by BLM in determining that the land was known to be mineral in 1912 does not appear to significantly differ from that cited by a court confronting a similar question in *Laden* v. *Andrus*, 595 F.2d 482, 489-90 (9th Cir. 1979). The *Laden* opinion, quoting from *Diamond Coal & Coke Co.* v. *United States, supra*, first stated the rule for determining the mineral character of land to be: "[I]t must appear that the known conditions * * * were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." *Id.* at 488. The Court then concluded that:

> The proper inquiry, thus, is not whether the [land] now contains, or ever did contain, a valuable mineral deposit. To paraphrase *Diamond Coal & Coke*, the relevant issue is whether the known conditions existing in 1901 were sufficient to engender the belief that the [land] contained minerals of a quantity that would render their extraction profitable and justify expenditures to that end.

Id. at 489.

While the State of Idaho is not barred by the principle of administrative finality or res judicata from raising the question whether the land in sec. 16 was mineral in character in 1912, the State

has not made an offer of proof sufficient to question the historical evidence relied upon by BLM in its conclusion that the land was properly classified as mineral in character and excluded from the State grant. Before considering the effect this circumstance has upon the State's claim, we must consider whether the claims in sec. 16 were excluded from the statutory conveyance of January 25, 1927.

[6] In the proceedings before BLM, the State responded to the claimant's assertions on this issue as follows:

> Basically, the testimony indicated the existence of "copper stains" and "green stains" in some of the tunnels on the Snow Storm and Snow Slide claims. Also there was testimony that this area was called the "Dry Belt of the Coeur d'Alenes." Presumably, this is Big Creek's basis for a valid surface discovery.
>
> If so, such evidence does not constitute the discovery of a valuable mineral deposit as required by the "prudent man test" and the later enunciated "marketability test."
>
> The "prudent man test" holds that a discovery has been achieved when one finds a mineral deposit of such quantity and quality 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. *Castle* v. *Womble,* 19 L.D. 455, 457 (1984), *Chrisman* v. *Miller,* 197 U.S. 313 (1905).
>
> Later, in *United States* v. *Coleman,* 390 U.S. 599 (1968), the Supreme Court complemented the "prudent man test" with the "marketability test" requiring a claimant to show that a mineral can be extracted, removed, and marketed at a profit.
>
> Mineralization that only justified further exploration in an effort to determine whether sufficient mineralization might be found to justify development does not constitute discovery of a valuable mineral deposit. *Barton* v. *Morton,* 498 F.2d 288 (9th Cir. 1974). Evidence of "copper stains" and that the claims were located in the "Dry Belt of the Coeur d'Alenes" is of geological inference only and cannot substitute for the actual finding of a vein of quartz or other rock bearing valuable deposits of minerals within the boundaries of the claim. *United States* v. *Bechthold,* 25 IBLA 77 (1976). Such an actual finding of a valuable mineral deposit must be made in order to support a valid discovery. *United States* v. *Walls,* 30 IBLA 333 (1977).
>
> Because the land in question was transferred to the State on January 25, 1927 and as a result was withdrawn from further location, Big Creek must show that there was a valid discovery at the time of the transfer to the State as well as presently. *United States* v. *Porter,* 37 IBLA 313 (1978). This means that Big Creek must satisfy the "prudent man test" for a valid discovery as of January 25, 1927 and must additionally satisfy the "marketability test" presently at the time of patent application.
>
> Even assuming there may have been a valid discovery at the time of transfer to the State on January 25, 1927, the claims in question here are not valid unless they are presently supported by a valid discovery. If the discovery is lost, so is the location lost. A valid discovery must be maintained up to the time that patent is issued. *United States* v. *Wichner,* 35 IBLA 240 (1978).

(State's Reply at 6-8). In dismissing Idaho's protest, it was held that the State had the burden of proof on these issues raised by the protest and that the material submitted by the State was insufficient to sustain

that burden. To support this finding, BLM quoted from *American Law of Mining* for the proposition that: "If a protest is filed after the date of the mineral entry, the presumptions are in favor of the regularity and legality of the entry, and the protestant must rebut the force of this presumption * * *." *Id.* § 9.26 at 354 (1982). Reliance upon this authority is misplaced in this case for two reasons.

First, it ignores the fact that the State also enjoys the benefit of a presumption that, as was pointed out above in this opinion, the land in sec. 16 was legislatively conveyed, effective either in 1912 when the land was first surveyed under the 1890 Admission Act, or in 1927, when the Act of January 27, 1927, became effective. We are not free to simply ignore this circumstance.

Second, the mineral entries, both dated December 7, 1982, expressly reserve the question of discovery for later determination as to both the Snow Slide and Snow Storm claims. In this context, the date of a "mineral entry" is not the date on which a mining claim is located, although the term may have such meaning in informal usage. Here, the term "designate[s] the filing in the Federal land office of an application for a mineral patent together with the notation of the application on the land office records." *Am. Law of Mining* § 30.02 (1986). The Department's decision in *Elda Mining & Milling Co.*, 29 L.D. 279 (1899), is dispositive on this point. In that case, the Department ordered a hearing to resolve a conflict between a mining claimant and a homestead entryman. The homestead entry was made on June 13, 1896. The conflicting mineral application was filed on September 30, 1896, and *mineral entry* was made on December 28, 1898. *Elda Mining* makes clear that mineral entry occurs after the conclusion of adverse proceedings by other mining claimants under 30 U.S.C. § 29. In this case, the date of the final certificate of mineral entry is December 7, 1982.

The December 7, 1982 final mineral certificates state that "[p]atent may issue if all is found regular and upon determination and verification of a valid discovery of a valuable mineral deposit as subject to the reservations, exceptions and restrictions noted herein." The mineral entries in this case, therefore, were conditioned upon later proof of the existence of the validity of the claims. That issue still remains to be resolved, contrary to the conclusion stated by the BLM decision, and no presumption concerning the existence of the discovery of a valuable mineral on either claim exists by virtue of the mineral entries made in the case of these two claims.

On the record before us there is no evidence at all relating to this issue; except for the 1912 survey plat, there is nothing in the record pertaining to the actual condition of the land located within the two claims, although there is apparently a mineral report in existence which was used by BLM to reach some of the conclusions reached in the letter dated November 1, 1953, which made certain conclusions concerning the amount of land which had been conveyed to the State in sec. 16 by operation of law.

In *Mangan* v. *Arizona, supra* at 269, the Assistant Secretary stated with respect to claims located prior to January 25, 1927:

> If and when an application to make mineral entry is filed the state will have an opportunity to proceed against the entry if of the opinion that the claim is not based on a valid discovery made prior to January 25, 1927; or if the mineral claimants continue in possession of the claim or claims, the state may institute proceedings to declare the claims invalid; but a contest against the state by the mineral claimant at this time is unnecessary, and will not be entertained.

The instructions issued after enactment of the 1927 Act have been codified in part, to state:

> Should the validity of any such claim be questioned by the state, proceedings with respect thereto by protest, contest, hearing, etc., will be had in the form and manner prescribed by existing rules governing such cases. This procedure will be followed in the matter of all protests, contests, or claims filed by individuals, associations, or corporations against the states affecting school-section lands.

43 CFR 2623.2(a).

We must also observe that 43 CFR 3872.3 provides: "Public land returned upon the survey records as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome." Section 3872.4 specifies the procedure involved in disputing the record character of land which is sought to be entered as agricultural. These provisions, however, are limited to circumstances where the land is sought to be entered as agricultural. They do not extend to circumstances where the party asserting the nonmineral character of the land asserts title under an *in praesenti* grant, as Idaho does here.

Thus, here, even if Idaho should apply for a patent,[4] this does not mean that the priority of the State's interest should be determined by the date on which patent application is filed. Strictly speaking, the State never had an "entry" upon the land at issue here; its interest is somewhat stronger than that. Idaho is favored in this proceeding by the presumption that title to the land passed under either the Enabling Act or the Act of January 27, 1927. To assign the State the ultimate burden of proof in the contest proceeding which is necessary in this matter, would run contrary to this presumption, since the State already is the presumptive holder of legal title to the land at issue.[5] The State's interest became a matter of public record with BLM either in 1912 when the plat of survey was filed or upon enactment of the Act

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[4] Although the authority to issue patents under 43 U.S.C. §§ 871a (1970), has been repealed, § 705(a), P.L. 94-579, 90 Stat. 2792 (1976), such action in no way affected the interest which vested under 43 U.S.C. § 870 on Jan. 27, 1927.

[5] The allocation of the burden of proof as to mineral character of land is not altogether clear. In 1903, registers and receivers of the United States Land Office were instructed by the following rule:

"When a school section is identified by the Government survey and no claim is at the date when the right of the state would attach, if at all, *asserted* thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the state, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of the school section will be disposed of in the same manner as other contest cases." (32 L.D. 39 (1903), italics added).

of January 27, 1927. The mining claimant's interest was not a matter of land office record until after its patent application was filed in 1979.

With respect to mineral patent applications, Departmental regulation 43 CFR 3862.5-1, provides that "No entry will be allowed until the authorized officer has satisfied himself, by careful examination, that the proper proofs have been filed upon the points indicated in the law and official regulations." As a consequence, we find that the record before us does not adequately present the necessary proofs to permit adjudication of these conflicting claims, and hold that appellant has sustained the burden of its protest by establishing error in BLM's decisionmaking process. BLM erroneously dismissed the State's protest despite the existence of presumptive title held by the State. BLM's decision must therefore be reversed. Furthermore, since the State has requested a hearing on the mineral character of the land as well as the validity of the subject claims, the request is granted. At hearing the mining claimant shall have the ultimate burden of proof. The burden of going forward at hearing shall, however, be upon the State. The principal issue to be decided at the hearing is whether, on January 25, 1927, there was a valid discovery on each claim contested by the State. *See Mangan & Simpson* v. *Arizona, supra.* A subsidiary issue is whether the land in sec. 16 was mineral in character on the date of survey in 1912.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case referred to the Hearings Division for assignment to an Administrative Law Judge whose decision shall be final for the Department unless it is appealed pursuant to 43 CFR 4.410.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

JOHN H. KELLY
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

April 29, 1988

SAN JUAN COUNTY

102 IBLA 155 Decided *April 29, 1988*

Appeals from decisions of the New Mexico State Office, Bureau of Land Management, suspending Recreation and Public Purposes Act leases NM 28553 and NM 088452.

Referred for hearing.

1. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Leases--Recreation and Public Purposes Act--Rules of Practice: Hearings

In accordance with 43 U.S.C. § 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

APPEARANCES: B. J. Baggett, Esq., County Attorney, Aztec, New Mexico, for appellant; Gayle E. Manges, Esq., Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

By separate decisions dated January 15, 1988, the New Mexico State Office, Bureau of Land Management (BLM), suspended leases NM 28553 and NM 088452 issued to San Juan County, New Mexico, for landfills pursuant to the Recreation and Public Purposes (R&PP) Act, 43 U.S.C. §§ 869-869-4 (1982).[1] The decisions stated that preliminary results of contractor site investigations showed that "contamination has migrated downward" and that samples taken along the perimeters of the landfills "indicate that contamination * * * has migrated beyond" the edges of the landfills. The decisions stated that allowing disposal of hazardous wastes at unauthorized sites is a violation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657

[1] Lease NM 28553 was issued to the San Juan County Road Department on July 26, 1978, for a 20-acre site for the Flora Vista Sanitary Landfill for a period of 20 years for a rental of $100 for the term of the lease. Lease NM 088452 was issued to the Board of County Commissioners of San Juan County on May 21, 1962, for a 90.24-acre site for a period of 20 years for a rental of $39.75 per year. It was renewed for 5 years as to 50.24 acres on Jan. 10, 1983; extended until Dec. 1, 1987, on May 14, 1987, as to 40.24 acres; and extended again until June 30, 1988, on Dec. 22, 1987. The 40.24-acre site is known as the Kirtland landfill.

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(1982), and 43 CFR 2741.5(j)[2] and that releases of hazardous wastes into the environment was also a violation of CERCLA. "Therefore, the site is in violation of CERCLA and the lease terms and stipulations accepted by the lessee," the decisions concluded, citing sections 4(a), 4(c), and 4(g) of both leases[3] and section II(e) of the plan of operations for lease NM 28553[4] San Juan County filed timely notices of appeal and a statement of reasons; BLM has filed an answer. We have given the matters expedited consideration.

[1] Our disposition of these appeals is governed by section 302(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(c) (1982), which provides:

> The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, *after notice and hearing*, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard [sic] or implementation plan [sic]: *Provided*, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: *Provided further*, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: *Provided further*, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: *Provided further*, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail. [Italics added.]

Although these leases do not include the provision required by this statute, this omission does not excuse BLM from adhering to the

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[2] This regulation states: "The Act shall not be used to provide sites for the disposal of permanent or long-term hazardous wastes."

[3] These lease provisions read:

"Sec. 4. In consideration of the foregoing, the lessee hereby agrees:

"(a) To improve and manage the leased area in accordance with the plan [of development and management designated as] Blanco and Kirtland Sanitary landfills [and approved by an authorized officer on] * * * or any modification thereof hereinafter approved by an authorized officer, and to maintain all improvements, during the term of this lease, in a reasonably good state of repair.

* * * * * * *

"(c) Not to allow the use of the lands for unlawful purposes or for any purpose not specified in this lease unless consented to under its terms; not to prohibit or restrict, directly or indirectly, or permit its agents, employees, contractors (including, without limitation, lessees, sublessees, and permittees), to prohibit or restrict the use of any part of the leased premises or any of the facilities thereon by any person because of such person's race, creed, color, sex, or national origin.

* * * * * * *

'(g) To take such reasonable steps as may be needed to protect the surface of the leased area and the natural resources and improvements thereon."

(The quoted language is from renewed lease NM 088452. In NM 28553 the bracketed language is replaced with "attached hereto and made a part of this lease.")

[4] This section of the plan for the Flora Vista landfill provides:

"*e. Types and Quantities of Solid Waste Disposal*

"There will be RESTRICTIONS as to the type of solid waste accepted at the site. Hazardous waste items will not be accepted at the site. There will be a sign approximately 4'x8' in size which will be placed at the entrance to the site. The sign will read "WARNING, HAZARDOUS WASTE WILL NOT BE ACCEPTED AT THIS SITE. IF YOU WISH TO DISPOSE OF ANY OF THE ITEMS LISTED IN THE GLASS COVERED CASE ON THE RIGHT, PLEASE CONTACT THE LOCAL EIA OFFICE AT 724 West Animas, Farmington, N.M. #327-9851, FOR INSTRUCTIONS." (see attachment I for list of common names that will be posted in a glass covered case attached to the sign). There will be no other restrictions, other than the list posted at the site. The dead animal and sludge pit will be covered immediately whenever possible, otherwise it will be covered before 5 p.m. daily."

section 302(c) procedural requirements, if applicable. *James C. Mackey*, 96 IBLA 356, 364, 94 I.D. 132, 137 (1987). In that case we held that the requirements of this section are not restricted to instruments issued by BLM under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), and that "Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM." 96 IBLA 365, 94 I.D. at 137. In *Mackey* we held that this section governed the suspension of permits issued pursuant to the Archaeological Resources Protection Act, 16 U.S.C. § 470aa (1982), because that statute did not contain specific provisions for the suspension or revocation of a permit under the circumstances cited by BLM. *Id.* Similarly, in this case, the final sentence of 43 U.S.C. § 869-1 (1982)[5] does not contain specific provisions for the suspension or revocation of an R&PP Act lease under the circumstances cited in the BLM decisions under appeal here, so the procedural requirements of 43 U.S.C. § 1732(c) apply.[6] Thus, BLM may suspend or revoke an R&PP Act lease for violation of one or more of its terms or conditions only after notice and an opportunity for a hearing.

In its statement of reasons, San Juan County disputes the facts cited in BLM's decisions as the basis for suspending the leases, namely, that hazardous substances are migrating off the lease premises or that they threaten groundwater.[7] In its answer BLM cites the findings of vertical and horizontal migration of chemical compounds in the contractor's reports of the site investigations of the two landfills that were the basis for the decisions under appeal. The answer acknowledges that extensive sampling was not done on and off site due to budgetary restrictions, and concludes: "our decision to suspend the R&PP leases

[5] "Each lease shall contain a provision for its termination upon a finding by the Secretary that the land has not been used by the lessee for the purpose specified in the lease for such period, not over five years, as may be specified in the lease, or that such land or any part thereof is being devoted to another use."

[6] In this case the concern is that the landfills have become contaminated with hazardous wastes. We do not consider that would constitute devoting part of the lands under the R&PP Act leases to "another use" within the meaning of 43 U.S.C. § 869-1 (1982).

[7] San Juan County's statement of reasons reads in part, at 1:

"To support the closure order, the Bureau of Land Management claims that "Analyses of samples taken along perimeter of the landfills indicate that contamination has migrated beyond the boundary." This statement is totally unsupported by any data. We challenge the record submitted to support this statement even as an inference.

"Secondly, there is no groundwater present beneath these landfills down to 250 feet and probably deeper. The report indicates that water was encountered approximately one mile northwest of the Flora Vista Landfill at a depth of 72 feet. At the Kirtland site, the County hired Western Technologies, Inc. to conduct boring tests on the site. The results are enclosed. You can see that no groundwater was found to a depth of 36 feet in the various holes bored.

"There have been over 20,000 wells drilled in the San Juan Basin, and the Petroleum Geologists who have participated in the drilling and have studied logs of wells drilled in the Kirtland shale indicate that water is rarely encountered, and if so, it is contained in limited lenticular deposits and is non-migratory (see report of Mark E. Weidler [attached to the statement of reasons]).

"There are not water wells near these sites, and the nearest homes are on domestic water supplies from Lower Valley Water Users Association in the Kirtland area and Flora Vista Water Users in the Flora Vista area.

"The County stopped accepting any liquids at the Kirtland site over two years ago, and stopped taking septage at the Flora Vista site more than one year ago. The lagoons were pumped out and back-filled with the dirt which was stockpiled when the lagoons were dug. Whatever residue from oil tank bottoms or engine oil that had been soaked up in the bottom of the pits is still detectable by boring directly into the lagoons. It has migrated nowhere, and is highly unlikely to do so (see Weidler report). It has not even migrated 75 feet laterally to the other solid waste trenches on the site."

to prevent further addition of waste into the landfills, compounding our existing problems, was based on a violation of CERCLA."[8]

The disputed facts as well as the requirements of section 1732(c) make it appropriate to order a hearing in this case. *James C. Mackey, supra*; 43 CFR 4.415.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we refer these cases to the Hearings Division for a hearing in accordance with 5 U.S.C. § 554 (1982), to determine whether San Juan County has violated the terms of the leases, CERCLA, or other applicable law.[9] BLM shall have the burden of going forward to establish a prima facie case of such violations, and San Juan County shall have the ultimate burden of persuasion that there is no violation. If the Administrative Law Judge determines that such violations exist, he shall order the lease involved suspended. The decision of the Administrative Law Judge shall constitute final action for the Department, absent the timely filing of an appeal with this Board pursuant to 43 CFR 4.410.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

SHOSHONE & ARAPAHOE TRIBES

102 IBLA 256 Decided *May 23, 1988*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, approving application for patent corrections. C-050733 and C-051835.

Reversed.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

[8] Memorandum dated Apr. 8, 1988, from State Director, BLM, to Field Solicitor, entitled, "Response to Statement of Reasons for Appeal-Closure of San Juan County Landfills," at 3. This memorandum elaborated on the problems as follows:

"Although protection of the public is of utmost concern to the Bureau, our decision to close the landfills was not based solely on protection of the public health and safety. As trustee of the natural resources on public lands, it is our duty to protect resources, including groundwater. Allowing the addition of waste to the landfills where releases of contaminants have already occurred, as shown in the [contractor] reports, increases the chances of damage to resources. Also, when any nonhazardous wastes are added to hazardous wastes, the entire volume must be considered hazardous. Because these landfills have been shown to contain hazardous materials, we feel that any addition of even nonhazardous wastes will very likely increase our future liability and cleanup costs." *Id.*

[9] If the Administrative Law Judge prefers to conduct a separate hearing for each lease, he may of course do so.

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, in correcting errors under this statutory authority, only mistakes of fact may be corrected, not mistakes of law.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

Before action may be taken to correct a patent pursuant to 43 U.S.C. § 1746 (1982), the applicant for correction must show that an error in fact was made. Once the existence of an error in fact is shown, consideration may be given to matters of equity and justice which warrant amendment of the patent.

3. Homesteads (Ordinary): Lands Subject to--Homesteads (Ordinary): Settlement--Powersite Lands

Lands withdrawn for powersite purposes do not become available for homestead entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.

4. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

Absent exceptional circumstances, the Department cannot amend a patent to include lands that were not subject to entry by the original entryman.

APPEARANCES: Robert S. Thompson III, Esq., Boulder, Colorado, for the Northern Arapahoe Tribe and W. Richard West, Jr., Esq., Washington, D.C., for the Shoshone Indian Tribe; William L. Miller, Esq., and John R. Hursh, Esq., Riverton, Wyoming, for Oliver J. Foust.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation (Tribes) appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 30, 1985, approving an application for correction of conveyance documents by Oliver J. and Marjorie E. Foust [1] pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (1982). In its decision, BLM found that the two patents held by Oliver Foust (Foust) (Patent No. 1087000 and Patent No. 1087176) erroneously described the lands that his predecessor-in-interest, Byron H. Smith, entered and improved.

Foust is the record title owner of lots 4 and 5 and the NE1/4 SE1/4 of sec. 28, T 6 N., R. 6 E., Wind River Meridian. The lands are located within the Wind River Indian Reservation, Hot Springs County, Wyoming. Foust acquired these lands on June 19,1963, by warranty deed from Evangeline Smith Meeks, widow of the original patentee,

[1] Marjorie Foust died Dec. 27, 1984.

Byron H. Smith. In 1968 or 1969, the Bureau of Indian Affairs (BIA) discovered that Foust's home and other improvements were in trespass on tribal lands and requested an official survey by BLM. Pursuant to Special Instructions dated August 6, 1975, and Supplemental Special Instructions dated June 14, 1979, BLM conducted a dependent resurvey and survey of sec. 28, T. 6 N., R. 6 E., Wind River Meridian, in October and November 1979. The plat of that resurvey and survey was approved by BLM on January 29, 1980. In accordance with the special survey instructions, the S1/2 NE1/4 of sec. 28 was subdivided into lots 9, 10, 11, and 12. The boundaries of lot 11 were established by BLM to include all Foust's improvements. The resurvey confirmed that Foust's home and other improvements were located within the S1/2 NE1/4 of sec. 28, in trespass on tribal lands, and not located on lands conveyed to Foust by Smith's widow.

In order to resolve the trespass situation, Foust proposed to exchange the NE1/4 SE1/4 of sec. 28 (40 acres) for lot 11 of sec. 28 (9.74 acres), but this offer was rejected by the Tribes. Next, the Fousts offered to exchange lot 5 of sec. 28 (47.55 acres) for lots 9, 11, and 12 of sec. 28 (40.02 acres). The Tribes rejected this offer also.

By letter dated March 15, 1982, the Department of the Interior Field Solicitor, Billings, Montana, informed the Fousts that accrued damages resulting from unauthorized occupancy from June 16, 1963, to February 15, 1980, totaled $25,000, plus an undetermined rental for 1981 and 1982. The Field Solicitor set forth the following settlement proposals:

1. Payment for past rentals up to and including 1981 and 1982.
2. Execution of an easement to the Tribes to cross fee lands in lot 4, sec. 28, T 6 N., R. 6 E., [2] to obtain access to other Tribal trust lands.
3. Possibly entering into a lease by the Tribes to the lands involved in the alleged unauthorized use.

The Fousts found these proposals to be unacceptable and filed an application for correction of conveyance documents pursuant to section 316 of FLPMA, 43 U.S.C. § 1746 (1982), on May 3, 1982. This application explained that it was only after the resurvey was approved on January 29, 1980, that the Fousts learned that their present home with all of its outbuildings was not located on lot 5 as they had previously thought, but was on what is now described as lot 11, located principally in the SW1/4 NE1/4 sec. 28. The Fousts concluded from this circumstance that a "misdescription of the original homestead appeared on the face of the patent."

The Fousts argued that the best evidence of error in the patent is the layout of the land. They explained that their improvements are located in a small canyon arising out of the Wind River, almost perpendicular to Wind River Canyon. They said that for approximately 1 mile north or south of their home, there are no suitable locations for a homestead site because of extremely rough terrain and cliffs,

[2] Lot 4 was sold by the Fousts at some time prior to their application for patent correction (Land Report at 6).

especially in lot 5. They pointed out that the only site upon which a home and improvements could have been reasonably constructed is the present lot 11. The Fousts contended that the error was made because, until 1980, no reliable survey had been made of the area.

In order to correct the perceived error, the Fousts proposed to deed back to the United States lot 5, sec. 28 in exchange for the present lots 9, 10, and 11, sec. 28,[3] which contain almost identical acreage. The Fousts specified that a new patent should be issued to them conveying lots 9, 11, and 12, sec. 28.

In the decision approving the Fousts' application for correction of conveyance documents, BLM found that both of the patents issued to Smith erroneously describe the lands that Smith entered and improved. BLM found that Smith actually entered the SE1/4 NE1/4 instead of NE1/4 SE1/4 of sec. 28 in entry C-050733 and the SW1/4 NE1/4 instead of lot 5 of sec. 28 in entry C-051835. BLM determined that relief was warranted and stated that the patents may be corrected, inter alia, by conveyance of the S1/2 NE1/4, containing the lands upon which Smith built, to the Fousts in exchange for the land patented to Smith in lot 5 and the NE1/4 SE1/4 sec. 28, which would be reconveyed to the United States. Attached to this decision was BLM's land report recommending approval of the Fousts' application, upon which report BLM presumably relied in making its determination.

The history of the ownership status of sec. 28 is relevant to consideration of this appeal. On July 3, 1868, the Wind River Indian Reservation was established by treaty concluded between the United States and the Eastern Band of the Shoshone Tribe on lands including sec. 28. The lands in sec. 28 were included in those ceded to the United States pursuant to the Act of March 3, 1905, 33 Stat. 1016. The 1905 Act permitted homesteading on those land for 5 years after the President declared the reservation open for homesteading. After the 5-year period, sales were to be made only by competitive bidding. 33 Stat. 1020-1022. The President declared the reservation open for homesteading by Presidential Proclamation of June 2, 1906. Thereafter, rather than having competitive bidding for the remaining land, the Secretary, by letter to the Commissioner of the General Land Office, dated May 27, 1915, postponed the sale indefinitely. However, BLM, in its land report dated December 23, 1985, notes that at the time of the 1905 Act, the lands in sec. 28 were unsurveyed and therefore not subject to entry under the homestead laws.

On February 10, 1910, the lands in sec. 28 were withdrawn for Temporary Power Site Withdrawal No. 115 by Executive Order (E.O.). On July 2, 1910, Power Site Reserve No. 115 was established by E.O., pursuant to the Act of June 25, 1910, 36 Stat. 847. The E.O. of July 2,

[3] This proposal should have read lots 9, 11, and 12, rather than 9, 10, and 11.

1910, ratified, confirmed, and continued the withdrawal created by the E.O. of Feb. 10, 1910, and included all of sec. 28 (unsurveyed). The survey plat for a portion of T. 6 N., R. 6 E., including sec. 28, was approved on November 12, 1927, and, by Secretarial Order (SO) dated May 10, 1928, Power Site Interpretation No. 115 was conformed to the powersite withdrawal. Withdrawn lands in sec. 28 included lots 1 through 8, SW1/4 NE1/4, W1/2 NW1/4 and NW1/4 SW1/4. On October 5, 1928, the Official Survey Plat was filed.

By notice of the General Land Office dated November 17, 1928, lands shown on the survey plat filed October 5, 1928, were opened to homestead entry pursuant to the Act of March 3, 1905, beginning December 15, 1928. This notice stated that the lands included in powersite reserve 115 were not subject to appropriation except in a case of valid existing claims initiated prior to February 10, 1910. Lands not subject to appropriation included lots 1 though 8, SW1/4 NE1/4, W1/2 NW1/4, NW1/4 SW1/4 sec. 28. Thus, as of December 15, 1928, the NE1/4 SE1/4, which was subsequently patented to Smith, was opened to homestead entry. Then, on August 19, 1930, lots 4 and 5 of sec. 28, which also would be patented to Smith, were opened to entry by Restoration 541. By SO dated Aug. 5, 1942, the Secretary restored "undisposed of ceded land of the Wind River Reservation" in that portion of sec. 28 lying east of the Big Horn River to tribal ownership.

On December 9, 1929, Byron Smith filed an application for stock-raising homestead entry No. 050733 on the NE1/4 SE1/4 of sec. 28. The land office rejected Smith's application, stating that the land was not subject to entry under the 1905 Act. On December 15, 1929, Smith appealed this decision. On the same day he filed his appeal, Smith filed Supplemental Homestead Entry C-050733 for the same land under R.S. 2289. On July 9, 1930, Homestead Entry C-050733 was aollowed under R.S. 2289.

On March 19, 1930, Smith filed an application for a stock-raising homestead entry on lots 4 and 5. This application was allowed March 16, 1931.

In their statement of reasons, the Tribes contend that the lands in question are "Indian lands" not "Public lands" and are not within the purview of section 316 of FLPMA and that FLPMA does not authorize BLM to divest the Tribes of title without their consent to the lands sought by the Fousts. The Tribes assert that even if section 316 did permit the requested relief, BLM could not grant the Fousts' application unless they clearly established that Smith had made a mistake in describing the lands he intended to enter, an occurrence which they deny took place. The Tribes point out that the Fousts' effort to make a showing of such error is contradicted by the location of the Smith settlement within a powersite withdrawal and by Smith's own description of the lands patented. The Tribes believe that Smith's "mistake" was deliberate rather than inadvertent and that no clear error of description has been shown.

In addition to requiring a showing of mistake, the Tribes point out that BLM must determine whether "considerations of equity and justice" mandate the correction and that no such determination has been made by BLM. The Tribes contend that Smith's "apparent fraud" (consisting of the fact that he appears not to have entered the land for agricultural purposes despite his declared purpose to do so), the fact that he could not have obtained the land now sought by Foust even if he had applied for it, the fact that the 1905 Act never should have been relied upon to patent land in the 1930's, and Foust's own lack of reasonable diligence, all weigh heavily against the application.

In response, Foust states that under section 316 of FLPMA, the rationale for correcting an error in a patent is to simply correct an error that was made at the time the patent was issued. Foust asserts that the lands in question were public lands at the time the patent was issued. In addition, Foust argues that many of the arguments made by the Tribes are collateral attacks on a patent which is insulated by the passage of time from such attacks by provision of 43 U.S.C. § 1166 (1982), a circumstance which he claims renders much of the Tribes' argument irrelevant to these proceedings. Foust states that the statutory purpose of correcting patents is to grant to the present landowner the lands which in reality were originally homesteaded. The only way to accomplish this, according to Foust, is for the Secretary to correct the conveyance to show the actual land originally entered and homesteaded.

Foust contends that the issue here concerns what lands Smith was entitled to claim as a result of compliance with the homestead laws. Foust asserts that the record shows the only land in the area suitable for homesteading was the land actually improved by Smith.

In response to the Tribes' argument that the lands were not subject to entry under the homestead laws,[4] Foust asserts that under section 316 of FLPMA the Secretary has the authority to determine that issue and make corrections. Foust contends that an error was made and that the best evidence of mistake is the fact that the terrain is so rough in the area described by the patents that it would be impractical, if not impossible, for improvements to have been built there.

Foust believes that there are equities which favor granting the corrections sought. Foust asserts that he and his wife, now deceased, and their predecessors have lived on the land over 40 years, have

[4] The Tribes state that under the 1905 Act, the ceded lands were available for homesteading for a 5-year period beginning in 1906 when the President declared them to be open to entry. Thus, the Tribes contend that after 1911 the land in question could not be entered for homesteading purposes. The Tribes contend that, as a consequence, the notice of the General Land Office dated November 17, 1928, opening the lands to homestead entry beginning December 15, 1928, was illegal. Since the lands in sec. 28 were unsurveyed at the time of the President's proclamation opening the lands in 1906, the notice of the General Land Office, issued after the official plat of survey was filed in 1928, found that the opening was proper. This notice, however, specifically stated that the lands included in powersite reserve No. 115 were not subject to appropriation except in a case of valid existing claims initiated prior to Feb. 10, 1910. The notice listed SW1/4 NE1/4 sec. 28 as land withdrawn for powersite reserve No. 115. Since there has been no allegation that Smith entered the SW1/4 NE1/4 prior to 1910, there is no basis for finding he had a valid existing claim to the withdrawn lands in sec. 28 as a result of his later entry onto these lands.

constructed further improvements, maintained the land, paid the taxes, and lived in a small, level valley (described by the parties as a "draw") which is the land best suitable for a homesite in the vicinity of the patented lands. Foust claims that he had a title search made before he purchased the property and was a purchaser in good faith. Foust points out that he is elderly and that the economic hardship in losing his home would be severe. In contrast, Foust contends that granting relief to him would not create any hardship on the Tribes by hindering the economic, social, or long-range development of the reservation. Foust states that BIA entered no objection or made only "tacit" objection to patent correction on appeal.

[1] Section 316 of FLPMA authorizes the Secretary of the Interior to "correct patents * * * where necessary in order to eliminate errors." 43 U.S.C. § 1746 (1982). The statute, thus, invests the Secretary with discretionary authority to correct patents which contain an erroneous description of the patented land such that the description does not match the land the patentee either originally applied for or entered or intended to enter on the ground. *Arthur Warren Jones*, 97 IBLA 253, 254 (1987); *Rosander Mining Co.*, 84 IBLA 60, 63 (1984); *Elmer L. Lowe*, 80 IBLA 101, 105-106 (1984); *George Val Snow (On Judicial Remand)*, 70 IBLA 261, 262 (1984). By regulation the term "error" is limited to mistakes of fact and not mistakes of law. 43 CFR 1865.0-5(b); *Lone Star Steel Co.*, 101 IBLA 369 (1988); *Bill G. Minton*, 91 IBLA 108 (1986). The first obligation of an applicant for amendment of a land description in a patent, then, is to establish that the land description questioned is in fact erroneous. *George Val Snow (On Judicial Remand), supra.* Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application. *Id.* Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application. *Id.*

[2] Foust has not shown that there was a mistake of fact involved in the patents in question. He has not pointed to any misdescription or other circumstance to indicate the existence of factual error. On the contrary, he merely concludes, from the fact that his buildings have been shown to be in trespass, that there must have been some mistake. This is not the case, however, where the occurrence speaks for itself, as he assures.

Foust has failed to submit any evidence to show that the patents issued to Smith do not correctly describe the lands he sought in his applications for patent. In his Petition for Designation of the NE1/4 SE1/4 as stock-raising lands, filed December 9, 1929, Smith stated all the lands in the NE1/4 SE1/4 sec. 28 are "rough and broken and not susceptible of cultivation" and "of such character that they are not suitable for any other use than grazing purposes and owing to the rough and uneven surface cannot be cultivated." Again in his Petition for Designation of lots 4 and 5 as stock-raising lands dated September 17, 1930, Smith stated that the "land is all of the same

general character. It is very rough and covered mostly with sage brush with some native grasses." It is apparent, therefore, that there was no mistake for these words describe the lands for which Smith applied and these are the lands included in his patents.

As the Tribes contend, there are other indications that there was no mistake made by Smith, although he located his buildings outside his patented lands. For example, Foust claims that Smith intended to build his homestead on lot 5 but actually built it on lot 11. Foust describes lot 5 as "extremely rough and steep" and "consist[s] mostly of cliffs," whereas lot 11 is the only spot in the area suitable as a homestead site (Application for Correction at 4). This is inconsistent with Smith's statement in his final proof that his residence was on the original entry, NE1/4 SE1/4 of sec. 28, not on lot 5. Moreover, it must be observed that because the NE1/4 SE1/4 and lot 11 do not adjoin one another, it is extremely unlikely that Smith mistakenly confused the location. The only improvement listed as being on lot 5 was a garden fence. Considering the relationship of the NE1/4 SE1/4 (the lands in Smith's original entry) to the SW1/4 NE1/4 (the lands now encompassing Foust's improvements), it is difficult to imagine that Smith could have confused the boundary between these parcels. They touch only at a corner and do not share a single boundary. Furthermore, had Smith applied for the lands which he actually improved, his application would have been rejected because the lands were included in a powersite withdrawal. This circumstance negates entirely the possibility that a mistake was made in the description of the patented land.[5]

[3] The land where Smith's buildings were placed, the SW1/4 NE1/4, was withdrawn for powersite purposes in 1910 and remained withdrawn until 1942 when it was restored to Tribal ownership. It was not available for homestead entry at the time Smith made his entry. BLM erred, therefore, in finding in the land report attached to the decision under review that the S1/2 NE1/4 "was equally available for entry" with the patented lands in 1928. *See Carmel J. McIntyre*, 67 IBLA 317 (1982), dismissed for lack of subject jurisdiction, *McIntyre* v. *United States*, 568 F. Supp. 1 (D. Alaska 1983), *aff'd*, No. 85-3861 (9th Cir. May 20, 1986).

In the land report of December 23, 1985, which supplies the foundation for the decision to correct patent now under review, BLM found that Smith's entry was contingent upon a Geological Survey (GS) determination pursuant to section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1982), that the value of the land for power development purposes would not be injured or destroyed by

[5] Foust refers to the Board's decision in *Mantle Ranch Corp.*, 47 IBLA 17, 87 I.D. 143 (1980), in which the Board stated that even if the rights of the patent holder claiming a right to correction of his patent were subject to the effect of withdrawals, the Secretary could grant relief in his discretion if the agency administering the withdrawn land gave its approval. In the *Mantle* case, however, Mantle's entry preceded both of two described withdrawals.

location, entry, or selection under the public land laws. BLM stated that such a determination was made as to lots 4 and 5 in response to Smith's application C-051835 and the patent contains such a restriction. The BLM land report then goes on to say that "[t]he S1/2 NE1/4 of sec. 28, which Smith actually occupied and improved, was equally available for entry when he filed applications C-050733 and C-051835" (Land Report at 6). BLM does not mention that the SW1/4 NE1/4 was specifically excluded from appropriation in the General Land Office notice of November 17, 1928, opening the lands in sec. 28 to homestead entry. There is no evidence that GS made a determination under section 24 of the Federal Power Act respecting the SW1/4 NE1/4 of sec. 28 as it did for lots 4 and 5.

Land withdrawn for powersite purposes does not become available for entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry. *Carmel J. McIntyre, supra.* The BLM finding concerning the availability to entry of the land which is now lot 11 is clearly erroneous. The erroneous finding was central to the conclusion that a correction such as was purported to be made here, was proper.

The BLM decision before us on appeal does not discuss either the factual or legal basis for the correction of the patent which is ordered by the decision, but assumes that such action is proper, in apparent reliance upon the land report. The findings of the land report, therefore, become very important to an understanding of BLM's decision because they form the legal foundation for the decision. Since the land in the SW1/4 NE1/4 was continuously closed to entry from 1910 until 1942 when it was returned to tribal ownership, anyone applying for patent to that land would have been refused a patent. It is of course correct that the lands patented to Smith had been also withdrawn for powersite purposes prior to Smith's entry. Indeed, Smith showed that he was familiar with the existence of the powersite withdrawal in sec. 28 in the appeal he filed with the Department in 1929 following the initial rejection of his homestead entry. Unlike those lands patented, however, which were subsequently opened to entry, the SW1/4 NE1/4 was never opened. This distinction is important in this case because it indicates there was no application made for the land remaining in the powersite withdrawal because there was no legal possibility that it could be conveyed to an entryman. When the land report blurred this distinction between the land which is now designated lot 11 and the patented lands, that error paved the way for a conclusion that the existence of a mistake was a possibility in this case. But, when this possibility is shown not to exist, the entire notion that there was a mistake is dispelled.

[4] Nor do we find that Foust is entitled to relief in this case as a matter of equity. It is apparent that Foust did not exercise due diligence in purchasing the property in question. Foust implies that until the 1980 resurvey, there was no way he could have discovered

that his home and outbuildings were located on the Tribes' lands. The Tribes, however, point out that BIA discovered his trespass by using a GS map and master title plats for the Reservation. Both the 1928 homestead opening and powersite withdrawal were described by reference to the 1928 survey, which was available both to Smith and Foust. The 1928 survey shows the lots and quarter quarters of sec. 28 and the general topography of the land. The 1928 survey also shows the draw where Smith built, and it shows that the draw was not within the land patented to Smith, but that it was located instead within the powersite withdrawal in the SW1/4 NE1/4. The BIA range conservationist who detected the trespass did not need to leave his office to see that there was a trespass.

Although Foust argues otherwise, it is apparent the trespass was discovered by BIA before the resurvey in 1980, and that the survey was intended to be used to confirm positively the observed condition. The same sources that BIA used to discover the trespass were available to Foust in 1963 when he purchased the property. The argument that the trespass was undetectible before the survey approved in 1980 would be more persuasive had Foust ordered his own survey at the time of purchase or relied upon a survey furnished by his seller. As it is, such an argument merely points up the apparent neglect of a purchaser who failed to obtain a survey of lands purchased prior to sale.

Foust claims that when the land was purchased in 1963 it was taken with an abstract of title showing no liens or claims by the Tribes. Foust asserts that he contacted a surveyor and was told that exact surveys in the canyon were impossible (Response to Statement of Reasons at 7). This testimony serves to reinforce our conclusion that Foust was negligent in failing to obtain a survey since the reported response by the surveyor should have alerted him to a possible defect in the survey of the Smith lands. Nor does Foust allege that Smith engaged the services of a surveyor in preparing his applications. Indeed, Foust fails to present any evidence that Smith relied on the opinion of a professional in describing the property. *Cf. Mantle Ranch Corp.*, 47 IBLA 17, 32, 87 I.D. 143, 151 (1980).[6] On appeal, Foust suggests that the 1928 survey was somehow inadequate, but does not specify how it could have deceived Smith concerning the location of the Smith improvements. The 1980 resurvey does not appear to have discovered any error in the 1928 survey, and none is cited by Foust. Like the assertion that mistake can be inferred from the topography of the land surrounding the Smith improvements, this argument also lacks a support in fact.

[6] In *Mantle*, the Board noted that the applicant had paid a surveyor to describe his land and to "make out the papers for the original homestead." The Board commented that having entrusted this task to someone he believed to be a professional, it is conceivable that Mantle assumed it had been correctly done and never undertook to analyze it himself. *Mantle Ranch Corp.*, 47 IBLA at 32, 87 I.D. at 151.

Foust points out that in *Mantle*, the Board held that "[t]he heirs of Charles Mantle are entitled to what their father and husband actually earned by his compliance with the homestead law." *Mantle Ranch Corp.*, 47 IBLA at 38, 87 I.D. at 154. In the *Mantle* case we found that no undue prejudice to the public interest would result from allowing the patent correction because the agency charged with responsibility for the lands sought by the applicant agreed to the changes desired. In this case, however, BIA, one of the responsible agencies, has opposed the change Foust wishes to obtain, as noted *infra*.[7]

In the present appeal, moreover, we have the additional interest of the Tribes to consider. The Federal Government has ultimate responsibility for the Indians. *Mohegan Tribe* v. *State of Connecticut*, 528 F. Supp. 1359 (D. Conn. 1982). Supreme Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards. *See Nance* v. *Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), citing *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942). In reviewing BLM's decision in this case we must be aware that any Federal Government action is subject to the United States fiduciary responsibilities toward the Indian Tribes. *See Nance* v. *Environmental Protection Agency, supra* at 711.

Here, BIA, the agency administering the SW1/4 NE1/4, is on record as having opposed the correction proposed by Foust for the reason it would be contrary to the best interest of the Tribes. The position of BIA is stated as follows:

> Please be advised that the Bureau of Indian Affairs opposes the application to correct Mr. Foust's homestead patent. Based on the facts of this case, it is our opinion that a correction of the patent would be detrimental to the Shoshone and Arapahoe Tribes. Further, it is not clear that an error of the description was made.
>
> For the foregoing reasons and in fulfilling our trust responsibility to the Tribes, we support the position of the Shoshone and Arapahoe Tribes.

(Memorandum dated June 16, 1983, BIA Area Director to BLM). In effect, BIA endorses the position taken by the Tribes.

Finally, Foust's contention that 43 U.S.C. § 1166 (1982), is applicable to exclude from our consideration the issues raised by the Tribes concerning the equitable position of the Fousts vis-a-vis the Tribes is without merit. That section states: "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." Section 1166 is inapplicable. This is not an action to annul a patent. To the contrary, upon review of an administrative determination that a patent should be amended, the Board holds otherwise. We find no foundation in fact for holding that Smith's patents were meant to convey any land other

[7] Another consideration in *Mantle, supra*, was the fact that there was written acceptance by BLM of a deed from appellant to the United States and the subsequent recordation of that deed at BLM's direction, in contemplation that the patent would be amended. The Board found this had "significant implications in equity." 47 IBLA at 38, 87 I.D. at 154. No such circumstance is present in this case.

than lots 4 and 5 and the NE1/4 SE1/4 sec. 28, the land described by the patents. *See Roland Oswald*, 35 IBLA 79, 88-89 (1978). An application to change the legal description of a patent may not be approved where the record does not support a finding that the entryman erred in describing the lands that he entered. *Ben R. Williams,* 57 IBLA 8 1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

JOHN H. KELLY
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

TURNER BROTHERS, INC. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

102 IBLA 299 Decided *May 31, 1988*

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming issuance of Notice of Violation No. 84-03-006-012. TU 5-2-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the *Federal Register* constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement is a preventative measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation. A violation may be established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area.

Alpine Construction Co. v. *OSMRE*, 101 IBLA 128, 95 I.D. 16 (1988), *modified.*

APPEARANCES: Mark Secrest, Esq., Assistant General Counsel, Muskogee, Oklahoma, for Turner Brothers, Inc.; Nell Fickie, Esq., Department Counsel, Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

Turner Brothers, Inc. (TBI), has appealed from a decision dated January 24, 1986, by Administrative Law Judge Frederick A. Miller affirming two violations cited in Notice of Violation (NOV) No. 84-03-006-012 issued September 27, 1984, at TBI's Welch No. 1 and No. 1B mines in Craig County, Oklahoma.

Pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1275 (1982), TBI filed an application for review of the NOV; the Office of Surface Mining Reclamation and Enforcement (OSMRE) filed an answer; and the matter was heard before Judge Miller in Tulsa, Oklahoma, on September 18, 1985.

TBI's first argument on appeal is that OSMRE lacked jurisdiction to issue the NOV because it failed to provide proper notice as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982), when it attempted to assume primary enforcement responsibility for surface coal mining operations in Oklahoma. In his decision, the Judge stated that this issue had been addressed in previous TBI appeals and ruled that OSMRE had jurisdiction to enforce the Oklahoma Permanent Program Regulations (OPRPR).

Judge Miller's ruling was correct. TBI's arguments regarding jurisdiction are identical to those addressed by this Board in *Turner Brothers, Inc.* v. *OSMRE*, 100 IBLA 365 (1988), and *Turner Brothers, Inc.* v. *OSMRE*, 99 IBLA 349 (1987), among others. As in the previous *Turner Brothers'* cases, we affirm Judge Miller's dismissal of TBI's challenge to OSMRE's jurisdiction.

Next, TBI contends that OSMRE failed to establish a prima facie case with respect to violation No. 1 cited in the NOV.[1] Violation No. 1 alleged that the operator had failed to direct all water from disturbed areas to a sedimentation pond in violation of section 816.42(a)(1) of the OPRPR.[2] The NOV stated that this violation was occurring on the

[1] Appellant does not challenge Judge Miller's decision to the extent that it affirmed violation No. 2 (failure to certify a sedimentation pond).

[2] This regulation is the same as 30 CFR 717.17(a)(1) and 30 CFR 816.46(b)(2) which require that all surface drainage from disturbed areas shall be passed through a sedimentation pond or a siltation structure prior to leaving the permit area during the interim program and permanent program, respectively. We note, however, that by notice in the *Federal Register*, 51 FR 41961 (Nov. 20, 1986), the Department suspended 30 CFR 816.46(b)(2).

north and east sides of the coal pad on permit No. 82/86-4049, on the north and south berms directed to pond No. 2, and on diversion No. 1 directed to pond No. 4 on permit No. 84/86-4090.

TBI contends that in order to establish a prima facie case of a violation of section 816.42(a)(1) of the OPRPR, OSMRE was required to establish a prima facie case as to each of the elements of the violation, which, as enunciated in *Avanti Mining Co.*, 4 IBSMA 101, 107, 89 I.D. 378, 381 (1982), are: (1) The existence of surface drainage from areas disturbed in the course of mining and reclamation activity; (2) that such drainage was not passed through a sedimentation pond; and (3) that such drainage flowed off the permit area. TBI argues that OSMRE failed to establish the existence of surface drainage in disturbed areas or that such drainage flowed off the permit area without passing through a sedimentation pond. TBI contends that OSMRE must show a likelihood, not mere speculation, that the harm designed to be prevented by the regulation will occur.

OSMRE contends it established a prima facie case that the violation occurred in all three areas.

The Board in *Alpine Construction Co.* v. *OSMRE,* 101 IBLA 128, 95 I.D. 16 (1988), recently addressed the type of proof that is necessary to establish a violation of 30 CFR 717.17(a)(1). We stated that the elements of proof required to support such a violation are (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left or will leave the permit area. Thus, we concluded that proof that surface drainage has actually left the permit area is not mandatory. In so holding we expressly overruled to the extent inconsistent *Avanti Mining Co., supra*; *Consolidation Coal Co.*, 4 IBSMA 227, 89 I.D. 632 (1982); and *Turner Brothers, Inc.* v. *OSMRE*, 98 IBLA 395 (1987).

At the hearing before Judge Miller, OSMRE Inspector Joseph Funk testified that there were no drainage controls on the coal pad and therefore water had a potential to flow off the minesite without passing through a sedimentation pond. He described the coal pad as a disturbed area, a coal loading facility with coal piles and coal trucks entering and leaving (Tr. 10). He indicated that the area of the coal pad was higher than the area immediately to the north of it and described the potential drainage as follows:

> A. Okay. On the east side is relatively flat. The drainage could potentially go anywhere. It could stay there, it could go west or it could go east off the permit line. * * * On the north side of the permit line it's a very very moderate slope, but there would be a flat area right in the permit – right on the – I'm sorry. There would be a flat area where the permit boundary right on the edge of disturbance and immediately north of it is a low spot between the permit line and the highway. So, once again water could go any way, but from a high point to a low point I would say it would have a more likely chance of flowing north into that low spot from the disturbed area.

(Tr. 14-15).

The inspector stated there were no diversions or berms to prevent the surface drainage from leaving this area without first passing through a sedimentation pond. Although he saw no drainage flowing off the site, the inspector explained his conclusion that such drainage could occur as follows: "By looking at the site out in the field I could see the low spot north of the permit boundary where water would obviously have a potential to flow to it" (Tr. 16).

The Judge concluded from Inspector Funk's testimony that OSMRE demonstrated surface drainage would flow north and off the permit area without first passing through a sedimentation pond.

A second area involving this violation was described as being the area west of sedimentation pond No. 2 on permit No. 84/86-4090. The inspector testified with reference to a topographical map (Exh. R-6) on which he entered approximate elevations and by means of arrows depicted potential drainage flow lines. He stated that although no berms or diversions were required by the permit, there was a disturbed area west of pond No. 2 which would result in some uncontrolled drainage downhill and behind the pond dam (Tr. 20). The inspector surmised that drainage had the potential of leaving the permit site without flowing through a sedimentation pond (Tr. 21-22).

TBI's mining engineer Gregory Govier testified that a north/south haul road in area 2 was constructed for the purpose of holding water in the permit area. He testified also that some areas on the downhill slope of the haul road were disturbed and unvegetated (Tr. 45).

Judge Miller found that the haul road was not a completed drainage retention structure because areas to the west of it would allow surface drainage to flow off the permit area without first passing through a sedimentation pond. As to area 2, he concluded that OSMRE had presented a prima facie case that was not overcome by contradictory evidence.

The third area involving this violation is an area labelled diversion No. 1 located south of pond No. 2 and west of pond No. 4 (Exh. R-6). The inspector testified that diversion No. 1 had not been constructed but that it was needed because the entire watershed to the east of it had been disturbed but not vegetated (Tr. 22). He indicated that without the diversion, water would run off the permit because it could not be directed either to pond No. 2 or pond No. 4. He cited this area as an area of violation because the watershed had been mined and disturbed, but drainage was not being directed to a sedimentation pond before leaving the permit area (Tr. 24). TBI presented no testimony in regard to diversion No. 1 and the Judge again concluded that OSMRE had presented a prima facie case of the existence of a violation in this area.

In his evaluation of the evidence, Judge Miller stated that the sedimentation pond requirement is a preventative measure which does not require a showing of the harm it is intended to prevent in order to establish a violation. He found also that an inspector need not see surface drainage leaving the permit area so long as he testifies that

drainage could flow off the permit without first passing through a sedimentation pond.

[2] In *Alpine Construction Co.* v. *OSMRE, supra*, we dealt with the situation in which the OSMRE inspector could not specifically testify that surface drainage had left the permit area. Nevertheless, based on the rationale that the sedimentation pond requirement is a preventative measure, we held that testimony that surface drainage would leave the permit are was sufficient to establish a prima facie case in support of a violation.

In the present case, the inspector did not see any surface drainage from disturbed areas at the time of his inspection nor did he find any evidence that any drainage had left the permit area. However, his testimony established for all three areas that there was a reasonable likelihood that there would be surface drainage from those areas, that it would not pass through a sedimentation pond, and that it would leave the permit area. Appellant did not rebut that testimony.

Thus, consistent with the rationale which formed the basis for our holding in *Alpine Construction Co.* v. *OSMRE, supra*, we conclude that evidence that there is a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area is sufficient to establish a prima facie case of a violation of the regulations.

Since our conclusion represents a clarification of the evidence necessary to establish a prima facie case, we expressly modify *Alpine Construction Co.* v. *OSMRE, supra*, to incorporate our holding in this case.

Based on our review of the record, we conclude that Judge Miller correctly found that OSMRE established a prima facie case that a violation existed in each of the three areas, and that TBI failed to meet its burden of persuasion that the violation did not occur. *See Turner Brothers, Inc.* v. *OSMRE*, 100 IBLA 365, 370 (1988); *Alpine Construction Co.* v. *OSMRE, supra.*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

GAIL M. FRAZIER
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

WM. PHILIP HORTON
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1988 O - 215-288

June 6, 1988

APPEAL OF BALL, BALL, & BROSAMER, INC., & BALL & BROSAMER (JV)

IBCA-2103 & 2350 Decided: *June 6, 1988*

Contract Nos. 1-07-3D-7477 & 5-CC-30-3560, Bureau of Reclamation.

Motions to dismiss granted.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction

Substantial compliance with the certification requirement of the Contract Disputes Act is jurisdictional, and the Board has no authority to waive it. Substantial compliance is not found (1) where the required certification of a corporation was executed by a person who was neither a general officer nor an onsite project manager of the corporation, and (2) in the case of a joint venture, where the required certification was signed by a person who was not formally established as an agent of the joint venture in an equivalent capacity.

APPEARANCES: John R. Little, Jr., Esq., Nancy E. VanBurgel, Esq., Duncan, Weinberg, Miller & Pembroke, P.C., Denver, Colorado, for Appellant; Daniel L. Jackson, Esq., Wayne C. Nordwall, Esq., Government Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

The above appeals were timely filed, respectively, by Ball, Ball, and Brosamer, Inc., and Ball and Brosamer (JV), a joint venture (hereinafter the Joint Venture) (IBCA-2103) and by Ball, Ball, and Brosamer, Inc. (hereinafter the Corporation) (IBCA-2350), from contracting officer decisions denying claims in connection with the construction of two aqueducts as part of the Central Arizona Project, under Bureau of Reclamation (Bureau) contract Nos. 1-07-3D-7477 (IBCA-2103) and 5-CC-30-3560. IBCA-2103 has been pending since November 18, 1985, and IBCA-2350 has been pending since June 30, 1987.

On January 22, 1988 (IBCA-2350), and on March 4, 1988 (IBCA-2103), Government counsel for the first time raised the issue of improper claim certification under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(1), in that the claims under both appeals had been signed by the same individual in his capacity as Chief Cost Engineer for the Corporation, without any indication that he was either a general officer of the corporation, a project manager at the work site, or a duly authorized agent of the Joint Venture in an equivalent capacity.

The Government moves to dismiss both appeals on the ground that the Board lacks jurisdiction to consider them in the absence of the

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required certification. For the reasons set forth below, the Board grants the Government's motions and dismisses the appeals.

Facts

1. CDA section 605(c)(1) provides, in pertinent part, that "[f]or claims of more than $50,000, the *contractor* shall certify that the claim is made in good faith," etc. (Italics added.) Thus, the issue raised by the Government's motion is who can validly certify a claim on behalf of a corporate contractor.

2. The regulatory requirement for claim certification is set forth in Federal Acquisition Regulation (FAR) 33.207, 48 CFR 33.207, which states in subsection (c)(2) that:

> If the contractor is not an individual, the certification shall be executed by–
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

3. The contracts with the Bureau were signed by Robert G. Brosamer as President of Ball, Ball and Brosamer, Inc., for the Corporation, and as Co-Joint Venturer for the Joint Venture. They contained, in Clause I.1.8, the above-quoted language, as part of Disputes Clause Alternate I (FAR 52.233-1, Apr. 1984).

4. The claim certifications were signed by Don Meek as Chief Cost Engineer for the Corporation, which is located in Alamo, California. (The project itself was located in Arizona.) According to Meek's affidavit, submitted as Exhibit A of Appellant's Opposition to the Motion (hereinafter, AOM-A), Meek's job is: "[T]o supervise and administer all cost and claim aspects of the performance and administration of [the Corporation's] contracts. I am responsible for preparing claims. After due consultation with my superior, [Corporation] President Robert Brosamer, I certify and submit claims to the contracting officer." Meek goes on to say (with respect to IBCA-2350):

> On February 18, 1987, I submitted what we intended to be a certified claim to the contracting officer. I included the certification language, required by the Contract Disputes Act, in my letter. I signed that certification with "Ball, Ball and Brosamer, Inc., By: Don Meek." * * * I intended, by that format, to sign on behalf of the contractor. I have the authority to sign claims on behalf of [the Corporation].

5. According to an affidavit submitted by Corporation President Robert G. Brosamer (AOM-B):

> 2. Mr. Don Meek has held the position of Chief Cost Engineer with Ball, Ball & Brosamer for approximately 8 years. The Chief Cost Engineer is a senior management level position and Mr. Meek reports directly to me. Mr. Meek is the senior official at [the Corporation] working on all *cost and claim aspects* of all corporate contracts. Mr. Meek is, in effect, Ball, Ball & Brosamer's director of contracts or contracts manager.

3. Mr. Meek's job entails overall supervision and administration of all *cost and claim aspects* of the performance and completion of all of the contracts that this firm has at any given time. * * *

* * * * * * *

5. Mr. Meek is directly responsible to me and essentially functions as our senior contracts *claims manager*. I provide him with general policy direction but he has the authority to proceed with claims within these general guidelines. Since *he is, therefore, directly responsible for preparation of all claims*, he also has sufficient background and knowledge and facts and costs contained in the claim to fully and truthfully certify to their completeness and accuracy. *I do provide Mr. Meek with specific decisions or instructions on important issues* that he brings to me for determination *and occasionally participate personally in important negotiations with owners on claims.* Otherwise, he is fully responsible and has full authority to handle claim matters within this management and policy framework.

* * * * * * *

7. Since Mr. Meek is a duly authorized agent of the corporation and has the authority to sign and certify claims on behalf of the corporation, *I also hereby ratify and confirm his authority* to act in this capacity. [Italics added.]

Arguments by the Parties

Counsel for the parties have adequately briefed the relevant authorities in this matter. Essentially, appellant argues that:

The authority or qualification to bind the contractor is, in the final analysis, the whole point. Section 605(c)(1) requires only that "the contractor shall certify" and Admiral Rickover [who was instrumental in the enactment of the CDA's certification requirement] defined this as a "senior, responsible contractor official." Thus, "bond claim attorneys," "general managers," "directors of contracts" and "project managers" have all signed acceptable certifications *provided* they had actual, in-fact authority to bind the corporation. In each case where a certification was rejected, the certifying party lacked the actual authority to bind the contractor. This distinction rationalizes all of the reported cases, including those that the government relies on here. [Italics added.]

(AOM at 16).

Government counsel, while in agreement with the statement of the issue as framed by appellant's counsel, argues that:

Appellant has succinctly stated the issue, but has failed to provide evidence that the purported certification signed by Don Meek was sufficient to bind the corporation.

As noted by the Claims Court in *Drake v. United States*, 12 Cl. Ct. 518 (1987), "Congress wanted to hold the contractor personally liable, and it considered the best way to do this would be to require contractors personally to certify their claims." *Drake*, 12 Cl. Ct. at 519.

Government counsel goes on to assert:

Corporations, like the Government, operate primarily through delegations of authority. If there is a common thread in the case law (discussed below) relied upon by Appellant which addresses the adequacy of corporate certifications, that thread is whether the person signing the certification had the delegated authority to act on behalf of and bind the corporation *at the time he executed the certificate*. Appellant asserts Mr. Meek had "the authority to certify the accuracy of [the Corporation's] claim." (Opposition, page 17) Authority to certify the accuracy of a claim is, however, insufficient to meet the requirement that the contractor be bound by the certification and personally liable

therefore [*sic*]. Appellant's belated effort to ratify the certification (Opposition, Exhibit B, paragraph 7) is likewise insufficient to now vest this board with jurisdiction to hear this claim. [Italics added.]

(Bureau Reponse at 2).

Legal Authorities

A. Cases Finding Certification Proper.

In *W. H. Moseley Co.* v. *United States*, 230 Ct. Cl. 405, 677 F.2d 850, *cert. denied*, 459 U.S. 836 (1982), the court emphasized that the adequacy of a certification was not a matter left to the discretion of the contracting officer. *A certification by an economist was found insufficient* to meet the certification requirement imposed by the CDA upon the contractor.

Three Board cases cited by appellant reach consistent results. In *Dawson Construction Co.*, VABCA No. 1967, 84-2 BCA par. 17,383, the Board held that the contractor's *project supervisor was authorized* to make the certification because he was a senior company official in charge at the location involved, as permitted by the Federal procurement policy then in effect. In *Christie-Williamette*, NASA BCA No. 1182-16, 85-1 BCA par. 17,930, the Board held that a *project manager*, who was expressly delegated "full authority to act in behalf of the Joint Venture on all matters involving the execution of [the] contract" and who was also a voting member of the Management Committee of the venture, *had authority* to certify a claim. In *Santa Fe, Inc.*, VABCA No. 1746, 85-2 BCA par. 18,069, the Board again accepted certification by a project manager with delegated authority, for the same reason as in *Dawson, supra.*

In *Tracor, Inc.*, ASBCA No. 29912, 87-2 BCA par. 19,808, the Government objected that the certifying official was neither responsible for the general management of the contractor's operation nor a senior corporate official in charge of the contractor's plant on location. The facts of the case are not clear; but the Board, in accepting the certification, found that the signer, who was the *corporation's director of contracts* (allegedly with overall responsibility for its contracting activities), *was in fact a "senior company official in charge* at the contractor's plant or location involved."

In *Eastern Car Construction Co.*, ASBCA No. 30955, 86-2 BCA par. 18,909, another joint venture case, the Board found a certification proper because the *signer was a vice president* of one of the corporate venturers *who had been duly authorized* to make the claim and certification on behalf of ECCC.

A similar case is *Transamerica Insurance Co.* v. *United States*, 6 Cl. Ct. 367 (1984), in which the certification was signed by a Bond Claim Attorney, who asserted in an affidavit that he was "*the senior company official in charge of all matters relating* to Transamerica Insurance Company involved with * * * [*the*] *Contract*," and that he "had overall supervision on behalf of Transamerica Insurance Co. of all

the completion work on the * * * project" (6 Cl. Ct. at 370). The court accepted the certification.

Finally, in *United States* v. *Turner Construction Co.*, 827 F.2d 1554 (Fed. Cir. 1987), involving a certification by a prime contractor on behalf of its subcontractor, the court, while stressing the importance placed by the Congress on the certification procedure, stated that it found nothing surprising or "hopelessly irreconcilable" in the fact that a prime contractor might "both certify the claims of its subcontractors and provide the government with facts and theories with which to defend those claims" (827 F.2d at 1559). The court went on to say:

> Thus, how the prime contractor itself would resolve the dispute should not be relevant to the certification issue; the prime contractor should not, through the requirement that it certify subcontractor claims, be used as a substitute for the contracting officer or the board in the determination of the merits of the submitted claims under the CDA.

827 F.2d at 1561.

B. Cases Finding Certification Improper.

Turner, supra, sets out at 827 F.2d 1560 various circumstances in which certification was found to be improper or inadequate, and we see no need to repeat here the various cases cited. However, some recent decisions by the Claims Court are worthy of note in the context of the Government's motion.

In *Todd Building Co.* v. *United States*, 13 Cl. Ct. 587 (1987), an Executive Assistant for the contractor, upon being challenged by the Government, stated in a letter that she had been "authorized, in the absence of any authorized signatories, to execute the Certification." The corporation's general manager signed and confirmed the letter. He also enclosed a photocopy of the original certification, on which he had placed his own signature alongside the Assistant's. Both parties agreed that the General Manager had general supervisory authority over the contractor's affairs, as well as full authority to represent and bind the company. Therefore, the court found that the certification, which was tendered before the contracting officer considered the claim, was valid from the point at which the general manager had affixed his own signature to it.

Although *Aeronetics Division, AAR Brooks & Perkins Corp.* v. *United States*, 12 Ct. Cl. 132 (1987), turns on deficiencies in the certification statement rather than on the person of the signer, it again points out the importance of strictly construing the certification requirement, citing *Moseley, supra*.

Similarly, in *Romala Corp.* v. *United States*, 12 Ct. Cl. 411 (1987), the court distinguishes *Transamerica, supra*, from the case before it, on the ground that, in *Romala*, there was no evidence that the signer of the certification was *either a senior company official or acting in any type of supervisory capacity* with regard to the performance of the contract,

citing the FAR provision already quoted (12 Ct. Cl. at 413). Thus, the certification was inadequate.

However, the most significant recent Claims Court case on certification appears to be *Donald M. Drake Co.* v. *United States*, 12 Cl. Ct. 518 (1987), in which the court summarily granted the Government's motion to dismiss even though the certification was signed by the project manager. In her discussion, Judge Nettesheim notes that the purpose of the certification requirement was to insure against inflated claims by triggering "a contractor's potential liability for a fraudulent claim under 604 of the [CDA]," quoting *Skelly & Loy* v. *United States*, 231 Ct. Cl. 370, 685 F.2d 414 (1982). Judge Nettesheim then points out that, at the time in question, Drake was owned by FMD Corp. "Thus, only a senior company official or an officer or general partner of the plaintiff contractor would have been able properly to certify the claim." 12 Cl. Ct. at 520. Moreover, the decision notes that the interrogatories between the parties had clearly established that primary claims authority resided in Drake's Executive Vice President and not in its project manager.

Some 4 years ago, this Board made clear that it would take a strict view of the certification requirement, insofar as the person of the signer is concerned. In *Whitesell-Green, Inc.*, IBCA No. 1927, 85-3 BCA par. 18,173, we seriously questioned a certification, even by a project manager, under circumstances where it was not sufficiently clear that he had authority from the contractor to sign it. We said:

> [W]e have doubts about the validity of the purported certification because it was not written or signed by an officer of the corporation. The letter of November 30, 1984, *did not enclose a copy of a resolution of the Board of Directors* of the appellant corporation *stating that the project manager*, Mr. Caldwell, *was authorized to act on behalf of the corporation with respect to the certification of claims*. Neither did the letter show him to be an officer of the corporation.
>
> The CDA requires that the *contractor* certify when certification is necessary. Thus, when the contractor is a corporation, the individual who acts for the corporation by executing the certification should have at least apparent authority to do so. Our holding here is that the certification itself is defective and therefore is not dependent upon the authority, or the lack thereof, of the certifier. Nevertheless, we believe that a careful and conscientious approach to proper certification by a corporate contractor dictates that a *clear showing* be made *that the individual certifying on its behalf has the authority to so certify as an act of the corporation*. [Italics added.]

(85-3 BCA at 91,259).

Discussion

In recent cases, relying primarily on *United States* v. *General Electric Corp.*, 727 F.2d 1567 (Fed. Cir. 1984), this Board has taken a fairly liberal position on the manner in which the substantive requirements of the CDA certification can be met. (*See, e.g., A&J Construction Co.*, IBCA-2269 and 2376-F, 94 I.D. 211, 87-3 BCA par. 19,965, and 25 IBCA 73, 88-1 BCA par _____.)

We do not, however, believe that the arguments for leniency that apply to the other formalities of the CDA certification requirement can

be applied equally--or, indeed, at all--to the representations upon which the Government must rely if the certification is to be binding upon a corporation or a joint venture as the actual contracting party.

It is our view, in fact, that just as a contractor should not have to guess at its peril upon whom it may rely, among the Government's many servants, when a contract is about to be signed or a change is about to be made or a claim is about to be filed; so too the Government should not be forced to guess whether the act of the private institutional signer in certifying a claim is, or is not, one for which the corporation, legally and without unnecessary litigation, can readily be held accountable. We think that it is the purpose of the FAR requirement to avoid such confusion and that, in the grand scheme of things, the corporate authority requirement makes considerable sense. Thus, we are not disposed to let corporate contractors off the hook easily.

Nor, on the whole, do we think the cases in which adequate certification has been found closely parallel the facts before us. Even in *Tracor, supra*, which arguably is the strongest case in appellant's favor, the Armed Services Board made a specific finding that the certification by the contractor's agent met the literal test of the FAR requirement because of his actual onsite management responsibilities.

The most analogous situations to those before us, in fact, were the ones in *Whitesell-Green, supra*, and *Drake, supra*, where the opinions noted that while the certifying individual may have been the onsite project manager, there was no indication that he had the authority to sign the certification involved. In the case before us, while the signer may have been a senior level official, he was clearly not an onsite manager, and there is no indication that he had the *general* corporate authority that the FAR clause contemplates as an alternative.

What is required is not complicated. Corporations delegate responsibilities every day; and they are commonly familiar with the fact that when someone other than a general corporate officer will be expected to act on their behalf, a board of directors' resolution is the proper means for authorizing the necessary action (*Whitesell-Green, supra*). Similarly, where the corporation undertakes to act as a partner in a joint venture, there must be an adequate legal basis for the apparent authority of the person who will serve as the corporate parties' legal agent (*Christie-Williamette, supra*).

For the Corporation's Chief Cost Engineer, in one of the two cases before us (IBCA-2103), to attempt to perform legal acts on behalf of the Joint Venture without any form of warrant, and then to argue that he was orally authorized to do so, strains credulity. If the purpose of the certification requirement is to bind the contractor to the elements of the certification, and the courts have said that it is, it is difficult to see how that purpose can be carried out by the Joint Venture certification before us.

It is also clear that, under the FAR clause, corporate contractors are permitted to choose between two reasonable certification alternatives: either they may provide their senior onsite project managers with the necessary express authority, or they may vest the claim certification responsibility in their general corporate officers. If the latter alternative is chosen, there is no reason to believe that the boards and courts would not be prepared to construe certifications by senior corporate officials reasonably, just as the Federal Circuit was prepared to treat a prime contractor's certification reasonably with respect to a subcontractor's claim (*Turner, supra*).

On the other hand, it could also be argued that if a general corporate officer does not have sufficient facts to make the necessary certification, then perhaps he should get them before making the certification, just as he should get the facts before signing away the corporation's rights in a claims release (*see, e.g., Mingus Constructors, Inc.* v. *United States*, 812 F.2d 1387 (Fed. Cir. 1987)). In this connection, we note that the President of the Corporation before us personally signed both of the contracts involved. If it was important for someone at his level to sign the original documents, it is not clear to us why it was not important for someone at the same level to sign any formal claims in excess of $50,000 that arose under those contracts.

Also, the appeals before us seem similar to *Romala, supra*, in that, if appellants' Chief Cost Engineer in fact had the authority to certify claims, then why did the Corporation President find it necessary (as he apparently did) to attempt to ratify the certification in the affidavit appended at AOM-B?

Since the purpose of the certification requirement is to prevent frivolous or fraudulent claims, it is this Board's position that the certification required by the statute ought to be signed by someone who *clearly* has the authority to bind the corporation or other legal entity involved. Otherwise, the certification requirement of the Act would be meaningless.

Decision

In summary, we hold that the claim certification signing requirements of the FAR must be strictly construed, and that consequently such certifications can be made only by general officers of corporations, or their equivalent with respect to other entities, or by senior onsite project managers. Since no such certifications were provided to the contracting officer in the cases before us, and since the certification requirement is jurisdictional, these appeals must be dismissed pending resubmission of the claims, with proper certification, to the contracting officer involved.

As a matter of convenience to the parties, the Board will retain the appeal documents on file for a reasonable time to facilitate any further

appeals that may be taken from any subsequent contracting officer's denials.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

BLACK BUTTE COAL CO.

103 IBLA 145 Decided *July 21, 1988*

Appeal from a decision of the Director, Minerals Management Service, disallowing certain deductions for transportation and processing expenses and ordering appellant to pay additional royalties on production from coal lease W-6266. MMS-84-0009-MIN.

Affirmed in part, affirmed in part as modified, and reversed in part.

1. Coal Leases and Permits: Royalties--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties

Where the language of a negotiated coal lease provides that the value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs incurred between the point of delivery from the pit and the point of sale, and it is clear from the record that all transportation costs from the pit to the processing plant were intended to be deductible, the point of delivery from the pit is properly held to be the point when the haul trucks have been loaded in the pit.

2. Coal Leases and Permits: Royalties--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties

Royalties, production and severance taxes, black lung taxes, and reclamation fees are properly considered to be elements of the costs of mining and, as such, no part of these expenses will be allowed to be deducted from value for royalty computation purposes as an indirect cost of transportation or processing.

APPEARANCES: Mary Anne Sullivan, Esq., George W. Miller, Esq., and Jonathan L. Abram, Esq., Washington, D.C., for appellant; Howard Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., U.S. Department of the Interior, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This appeal is brought by Black Butte Coal Co. from a November 27, 1985, decision of the Director, Minerals Management Service (MMS), ordering the appellant to pay additional royalties on coal mined on

Federal coal lease W-6266. The basis for the decision was the disallowance of credits claimed by appellant for certain expenses charged to the transportation and processing of coal mined from the lease and sold from February 1980 through December 1982.

The coal lease at issue in this case was entered into on April 1, 1976, by the United States and Rosebud Coal Sales Co., appellant's predecessor in interest. Section 5(a) of the lease provides a "production royalty shall be due on Coal extracted by the Lessee from the Leased Lands" in the amount of 10 percent of the gross value of coal produced by strip mining methods and 8 percent of the gross value of coal produced by underground mining. The essence of this dispute involves two provisions of section 5(b) of the lease critical to the calculation of royalties due thereunder. Section 5(b) provides in relevant part that:

(1) The gross value shall be considered to be the price received by the Lessee, adjusted for transportation and/or processing costs so that it is a measure of the value of the Coal at the mine mouth (or in the case of strip mining that point where the Coal is delivered from the pit) * * *.

(2) The Area Mining Supervisor may make deductions from gross values for costs of preparing and transporting Coal which are incurred by the Lessee between the mine mouth, or in the case of strip mining that point to which the Coal is first delivered from the pit, as designated by the Supervisor, and the point of sale. He will make such deductions only when, in his judgment and subject to his audit, the Lessee provides him with an accurate account of the costs so incurred.

The Director's decision acknowledged that the Black Butte Mine is a large strip mining operation in which coal is mined from several separate pits spread over a broad area.[1] Bruce M. McKay, an engineer employed by appellant, explained in an affidavit submitted with appellant's statement of reasons for appeal that the mine involves a total of 13 different pits connected by an "extensive transportation network for moving mined coal from the several outlying pits to the central plant for processing and shipment" (Exh. 5 at 3). McKay further stated:

[T]rucks transport the coal out of the pit and along the haul roads to a primary crusher, either at the central plant or at one of the two overland conveyor systems. The coal which is trucked to a primary crusher at an overland conveyor is then moved by the conveyor to the central plant. The "grizzly" is simply the iron bars that protect the opening to the primary crushers; thus, there are grizzlies at the primary crusher in the central plant and at the outlying primary crushers located at the beginning point of each overland conveyor.

Exh. 5 at 6.

The Director's decision explained that the Royalty Management Program (RMP) of the MMS had issued a demand letter dated March 15, 1984, to appellant following a 1983 royalty audit. Although the audit report found that the sale prices used to establish royalty value and the production volumes reported by the lessee were acceptable, payment of additional royalty in the amount of $3,875,189 and interest was demanded. The demand was based on unauthorized

[1] Lease W-6266 embraces almost 15,000 acres of public lands.

deductions by the lessee from the sale price for costs (direct and indirect) of transportation and processing of the coal prior to sale.[2] The Director's decision further explained that the RMP had determined that no deductions were allowable in the royalty calculation under section 5(b) of the lease because the point where the coal is delivered from the pit is the point of sale at the railroad line.

The Director in his decision did not accept the position taken by the RMP.[3] Rather, the Director concluded that the coal is "delivered from the pit" at the point where the mined material is dumped into the grizzly serving the pit. Hence, he determined that appellant was entitled to deduct transportation and processing costs incurred after that point. The Director elaborated on those expenses which are deductible and those which are not as follows:

> Black Butte may deduct from its sales price direct and indirect costs, as determined by generally accepted accounting principles, and approved by MMS, which are directly attributable to transportation, preparation, and processing activities between the point at which the coal enters the grizzly chute and the point of sale. All costs incurred prior to the coal entering the grizzly chute are not deductible. The following additional costs are not deductible: management fees (not attributable to transportation, preparation and processing activities), royalties, reclamation fees, and taxes.

Exh. 2 at 9. Refusing to uphold RMP's finding that all claimed deductions for transportation and processing costs should be disallowed because of appellant's failure to obtain prior approval of the Mining Supervisor (the deductions came to light in a subsequent royalty audit), the Director ordered appellant for future years commencing with 1986 to pay royalties on the basis of the full sales price subject to filing an application with MMS within 90 days after the close of the calendar year for deductions for costs of preparation and transportation of coal.

In the statement of reasons for appeal, Black Butte argues that the Director erred in holding that the point of delivery from the pit occurs at the grizzly, thus limiting its deduction for transportation costs to those occurring after that point. Appellant notes this would eliminate the deduction for roads and transportation of the coal by truck from the pit to the conveyor belt for that portion of the coal transported by conveyor and from the pit to the central processing plant for the coal which enters the grizzly at that point. Thus, the only transportation costs allowed would be for the conveyor system, a means of transportation which appellant asserts was not even contemplated at the time the lease was negotiated. Black Butte contends it is entitled to deduct all transportation expenses from the point at which the coal is severed from the pit to the point of delivery to the rail cars.

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[2] Of this amount demanded, $3,837,931.54 was identified as involving improper deductions for transportation and processing costs. The decision of the Director found that the balance of the sum demanded by the RMP letter, involving improper deductions against royalty for advance rental payments, was not at issue.

[3] The Director also expressly rejected appellant's contention that it is "entitled to deduct all expenses incurred after the overburden is removed and the coal is exposed."

Appellant also asserts error in the disallowance of certain indirect costs including royalties, reclamation fees, and taxes (including black lung and severance taxes) to the extent they may be allocated to the deductible activities (transportation and processing) which contribute to the value of the coal upon which the royalty is assessed. Appellant further argues that profit, as a cost of capital, is a deductible expense to the extent it may be allocated to deductible expenses.

Finally, Black Butte asserts error in the requirement imposed by the Director that it receive a credit for allowable expenses only after filing a claim for refund within 90 days after the close of each calendar year. Appellant contends there is no authority for this procedure either in the lease terms or the regulations.

In answer to appellant's statement of reasons, MMS contends that mining of coal involves not only severing it from the ground but also bringing it to the surface which would include removal to a point outside the pit. MMS asserts that the operation of frontend loaders to load coal into trucks in the mine is a part of the mining rather than the transportation process and hence such costs are not deductible. Further, MMS argues that the phrase in section 5(b) of the lease terms referring to the point where coal is "delivered *from* the pit" necessarily imports a location distinct from the mine pit itself. MMS contends this point is logically contrued to be the grizzly to which the coal is delivered as the Director held.

With respect to the issue of indirect costs, MMS notes that royalty is defined as a share of production free of the costs of production. MMS argues that reclamation fees, black lung tax, and state taxes have no relation to transportation and processing. Rather, they are costs of production based on tonnage of coal produced and/or sold which would be incurred even if there were no transportation and processing costs. Similarly, MMS asserts that any overriding royalty paid by the lessee is a component of the value of the coal at the mine and cannot be allocated to transportation and processing costs.

MMS further contends that allowable deductions are limited to *costs* of transportation and processing and thus no element of profit is properly included in such a deduction. Regarding the requirement to pay royalty on the full value and then make application for approval of deductions after the close of the calendar year, MMS asserts on appeal that once deductions are authorized for the first calendar year, this level of deductions could be taken as payments are made on a monthly basis during the succeeding year, subject to adjustment after the close of the year.

Accordingly, the issues raised by this appeal are twofold. The first controversy entails determining at what point in the process coal is "delivered from the pit" in order to ascertain what transportation and processing costs are incurred thereafter and, hence, are deductible from the sale price of the coal. The second issue is what indirect costs may properly be attributed to transportation and processing.

[1] The language of section 5(b)(1) of the lease clearly states that value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs to reflect the value of the coal at the point where coal is delivered from the pit. Section 5(b)(2) of the lease confirms that deductions from the gross value of the coal are authorized for costs of preparing and transporting the coal incurred by the lessee between the point where the coal is first delivered from the pit and the point of sale. Although MMS argues that the phrase delivery "from" the pit requires a finding that delivery must occur at some point remote from the pit, this is not the only logical construction of the phrase. In the case of *Hillard* v. *Big Horn Coal Co.*, 549 P.2d 293 (Wyo. 1976), the Supreme Court of Wyoming had occasion to examine the question of where mining stops in reviewing the assessment of the value of coal at a strip mine for tax purposes. The Court found that "[m]ining is not completed until the coal has been loaded for removal from the pit" on the rationale that loading of the coal must be completed before further stripping which is part of the mining process, may be accomplished. 549 P.2d at 302.

This construction of the lease term is consistent with the apparent intent of the parties to the lease. Donald Sturm, a director of Peter Kiewit Sons, Inc.,[4] and a member of the Black Butte management committee since formation of the joint venture, has stated in an affidavit submitted with the statement of reasons for appeal (Exh. 3) that this lease was carefully negotiated by the parties since it was issued at a time when the Department of the Interior had placed a moratorium on coal leasing (subject to limited exceptions) and was using no standard form lease. Sturm's affidavit relates that a preliminary mining plan was developed in 1974 (Exh. 3G) which detailed the plans for removal of the coal from the pits and transporting it to the central processing facility. He further states:

> In negotiating with the Department for a definition of gross value that excluded transportation and processing costs, I understood that the costs of the equipment and facilities described in the preliminary mining plan for removing the coal from each pit, delivering it to the processing facilities, processing it and finally, delivering it to the point of shipment at the Union Pacific Railroad line at the loadout building, shown as "G" on Figure 13, Exhibit 3G, would be excluded. It was clear to all involved that the lessee would be able to deduct its transportation and processing expenses.

Exh. 3 at 8. This understanding is corroborated in most respects by the affidavits of Hugh Garner (Exh. 4) who, as the Associate Solicitor for Energy and Resources at the time the lease was negotiated, was actively involved in lease issuance. Garner states in his affidavit:

> 7. It was my thought that, under the terms of Section 5(b)(1), Rosebud would be entitled to deduct all costs incurred from the point at which coal was extracted from the ground to the point of sale. This included both the costs of transporting coal from each

[4] Black Butte Coal Co. is a joint venture of Wytana, Inc., a Kiewit subsidiary, and Bitter Creek Coal Co., a subsidiary of Rocky Mountain Energy Co.

pit to the rail cars, which were to be the point of sale for the coal, and for processes such as crushing, washing and oil spraying, provided those costs were incurred prior to the point of sale.

This understanding is further supported by the fact that the preliminary mine plan called for virtually all transportation of coal from the pits to the central processing facility to be accomplished by trucks rather than conveyor facilities. *See* Exh. 3G (mine plan); Exh. 5 (McKay affidavit) at 3. Thus, the interpretation urged by MMS would, under the scenario envisioned at the time, have resulted in denying a deduction for virtually all of the transportation costs. When construing the language of contracts, it is fundamental that where the terms are susceptible to more than one meaning, the terms shall be construed in a manner which gives meaning to the intent of the parties. *See* 4 S. Williston, *A Treatise On The Law Of Contracts*, § 618 (3d ed. 1961). Accordingly, we find that the point of delivery from the pit occurs when the coal has been loaded into the trucks for transportation from the pits to grizzlies at the overland conveyor or at the processing plant. Applying this rationale, the cost of the loaders used to fill the trucks is a part of the costs of mining as opposed to transportation, but the costs of the trucks and the haul roads constitute transportation costs.

The remaining issue is whether the Director erred in not allowing as indirect costs of transportation and processing the pro rata share of royalties, reclamation fees, and taxes (including black lung and severance taxes). A subsidiary question raised by appellant is whether the allowance of indirect costs of transportation and processing includes an allocable share of profit.

[2] Appellant's argument proceeds as follows. Under standard accounting practices, certain indirect costs which cannot be directly attributable to any specific phase of an operation are treated as general overhead costs and are apportioned through all phases of the production process in the proportion that other costs at each particular phase contribute to the total value of the product. Appellant contends that since, under its contract, it is permitted to deduct certain transportation and processing costs, it should also be permitted to deduct so much of the general overhead costs as can be apportioned to the transportation and processing phase. It is appellant's position that included in these general overhead costs are the standard reclamation fee, the black lung tax, the State of Wyoming production tax, certain overriding royalties retained by Rosebud Coal Co. when it assigned the lease to appellant, and proportionate management fees and elements of profit.

In his decision, the Director, MMS, agreed that Black Butte could deduct those indirect costs "which are directly attributable to transportation, preparation, and processing activities," expressly disallowing those management fees not directly attributable to transportation, preparation, and processing activities, as well as royalties, reclamation fees, and taxes (MMS Decision at 9).

While we do not disagree with appellant's theoretical argument that, under the specific terms of its lease, it may deduct so much of general overhead expenses which are properly allocable to the transportation and processing phase, we substantially agree with the Director, MMS, that the deductions which appellant seeks for royalties, reclamation fees, and taxes are not properly allowable.

We believe that the general fallacy of appellant's argument lies in its assertion that the royalties, reclamation fees, and taxes are *not* specifically allocable to the mining phase. In its submissions, appellant argues that inasmuch as the *amount* of the reclamation fees, taxes, and overriding royalty may be dependent upon costs associated with the transportation and processing, such costs are properly allocable to general overhead rather than to mining. Thus, appellant notes that the reclamation tax is assessed at the rate of '0.35 per ton or 10 percent of the value at the point of sale, whichever is less, while the black lung tax is assessed at the rate of $0.55 per ton or 4.4 percent of the sales price, whichever is less. *See* Exh. 6 at 25. Appellant argues, in effect, that since these taxes *could* be based on costs associated with transportation and processing,[5] these fees are properly treated as general overhead costs rather than specifically attributable to the mining phase. We do not agree.

Appellant has confused the question of whether costs are directly attributable to a specific phase with the issue of how they are computed. The obligation to pay the reclamation fee and the black lung tax arises solely from appellant's mining of the coal. Or, to utilize appellant's terminology, the expenditure *is* directly "caused" by the mining phase. This is readily apparent if one assumes that, rather than transport and process the coal, appellant sold the freshly mined coal at the mine mouth to a third party. In such a situation appellant, as the operator, would be totally liable for the reclamation fee and the black lung tax. The individual who purchased the unprocessed coal would be assessed no costs therefor. Clearly, therefore, the costs of these assessments arise not from the general operations but from the specific act of mining. In this regard, the precedents are well settled: production, severance taxes, reclamation fees and the like, are properly considered to be a cost of production and may not be subtracted from the gross value for Federal royalty computation purposes. *See Peabody Coal Co.*, 72 IBLA 337 (1983); *Knife River Mining Co.*, 43 IBLA 104, 86 I.D. 472 (1979). Accordingly, we must reject appellant's assertion that it should be permitted to deduct any amounts for reclamation

[5] There is a certain disingenuousness to appellant's argument as it relates to the black lung tax and the reclamation fee. In point of fact, according to the audit report, the lowest selling price per ton for the period in question was $21.906 in June 1980. Thus, since both taxes are assessed at the *lower* of either a fixed rate or a percentage rate, appellant, in reality, never once tendered any payments which were dependent upon any of its production or processing costs. Rather, appellant, for every single month, paid the fixed rate provided in the statute which is determined independent of *any* transportation or processing costs.

fees, black lung tax, or the Wyoming severance and county ad valorem taxes.[6]

Appellant's assertions with respect to the overriding royalty which it pays to Rosebud Coal Co. suffers a similar infirmity. Thus, while the *amount* that it pays may be dependent upon allowable transportation and processing cost deductions, its *obligation* to pay any amount is directly attributable to the mining phase. Moreover, since royalty has generally been defined as a share of the production reserved to another party, free of the costs of production, royalty has been held to be a component of the value of the coal at the mine *not* to be apportioned between mining and processing. *Hillard* v. *Big Horn Coal Co., supra* at 301. Thus, we must agree with the Director, MMS, that no deduction may be allowed for the overriding royalty which appellant pays to Rosebud Coal Co.

Finally, with regard to the question of whether a share of profit may be allocated as an indirect cost of transportation and processing, we note, as counsel for MMS has pointed out, that deductions are limited to indirect *costs* attributable to transportation and processing. We also note that while the Director allowed indirect expenses with certain specific exceptions which we have affirmed, he did not purport to decide whether "profit" is a proper element of indirect expenses. While it would seem that costs of capital and costs of debt service may constitute an indirect cost of transportation and processing, we find it premature to rule on the broader question in the absence of an adverse ruling by the Director.

With regard to the question of the deferral of deductions for transportation and processing expenses until the filing of an application therefore within 90 days after the end of the calendar year for which the deductions are claimed, we note that counsel for MMS has modified this position on appeal. As indicated previously, counsel has stated that once deductions are authorized for the first calendar year, this level of deductions could be taken as payments are made during the succeeding year subject to adjustment after the close of the year. Appellant has indicated that it could accept this approach. Hence, the decision is modified in this respect.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, MMS, is affirmed in part, affirmed in part as modified, and reversed in part.

C. RANDALL GRANT, JR.
Administrative Judge

[6] Indeed, since appellant admits that both the severance tax and the ad valorem taxes are based on the value of the coal at the point where the coal "is removed from the pit * * * and prior to any beneficiation or further processing is placed in storage prior to transportation to market" (Exh. 6 at 26), it is difficult to even discern the theoretical basis for its assertion that part of this tax should be allocated to the transportation and processing phase.

July 25, 1988

WE CONCUR:

ANITA VOGT
Administrative Judge
Alternate Member

JAMES L. BURSKI
Administrative Judge

APPEAL OF ROUGH ROCK DEMONSTRATION SCHOOL BOARD, INC.

IBCA-2373 Decided: *July 25, 1988*

Contract No. N00 C1420 9692, Bureau of Indian Affairs.

Denied.

1. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law

Costs allowable under contracts entered into pursuant to the Indian Self- Determination and Education Assistance Act are only those authorized under the contract, regardless of the merits of the expenditures in other respects. Where the Government establishes a prima facie case that certain costs are unallowable under the literal terms of the contract, the burden is upon the contractor to prove allowability.

2. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law

Where a contract entered into under the Indian Self-Determination and Education Assistance Act was specific in providing for advertising expenses only if they were "solely" for the recruitment of personnel, and a preponderance of the evidence indicated that a disallowed color brochure and video tape were intended for both teacher and student recruitment, the Board will not overturn the contracting officer's determination that the costs were unallowable.

APPEARANCES: S. Bobo Dean, Esq., Carol L. Barbaro, Esq., Hobbs, Straus, Dean & Wilder, Washington, D.C., for Appellant; Thomas O'Hare, Esq., Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This case involves an appeal from the Rough Rock Demonstration School (school/contractor/appellant), a Navajo Indian tribal contractor with the Bureau of Indian Affairs (BIA/Government) under P.L. 93-

638, the Indian Self- Determination and Education Assistance Act ("638 cases"), from July 20, 1987, decision of the BIA contracting officer (CO) disallowing contractor expenses in the amount of $50,696.55 on the basis of an audit report, submitted in February 1986 and covering a 3-year period, that had questioned certain costs incurred by the contractor for FY 1985. The contractor appealed $49,043.45 of the disallowed costs.

The disallowed costs that were appealed were originally contained under the heading "Personnel Development" but were later labeled "Advertising" pursuant to a school board resolution in response to concerns raised by the audit report. They were paid for 30,000 copies of a color brochure and for a 12-minute video tape that were produced under contract between the school and a professional advertising firm, allegedly for the purpose of recruiting teachers for the school, but found by the auditors and by the CO to have been for general promotional purposes and for the purpose of recruiting students as well as teachers. For the reasons set forth below, the appeal is denied.

Facts

The contract involved, No. N00 C1420 9692, was for a term of 3 years, commencing on October 1, 1983. It was intended to provide educational services to eligible Navajo Indian students, including residential students. The contractor was to provide all necessary qualified personnel to operate the school, which included lower, middle, and secondary levels; and teachers were required to meet Arizona state certification standards.

In May 1985, BIA conducted an evaluation of the school and recommended that the secondary school be closed because of a shortage of certified teachers. As a result, the school board commenced efforts to recruit qualified teachers, employing its attorney to spearhead the campaign. At least two advertising agencies submitted bids to the school board; and the bid from Usher & Co., dated 1 July 1985, was accepted. Usher & Co. produced several products for the board, including teacher-recruitment advertisements for newspapers and a black and white brochure clearly addressed to potential teachers. The latter expenses were not disallowed by the CO.

However, the color brochure and the video tape, copies of which were provided to this Board, were of a more questionable nature. The color brochure, entitled "Growth Through Navajo Education (Dine' Bi' olta')," emphasizes the quality of existing facilities, instruction, and learning environment, and includes a business reply card whose text states in part, "Yes, I am interested in Rough Rock Demonstration School because of your unique bi-lingual, bi-cultural program," with blanks for the respondent's address and occupation and for the names and birthdates of his or her children. This brochure is characterized by Government counsel as "heavy on student recruitment and light on teacher recruitment" (Government "Points and Authorities" Memorandum (GPA) at 13). We agree with that characterization.

Similarly, although the video tape twice mentions the need for teachers, that need is not emphasized. Rather, the video stresses the integration of Navajo culture into the curriculum, student welfare, and the quality of the (existing?) teaching staff. It shows parents speaking the Navajo language, which is untranslated. Other evidence in the record, particularly statements by both contractor and Usher & Co. employees, obtained by the BIA auditor and further provided by Government counsel, support the conclusion that student recruitment was as much intended as teacher recruitment; and we so find.

Arguments by Counsel

Because the issues in the record were initially not clearly defined, the Board held a conference call with the parties on April 27, 1988, asking for an oral hearing, or else clarifying briefs with citations of authority, even though the case had been submitted for decision on the record.

In response, appellant's counsel primarily argues the equities of the situation. Her views, as set forth in the introduction of her resulting brief, can be summarized as follows (Appellant's Final Brief (AFB) at 12):

> In our view, this case is a classic example of the BIA making "much ado about nothing." Reduced to its essence, the BIA is complaining that a school board spent contract funds to attract children to come to school in a region where the high school drop-out rate is a shocking 56%. While we must emphasize that the School Board undertook the advertising efforts at issue primarily to recruit teachers in order to save its secondary school program, any byproduct of student attraction to school is neither voidable nor undesirable.
>
> Despite several lengthy, indepth conversation with BIA representatives about this issue, we still fail to understand why BIA would take the position that a school board, whose primary responsibility under its contract is to educate children (*see* Admision No. 11), should be prohibited from spending contract dollars on any activity whose byproduct might be that children are encouraged to come to school.

By contrast, Government counsel lists three specific contract clauses with which he contends there has not been contractor compliance: Clauses 308, 335, and 323. Clause 308, requiring Indian preference in connection with any contracts entered into by appellant, may have been raised tangentially by the BIA auditor in complaining about the school's lack of a procurement system (as Government counsel notes); but appellant has not previously been asked to address that issue in connection with this appeal and, in light of our disposition of this case on other grounds, we do not rely on that ground now.

Clause 335 is another story. That clause, entitled "Printing," expressly prohibits the contractor from engaging in, or subcontracting for, any printing in connection with the performance of work under the contract, except for single-color reproductions of under 5,000 1-page units under 25,000 multiple-page units. As Government counsel points out, the procurement of 30,000 copies of the multicolor brochure appears to be "in direct violation" of that clause of the contract (GPA

at 5). Moreover, he argues that if the school has 28 teachers on its staff, and

> [i]n the unlikely event that every teaching position is vacated every year * * * and that twenty brochures are sent out per position, Rough Rock has a 58 year supply of brochures for teacher recruitment. Based upon the large number of brochures printed, there is a logical inference that Rough Rock intended from the time of request for proposals that the brochure would be primarily for student recruitment.

(GPA at 12-13).

However, it is Clause 323 and its reference to Appendix A of 25 CFR 276 (also cited by appellant's counsel, but inaccurately quoted in her brief: AFB at 3) that is most relevant to the allowability of the video tape, which constitutes the major portion of the expenditure that the CO disallowed. Part II (Cost Standards), B (Allowable Costs), 2 (Advertising) states expressly that "[t]he advertising costs allowable are those which are *solely* for: a. Recruitment of personnel required for the * * * program." Government counsel, after quoting this provision verbatim, argues persuasively that since the school's expenditure for the video tape clearly had a dual purpose, it did not meet the requirement of Appendix A. We agree.

Discussion

The Board has spent considerably more time in the review of this case than the amount at stake would otherwise warrant, because we are sympathetic with the difficulties that must have been involved in attempting to operate a school, recruit new teachers and new students, correct past deficiencies, and upgrade and stabilize a curriculum, following a performance evaluation that urged a closing of the secondary school altogether. It cannot be easy to go back and re-read a BIA contract and its incorporated references in connection with each and every action the school board contemplated during the course of the school year.

And yet, that is what a Government contractor--not just a BIA contractor, but *any* Government contractor--is required to do. The appellant in this case can be no exception. Consequently, we cannot grant it the equitable relief it so obviously seeks.

There has been a gradual and logical progression of 638 cases decided by this and other boards, commencing primarily with the appeals of the *Papago Indian Tribe of Arizona*, IBCA-1962 & 1966, 93 I.D. 136, 86-2 BCA par. 18,859, in which the Board first held that such cases were unique and not subject to the Contract Disputes Act (CDA). In *Devil's Lake Sioux Tribe*, IBCA-1953, 94 I.D. 101, 88-1 BCA par. 20,320, we held that tribal contractors are nevertheless entitled to rely on formal decisions by BIA contracting officers--even if they are arguably in conflict with the agency's complex regulatory scheme--since the implementation of these regulations is primarily a BIA rather than a tribal responsibility.

In our reconsideration of *Navajo Community College*, IBCA-1834, 87-2 BCA par. 19,826, a case involving *amicus* intervention by the

Association of Navajo Community Controlled School Boards and by Metlakatla Indian Community, we decided that 638 contracts were to be regarded as self-contained documents, not subject to modification by the application of extrinsic CDA doctrines, such as the usual right of the Government to terminate a procurement contract for its convenience. That view was reinforced by *Alamo Navajo School Board, Inc.*, IBCA-2123-25, 88-2 BCA par. 20,563, in which the Board refused to recognize implied contractual modifications on the basis of evidence of either (1) oral consensus of the parties, (2) general Government policy statements contrary to provisions of the contract, or (3) the existence of alternate legal authority which could provide more generous contract funding but which was not the authority under which the contract was entered into.

Finally, in a decision by the Armed Services Board, *Puyallup Tribe of Indian*, ASBCA 29,802, 88-2 BCA par. 20,640, the board concluded that since 638 contracts are cost-reimbursement contracts, the burden of proving the allowability of expenditures is upon the contractor, once the Government has made a prima facie showing that the claimed costs are not allowable costs under the terms of the contract.

In the case before us, it matters not that the school board may have acted reasonably and in good faith in contracting for promotional materials to serve the dual purpose of attracting both students and teachers, because the language of the contract does not permit such an approach. If the school wanted its advertising expenses to be reimbursed by the Government, as it apparently did, it was incumbent upon the school board to bring its needs to the attention of the CO and to obtain the necessary contract modification to permit the expenditure. Since it did not do so, the CO was within his rights to disallow the costs involved, and this Board has no basis for overturning his decision.

Decision

Accordingly, the appeal is denied.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

WILLIAM F. MCGRAW
Administrative Judge

CLAYTON W. WILLIAMS, JR., EXXON CORP.

103 IBLA 192 Decided: *July 25, 1988*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, cancelling issuance of oil and gas lease W-88886 and reinstating and suspending oil and gas lease offer W-88886.

Reversed.

1. Oil and Gas Leases: Cancellation--Oil and Gas Leases: Lands Subject To--Withdrawals and Reservations: Generally

The Secretary of the Interior has authority to cancel an oil and gas lease issued for lands not subject to leasing at the time of lease issuance. However, where BLM cancels a lease on the basis that oil and gas leasing had been suspended for the lands described in the lease in a previous agreement between BLM and the Forest Service, and it is subsequently shown that the suspension agreement was an improper withdrawal of Federal lands because the agencies failed to follow statutory withdrawal procedures in 43 U.S.C. § 1714 (1982), and the lands described in the lease are otherwise subject to leasing, it is improper to cancel the lease on the grounds the lands were not subject to leasing.

2. Oil and Gas Leases: Bona Fide Purchaser

Where, at the time of lease issuance, BLM's records pertaining to the lease revealed no indication that the lease had been issued in violation of the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1982), but rather indicated that sufficient proper analysis of potential environmental impacts had been completed prior to lease issuance, reliance by an assignee of the lease on the BLM decision to issue the lease is not unreasonable and will support assignee's claim of bona fide purchaser status.

APPEARANCES: C. M. Peterson, Esq., Dwight I. Bliss, Esq., and Laura L. Lindley, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Clayton W. Willams, Jr., and Exxon Corp. have appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated February 24, 1986, cancelling oil and gas lease W-88886, which had been issued to Williams, effective December 1, 1985. This decision also reinstated and suspended Williams' over-the-counter noncompetitive oil and gas lease offer W-88886.

On June 7, 1984, Williams filed an over-the-counter lease offer pursuant to section 17(c) of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 226(c) (1982). The offer described lands within certain sections of T. 45 N., R. 113 W., sixth principal meridian, in Teton County, Wyoming, and within the boundaries of the Bridger-Teton National Forest. In a decision dated July 19, 1984, BLM rejected the lease offer, advising Williams that the described lands had been withheld from oil and gas leasing pursuant to a memorandum from Secretary Krug to the Directors of BLM and Geological Survey (Krug Memorandum), dated August 15, 1947, and published in the *Federal*

Register (12 FR 5859) that same date. *See James Donoghue*, 24 IBLA 210 (1976).

Upon receipt of the decision rejecting Williams' lease offer, counsel for Williams wrote to BLM, explaining that, in his memorandum, Secretary Krug had provided an exception for those lands within T. 45 N., R. 113 W., which were outside the Jackson Hole National Monument (now Teton National Park) and the Teton Wilderness Area, providing that such lands could be leased if they were "deemed necessary to establish or complete a logical unit area." 12 FR 5860.[1] Counsel then noted that certain lands described in Williams' lease offer fell within this exception, and further explained that Exxon Corp. was in the process of forming the Leidy Creek Unit Agreement which included lands in the lease offer. On August 17, 1984, after receiving this additional information, BLM reinstated Williams' oil and gas lease offer with its original priority date.

A review of various events occurring and actions taken between the time of the initial reinstatement of the lease offer and the issuance of the lease and its subsequent cancellation by BLM is important to an understanding of the issues raised in this appeal. Shortly before BLM's August 17, 1984, reinstatement of the lease offer, Exxon's Leidy Creek Unit Agreement, Unit No. 14-08-0001-21145, dated June 16, 1984, was approved by BLM upon recommendation of the Forest Service. The approval of the unit agreement included the notation that the unleased tracts, including the lands within the unit described in Williams' lease offer, were uncommitted but considered to be controlled acreage because, prior to issuance of leases for these tracts, the lessees would be required to commit to the unit agreement. An application for a permit to drill (APD) for the initial unit well was approved by BLM on September 7, 1984; the well was spudded on October 30, 1984, and plugged as a dry hole on January 18, 1985.[2]

BLM began processing Williams' lease offer soon after its reinstatement. On August 17, 1984, BLM forwarded a copy of the lease offer to the Forest Service for review and recommendations. By letter dated October 31, 1984, the Regional Forester advised the BLM Wyoming State Director that the Forest Service had "no objection to the issuance of oil and gas lease W-88886 for lands within the Bridger-

[1] Specifically, this memorandun provided:
"The lands north of the [11th standard parallel] shall continue to be temporarily withheld from leasing under the oil and gas provisions of the Mineral Leasing Act, unless the lands in T. 45 N., R. 113 W. 6th P.M., Wyoming outside the Jackson Hole National Monument and outside the Teton Wilderness Area are deemed necessary to establish or complete a logical unit area."

[2] In their statement of reasons (SOR) for appeal, appellants state that data from the test well demonstrated a need for additional geophysical work prior to determination of the location of the second unit test well. Accordingly, further seismic work was performed during Aug. and Sept. 1985. In Mar. 1986, Exxon filed a Notice of Intent to stake the second unit well, a 12,000-foot test in the NE 1/4 of sec. 2, T. 44 N., R. 113 W., sixth principal meridian, with the test to commence on Sept. 1, 1986, and to be completed in Feb. 1987. However, because the preferred drillsite was a south offset to lands within lease offer W-88886, Exxon requested on Apr. 2, 1986, a further suspension of the unit obligation and lease term, until a final decision in the present appeal. No further information on this request is available in the record on appeal.

Teton National Forest" provided the lease included certain standard and site-specific stipulations described in the letter. The Forest Service also stated that its recommendations were "based on environmental analysis reports for the Bridger-Teton National Forest," and that it did not believe an environmental impact statement was needed at that time. On January 7, 1985, BLM forwarded the stipulations recommended by the Forest Service to Williams, requiring their execution. The stipulations were signed by Williams on January 14, 1985, and returned to BLM.

On the same date that BLM forwarded the stipulations to Williams, it also sent him a notice requiring him to furnish either evidence of commitment of the lease to the Leidy Creek Unit Agreement or a letter from the unit operator stating that he had no objections to lease issuance without unit joinder. On January 17, 1985, Williams executed the Ratification and Joinder to the Leidy Creek Unit Agreement and forwarded the forms to Exxon, the unit operator. By letters dated February 12 and March 8, 1985, Exxon forwarded to BLM the necessary copies of the ratification and joinder, together with signed consent of the working interest owners. Upon receipt of these documents, BLM advised Exxon in a letter dated March 11, 1985, that "Lease W-88886, Unit Tract 15, is to be considered fully committed to the unit, effective as of the date of lease issuance, provided that the lease is issued to Clayton W. Williams, Jr. who has executed a joinder to the unit agreement and unit operating agreement." A copy of this letter was sent to the Forest Service.

BLM took no further action with respect to the lease offer until November 12, 1985, at which time the Rock Springs District Office, in a memorandum to the Wyoming State Office, stated that the lands included in the lease offer did not lie within any known geologic structure of a producing oil or gas field (KGS). Accordingly, the lands were clearlisted for lease issuance.[3] On November 18, 1985, the chief, Oil and Gas Section, of the BLM Wyoming State Office executed oil and gas lease W-88886 to Williams effective December 1, 1985. A copy of the executed lease was forwarded to the Forest Service. The lease as issued covered the following described lands within the Leidy Creek Unit Area:

T. 45 N., R. 113 W., 6th principal meridian

Sec. 26: Lots 1, 2, 3, 4, 5, E 1/2 NE 1/4

[3] Appellants document that a delay in issuing the lease was occasioned by the contention of the Rock Springs District Office that

"leasing within the unit should be delayed until it is determined whether or not the unit is productive. If the unit is productive, and the unleased lands are determined to be part of a KGS [known geologic structure], the minerals should then be leased competitively. In the event drilling for oil and gas fails and the unit is non-productive, then we believe that the intent of the Krug memorandum is not to lease the minerals."

(Memorandum to the State Director from the District Manager dated Sept. 16, 1985). The State Office disagreed, stating:

"[P]arcel W-88886 can no longer be 'held' pending Exxon's *possible* future activities in the area. As your memo indicates, since the lands underlying the referenced parcel are necessary to complete the logical unit area, the Krug memorandum allows leasing of the unleased Federal minerals in T. 45 N., R. 113 W."

(Memorandum to the District Manager from the State Director dated (Oct. 8, 1985 (italics in original).)

27: Lots 1, 2, 3, 4, 5
28: Lot 1
33: S 1/2 SE 1/4
34: S 1/2 S 1/2
35: E 1/2 E 1/2 SW 1/4 NE 1/4, SE 1/4 NE 1/4,
E 1/2 NW 1/4 SW 1/4, SW 1/4 NW 1/4 SW 1/4,
SW 1/4 SW 1/4, E 1/2 SW 1/4, SE 1/4
36: S 1/2 N 1/2, S 1/2

By letter dated December 4, 1985, the Regional Forester complained to BLM concerning issuance of the lease. The letter contained copies of previous correspondence between BLM and the Forest Service. These letters essentially set forth an agreement between the two agencies that noncompetitive oil and gas leasing within the Bridger-Teton National Forest would be suspended by BLM. In the first of these, dated May 29, 1985, the Regional Forester requested, based on "the environmental sensitivity of the Bridger-Teton National Forest, the intense public concern regarding its management, and the anticipated completion of further environmental assessments and/or Forest Plan in the near future" that "further processing oil and gas leases involving the Bridger-Teton National Forest should be delayed until these are completed and we submit new reports."

By letter dated June 10, 1985, the State Director informed the Regional Forester that, pursuant to his request, BLM was returning various letters of recommendation which it had received in January and March 1985. This letter also stated "We will suspend oil and gas lease issuance within the Bridger-Teton National Forest until further advised by you." In a subsequent letter, dated July 25, 1985, the Regional Forester advised the Wyoming State Director that, where drainage of Federal lands was occurring, the Forest Service would, under certain conditions, provide recommendations with respect to competitive leasing.

Despite this exchange of letters, however, Williams' noncompetitive lease offer "was inadvertently overlooked" and a lease ultimately issued on November 18, 1985, with an effective date of December 1, 1985.

When the Regional Forester discovered that BLM had issued the lease to Williams, he requested that it be cancelled as issued in error:

> We realize that the lease was issued through an oversight based on an out-of-date Forest Service report. [4] We, therefore, request that the lease be cancelled as being issued in error and the application be held in suspension. We are basing this request on the following reasons:
>
> 1. NEPA [National Environmental Policy Act] documentation had not been completed prior to lease issuance; therefore, full compliance with the National Environmental Policy Act of 1969 has not be achieved.
>
> 2. The issuance of the lease is inconsistent with your decision as authorized officer to suspend leasing within the Bridger-Teton National Forest.

[4] This reference is to the report dated Oct. 31, 1984, in which the Forest Service had originally notified BLM that it agreed to lease issuance subject to the imposition of a number of stringent stipulations. See note 7, *infra*.

(Letter dated Dec. 4, 1985, from the Regional Forester to the Wyoming State Director).

On December 31, 1985, BLM advised the Forest Service that it was prepared to initiate action to cancel the lease and requested documentation to support the requested cancellation. The Forest Service provided the following documentation on February 10, 1986:

> We requested that you initiate cancellation of W-88886 primarily because NEPA requirements were not fully complied with prior to lease issuance.
>
> Personnel on the Bridger-Teton National Forest are currently working on the Forest-wide Environmental Impact Statement (EIS) and Land and Resource Management Plan. The draft EIS and Plan should be available for public review from April through July 1986. The final documents are not anticipated until mid-1987.
>
> A preliminary environmental review conducted as part of the planning/EIS process indicates that the lands included in W-88886 are within an area of high environmental sensitivity and there is potential for significant environmental impacts.
>
> The lease area is within a grizzly bear habitat area. The grizzly is classified as a threatened species under the Endangered Species Act. Goals for the area are to maintain or improve essential habitat for recovered (viable) populations of grizzly bear and to minimize the potential for and resolve bear/human conflicts. Mineral leasing exploration and development may not be allowed if upon final analysis the grizzly bear may be adversely affected. The management area also contains high visual quality values. This visual sensitivity is due to the lease area being adjacent to the grand Teton National Park and in close proximity to the Teton Wilderness area. It is also located within the greater Yellowstone Ecosystem, an area of significant environmental concern and controversy.

Upon receipt of this information, BLM issued its February 24, 1986, decision cancelling the lease and reinstating and suspending the lease offer. In reaching its decision, BLM found:

> It is apparent from documents received from the Regional Forester that there are significant environmental values in the area: that preliminary environmental and planning assessments to comply with requirements of NEPA and the Endangered Species lease was premature, illegal, and contrary to the express request of the Regional Forester. Further analyses will identify the degree and manner of mitigation necessary in order to meet statutory obligations.
>
> Inasmuch as Lease W-88886 was issued prematurely, in error, and contrary to law, it is hereby cancelled. 43 CFR 3108.3(b). Lease *offer* W-88886 is reinstated and is hereby placed in a pending status until the Regional Forester sends us a final recommendation regarding stipulations or issuance, based on full compliance with NEPA and the Endangered Species Act. 43 CFR 3101.74(c). [Italics in original.]

Appellants then timely filed an appeal from the decision cancelling the lease.

In addition to the above review of the facts relating to the issuance and cancellation of lease W-88886, a review of the circumstances surrounding the assignment of the lease from Williams to Exxon is also important to an understanding of the legal issues raised by this action. Appellants state that by Letter Agreement dated February 25, 1985, Williams agreed to sell and Exxon agreed to purchase certain oil and gas leases, including Federal oil and gas lease application W-88886. The agreement provided for an initial payment upon execution of the Letter Agreement and payment of the balance of the purchase price " 'at such time as the resultant lease is assigned to Exxon' " (SOR at 14). According to appellants, on December 3, 1985, Williams executed and

delivered to Exxon an assignment of the issued oil and gas lease W-88886 and received payment for the balance of the consideration due upon lease issuance and delivery of the assignment. *Id.* This assignment was filed with the Wyoming State Office on December 16, 1985.

Appellants assert on appeal that there is no legal support for BLM's decision to cancel the lease. They argue that the reasons for cancelling the lease submitted by the Forest Service and accepted by BLM do not establish that the lease was improperly issued or subject to cancellation. They further assert that Exxon was a bona fide purchaser of the lease and, as such, should be afforded the appropriate statutory protection as provided in 30 U.S.C. § 184(h)(2) and (i) (1982).

Initially, we note that it is beyond dispute that the authorized officer, pursuant to the delegated authority of the Secretary of the Interior, has broad discretion in determining whether to issue an oil and gas lease pursuant to the MLA. *Geosearch, Inc.* v. *Andrus*, 508 F. Supp. 839 (D. Wyo. 1981). However, once this authority has been exercised and a lease has been formally issued, it can then be cancelled only under certain circumstances. *See David Burr*, 56 IBLA 225 (1981). *Cf. Exxon Corp.*, 97 IBLA 330 (1987) (once the authorized officer has communicated acceptance of a high bid he is thereafter estopped from rejecting the bid for a perceived inadequacy in the amount tendered).

It is, of course, axiomatic that the Secretary has the authority to cancel any lease issued contrary to law because of the inadvertence of his subordinates. *Boesche* v. *Udall*, 373 U.S. 472 (1963); *D. M. Yates*, 74 IBLA 159 (1983); *Fortune Oil Co.*, 69 IBLA 13 (1982). In *Boesche* v. *Udall, supra*, the Supreme Court noted that section 31 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 188(a) and (b) (1982), which provides procedures for cancellation and forfeiture of leases for failure to comply with the conditions thereof, "reaches only cancellations based on *post-lease* events and leaves unaffected the Secretary's traditional authority to cancel on the basis of pre-lease factors." *Id.* at 478-79 (italics in original).

[1] Thus, it is well established that the Department has authority to cancel a lease where the lands described in the lease were not subject to leasing at the time of lease issuance. *See, e.g., Richard H. Clark*, 92 IBLA 353 (1986). Where Federally owned lands that have been legislatively or administratively withdrawn from leasing under the MLA are inadvertently included within a lease, the Department must cancel the lease to the extent it embraces such lands, since, as to those lands, the lease is a legal nullity. *See Hanes M. Dawson*, 101 IBLA 315 (1988). Similarly, where a lease has issued to someone other than the first-qualified applicant, or has been issued in violation of established procedures, it is properly subject to cancellation. *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955); *United States* v. *Alexander*,

41 IBLA 1 (1979), *aff'd sub nom. Alexander* v. *Andrus*, No. 79-603-B (D.N.M. July 7, 1980). In this second instance, however, the lease is considered voidable rather than void. *See Raymond G. Albrecht*, 92 IBLA 235, 242, 93 I.D. 258, 262 (1986). As we shall discuss, *infra*, this distinction is of critical importance with respect to the applicability of the bona fide purchaser protection afforded by 30 U.S.C. § 184(h)(2) (1982).

In the present case, one of the reasons cited by the Forest Service in its December 4 letter as grounds for cancelling the lease was that it had been issued "contrary to our agreement to suspend oil and gas leasing within the Forest until the forest plan and/or further environmental assessments were completed." In its decision cancelling the lease, BLM noted that "issuance of the lease was premature, illegal, and contrary to the express request of the Regional Forester" (Decision at 3). It is unclear whether or not BLM was holding that the mere fact that the Regional Forester objected to lease issuance deprived the State Office of the authority to issue it. If so, BLM is simply wrong.

Under the law prevailing when the lease issued, it is clear that BLM, not the Forest Service, had the ultimate responsibility in determining whether or not an oil or gas lease for public domain land should issue.[5] *See, e.g., Natural Gas Corp. of California*, 59 IBLA 348 (1981); *Earl R. Wilson*, 21 IBLA 392 (1975). Thus, the mere fact that the Regional Forester objected to issuance of the lease could not make issuance improper. Indeed, this Board had repeatedly held in similar circumstances that even where the surface management agency objected to issuance of a public domain lease, it was the responsibility of BLM to independently determine whether or not leasing was in the public interest. *See, e.g., Western Interstate Energy, Inc.*, 71 IBLA 19 (1983); *Esdras K. Hartley*, 54 IBLA 38, 88 I.D. 437 (1981).

It is also possible, however, that BLM was arguing that the effect of the agreement between the Regional Forester and the Wyoming State Director suspending oil and gas leasing in the Bridger-Teton National Forest was to prevent any authorized leasing of the lands in question and could thus serve as a basis for cancelling the lease as having been issued in error. Appellants, in response to such a contention, argue at length that there was nothing precluding the authorized leasing of these lands, and specifically contend that the interagency agreement suspending leasing in the area was an improper withdrawal unauthorized by law and therefore invalid. Thus, appellants assert, the lease cannot be cancelled on the grounds the lands were not available for oil and gas leasing at the time that the lease issued.

[5] We recognize, of course, that sec. 5102 of the Federal Onshore Oil & Gas Leasing Reform Act of 1987, 101 Stat. 1330-256, codified at 30 U.S.C. § 226(h) (1982), *amended* sec. 17 of the MLA by adding, *inter alia*, the following subsec.: "(h) The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture." 101 Stat. 1330-258. But, at the time that the lease issued in the instant case, no such general authority was vested in the Secretary of Agriculture.

It is uncontroverted that the Secretary has general authority to refuse to issue oil and gas leases under section 17 of the MLA, *as amended*, 30 U.S.C. § 226 (1982). *See James M. Chudnow*, 68 IBLA 128 (1982); *David A. Province*, 49 IBLA 134 (1980). The Secretary has traditionally exercised this authority both on an ad hoc basis, in response to specific lease offers, or more formally through his general authority to withdraw land from mineral leasing. *See* 43 U.S.C. § 141 (1970) (repealed by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792); *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). Appellants argue that, since the passage of FLPMA, the Secretary's authority to withdraw lands from leasing is governed by section 204 of that Act, 43 U.S.C. § 1714 (1982), which provides that withdrawal authority can be delegated only to "individuals in the Office of the Secretary who have been appointed by the President," 43 U.S.C. § 1714(a) (1982), and outlines the steps to be taken by authorized individuals in effectuating withdrawals, including the requirement that the Department must notify both Houses of Congress where the withdrawal is larger than 5,000 acres. 43 U.S.C. § 1714(c) (1982). They contend that the indefinite suspension of oil and gas leasing by BLM in the Bridger-Teton National Forest constituted a "defacto withdrawal made by an authorized officer" (SOR at 31). In support of their argument, appellants cite two Federal District Court cases directly on point.

In the first case, *Mountain States Legal Foundation* v. *Andrus*, 499 F. Supp. 383 (D. Wyo. 1980), the Forest Service and BLM, as in the present case, had agreed to a suspension of oil and gas leasing on certain Forest Service lands. In considering the allegation that the "Secretary of the Interior's failure to act on the oil and gas lease applications" was an unauthorized withdrawal under FLPMA, the court first referenced the statutory definition of "withdrawal" found in FLPMA, which states in pertinent part:

> The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purposes of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; * * *.

43 U.S.C. § 1702(j) (1982); *see* 499 F. Supp. at 391. The court then found that

> the combined actions of the Department of the Interior and the Department of Agriculture fit squarely within the foregoing definition of a withdrawal found in 43 U.S.C. § 1702(j). The combined actions of the Secretaries have (1) effectively removed large areas of federal land from oil and gas leasing and the operation of the Mineral Leasing Act of 1920, (2) in order to maintain other public values in the area * * *.

Id. Thus, the court reasoned, since the agencies' moratorium on leasing "fit squarely" within the definition of withdrawal as found in FLPMA, it could only be implemented by proper compliance with the procedural requirements found in 43 U.S.C. § 1714 (1982). Since that

had not occurred, the Court ordered the Secretary to comply with the requirements or "cease withholding said lands from oil and gas leasing."

Appellants also cite the decision in *Mountain States Legal Foundation* v. *Hodel*, 668 F. Supp. 1466 (D. Wyo. 1987), a case of particular relevance to the present appeal. In that case, the Mountain States Legal Foundation (Foundation) filed suit against the Secretaries of the Department of the Interior and the Department of Agriculture challenging BLM's suspension of mineral leasing in the Bridger-Teton National Forest. The Foundation alleged that the suspension was improper, essentially for the same reasons cited by appellants herein, and requested that the Court permanently enjoin the defendents from pursuing the alleged unlawful policies and procedures with respect to processing mineral lease applications.

Consistent with the analysis in *Mountain States Legal Foundation* v. *Andrus, supra*, the court found that "the acts of suspension of mineral leasing and the unreasonable delay in mineral leasing in * * * Bridger-Teton National [Forest] fall squarely within the definition of withdrawal for purposes of [FLPMA]." 668 F. Supp. at 1474. Thus, the Court noted: "The action of the Secretaries is more than mere delay in the leasing process; rather, it involves affirmative action to withhold these forest lands from mineral leasing, thereby limiting leasing activities in order to maintain basic environmental values for an indefinite period of time." *Id.*

In response to arguments by the United States that mineral leasing does not come within the purview of the FLPMA withdrawal provisions, the court turned to the case of *Pacific Legal Foundation* v. *Watt*, 529 F. Supp. 982 (D. Mont. 1981):

> In contrast to arguments asserted by the defendants here, the Montana District Court in the case of *Pacific Legal Foundation v. Watt*, 529 F. Supp. at 995-997, concluded that mineral leasing is included in the definition of a withdrawal based on several factors. First, the term "mineral leasing" appears in several subsections of 43 U.S.C. § 1714. Second, the legislative history's reference to retaining the "traditional meaning" of a withdrawal does not support the conclusion that Congress intended to exclude mineral leasing from the procedural provisions regarding withdrawals of Federal land. Third, the district court distinguished the case of *Udall v. Tallman*, 280 U.S. 1, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965) as applying the use of "withdrawal" only to the specific public land order in question. Fourth, the district court noted that other Secretaries have withdrawn land from mineral leasing under the authority in 43 U.S.C. § 1714 [FLPMA]. For all of these reasons, the district court held that the definition of a withdrawal includes mineral activities under the Mineral Leasing Act.

668 F. Supp. at 1474. The court then found that the "actions taken by the Secretaries in delaying and suspending mineral leasing in the [Bridger-Teton National Forest] is an impermissible withdrawal of land by failure to comply with the requirements of 43 U.S.C. § 1714, and that such action is unlawful as an abuse of discretion and not in accordance with the law." *Id.* at 1475.

In light of the above holdings, particularly that of the District Court in *Mountain States Legal Foundation* v. *Hodel, supra*, it is clear that

the agreement between the Regional Forester and the Wyoming State Director, BLM, cannot properly serve as a basis for the conclusion that issuance of lease W-88886 was contrary to law and thus the lease was a nullity from its inception. Moreover, since, under the court's analysis, the interagency agreement suspending oil and gas leasing in the Bridger-Teton National Forest could not effectuate a withdrawal of the lands in question from leasing, neither could it serve as a basis for cancelling the lease.

[2] Having reached the above conclusion, we must next examine the alternate basis cited by BLM for cancelling the lease; namely, that the requirements of NEPA had not been fully met prior to lease issuance. The Forest Service, in its February 10, 1986, letter documenting its belief that the lease should be cancelled, cited this as the primary reason for cancellation. Agreeing with the Forest Service, BLM in its decision stated:

> It is apparent from documents received from the Regional Forester that * * * preliminary environmental and planning assessments have identified the need for more comprehensive analyses in order to comply with requirements of NEPA and the Endangered Species Act; that these efforts are ongoing; and that issuance of the lease was premature, illegal, and contrary to the express request of the Regional Forester. * * *
>
> Inasmuch as Lease W-88886 was issued prematurely, in error, and contrary to law, it is hereby cancelled.

In essence, BLM is contending that issuance of the lease prior to the preparation of further environmental studies[6] violated the applicable provisions of NEPA. *See* 42 U.S.C. § 4332 (1982). It is impossible for this Board to determine from the record presently before us whether or not the Forest Service and BLM are correct in their assertion that prior Forest Service environmental studies were inadequate. Inasmuch as the decision below involved cancellation of an issued lease, we would have expected that BLM and the Forest Service would have, at a minimum, attempted to document exactly what the deficiencies were in the original Forest Service analyses, since cancellation of this lease was, to a large extent, premised on the existence of such deficiencies. Rather than providing such documentation, however, both the Forest Service and BLM have submitted essentially conclusory statements that further studies are needed, generally referencing the "high environmental sensitivity" of the area.[7] Such generalized statements

[6] While the Forest Service justification mentioned preparation of a Forest-wide EIS, it is unclear whether or not the Forest Service felt that preparation of this document was absolutely necessary *prior* to lease issuance. Thus, its letter of July 15, 1985, informing the Wyoming State Director that it would provide recommendations with respect to competitive leasing of Federal lands where drainage was occurring is inconsistent with the argument that any leasing was impossible until such time as an EIS was prepared.

[7] That the lease involved land in an environmentally sensitive area was certainly known to the Forest Service when it initially recommended lease issuance on Oct. 31, 1984. Indeed, a review of the many restrictive stipulations which were placed on the lease at the request of the Forest Service discloses that the Forest Service was duly attentive to a vast array of possible environmental problems. Thus, one stipulation expressly advised the lessee that the presence of any threatened or endangered species "may result in some restrictions to the operator's plans *or even disallowing any use or occupancy that would detrimentally affect any of the species.*" Surface Disturbance Stipulations at 6 (italics supplied).

do not provide sufficient support for cancellation of the lease in the instant case.

In any event, however, it is important to note that NEPA is essentially a procedural rather than action-forcing statute. *See Strycker's Bay Neighborhood Council* v. *Karlin*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 591, 558 (1978); *Park City Resource Council, Inc.* v. *U.S. Department of Agriculture*, 817 F.2d 609, 616 (10th Cir. 1987). In other words, nothing in NEPA, in and of itself, requires the selection of one course of action. What NEPA does require, however, is that "the Government officials determining whether those actions should go forward have a full and complete grasp of the possible consequences of the activity in order that they may take steps to ameliorate adverse impacts to the extent possible, and, if certain impacts cannot be avoided, decide the advisability of proceeding and thereby accepting such impacts." *State of Wyoming Game & Fish Commission*, 91 IBLA 364, 367 (1986).

The importance of the foregoing is that, since NEPA is primarily procedural, even if a lease were issued in violation thereof, such a lease would be merely voidable rather than void. And this distinction becomes of critical relevance with respect to Exxon which asserts that it is entitled to the bona fide purchaser protection afforded by 30 U.S.C. § 184(h) (1982).

Thus, 30 U.S.C. § 184(h)(2) (1982) provides, in pertinent part:

> The right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease or interest therein * * * which * * * lease [or] interest * * * was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, [or] interest * * * was acquired * * * may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation.

The regulation implementing this statutory mandate, 43 CFR 3108.4, further provides:

> A lease or interest threrein shall not be cancelled to the extent that such action adversely affects the title or interest of a bona fide purchaser even though such lease or interest, when held by a predecessor in title, may have been subject to cancellation. All purchasers shall be charged with constructive notice as to all pertinent regulations and all Bureau records pertaining to the lease and the lands covered by the lease.

There are two discrete questions which must be answered in order to determine whether a party qualifies for bona fide purchaser protection. First, was the land embraced in the lease properly subject to leasing in conformity with the statute under which the offer was made? Second, if the answer to this first question is in the affirmative, is the assignee a bona fide purchaser for value?

The first question is relevant since, as the Board has long held, bona fide purchaser protection applies only where the land was, in fact, available for leasing at the time that the lease issued. Thus, where the United States has reserved no mineral interest in patented lands, a lease issued therefor is a nullity and, regardless whether an innocent

third-party has purchased the lease, 30 U.S.C. § 184(h)(2) (1982), can afford the individual no protection against cancellation of such an erroneously issued lease. A similar result has obtained where a noncompetitive lease was issued for lands subject only to competitive leasing (*Lee Oil Properties*, 85 IBLA 287 (1985)), where land was leased under the MLA when it was only subject to leasing under the Right-of-Way Leasing Act of 1930 (*William L. Ahls*, 85 IBLA 66 (1985)), and where the lands were located within a wildlife refuge not subject to leasing (*Oil Resources, Inc.*, 14 IBLA 333 (1974)). The important point here, and the fact which distinguishes the instant case from those cases in which we have held that bona fide purchaser protection was not available, is that bona fide purchaser protection is only available where the issuance of the lease involved a procedural defect; it is not available where no lease could properly issue for the land.

In the present case, even were we to assume that the Forest Service and BLM were correct in their assertions that an inadequate NEPA review had been conducted prior to lease issuance, this would not render the lease void. Rather, inasmuch as a lease might still issue after the completion of the environmental review, premature issuance of a lease renders the lease voidable. As such, the protection afforded by 30 U.S.C. § 184(h)(2) (1982), is available if an assignee can show that he is otherwise qualified under the Act.

Whether or not a party qualifies as a bona fide purchaser within 30 U.S.C. § 184(h)(2) (1982), depends on common law standards. Thus, a bona fide purchaser has been defined as one who acquires his interest in good faith, for valuable consideration, and without notice, actual or constructive, of any violation of the statute or regulations in the issuance of the lease. *Southwestern Petroleum Corp.* v. *Udall*, 361 F.2d 650, 656 (10th Cir. 1966); *See Winkler* v. *Andrus*, 614 F.2d 707 (1980); *Oil Resources, Inc., supra*. The above standards are controlling in ascertaining whether Exxon qualifies as a bona fide purchaser.

We note initially that there are no allegations of bad faith on the part of the parties to the assignment. Rather, the record before the Board indicates that the assignment was the direct result of Exxon's interest in the unit to which this lease had been joined. Also, the payment of valuable consideration is not an issue in this case. In a recent decision, the Board stated the rule that bona fide purchaser protection applies only where consideration has actually been paid prior to actual or constructive notice of an outstanding interest or defect in title. *Robert L. True*, 101 IBLA 320, 324 (1988), and cases cited therein. In their statement of reasons, appellants explain that Exxon committed to purchase lease W-88886 from Williams upon lease issuance under an agreement dated February 25, 1985, and paid Williams a portion of the consideration at that time. On December 3, 1985, 9 days before receipt by BLM of the Forest Service's objections to lease issuance, Williams delivered the assignment of the issued lease to

Exxon, also dated December 3, 1985, and Exxon paid the balance of the purchase price due (SOR at 21). As explained below, Exxon had no notice of any purported defect in lease issuance until after the transfer of the lease and payment of the purchase price of the lease.

To determine whether an assignee is a bona fide purchaser, it is necessary to examine the state of his knowledge, both actual and constructive, at the time of the assignment. *Jack Zuckerman*, 56 IBLA 193, 201 (1981). *Winkler* v. *Andrus, supra*; *O'Kane* v. *Walker*, 561 F.2d 207 (10th Cir. 1977). Assignees of Federal oil and gas leases who seek to qualify as bona fide purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment. *Winkler* v. *Andrus, supra*. An assignee is not, however, required to go outside those BLM records relating to the particular parcel of land assigned. *Id.* We further note that it is the responsibility of BLM to adjudicate lease offers, and the bona fide purchaser has a right to presume that BLM has properly discharged this duty. *David Burr, supra* at 230.

It appears from the information provided by appellants, unrefuted by BLM, that they had no actual knowledge of any defects in the lease at the time of the assignment. As noted above, assignment occurred 9 days before BLM received the Forest Service letter. BLM has provided no information that would indicate the parties to this appeal had requisite actual knowledge of the Forest Service's position made known in its December 4, 1985, letter.

Further, nothing contained in the record at the time of assignment could have served to put appellants on notice that there was a problem with lease issuance.[8] The Board has held that constructive knowledge will be imputed where the facts are sufficient to cause an ordinarily prudent person to make further inquiry which, if followed with reasonable diligence, would lead to discovery of the defects in lease issuance. *David Burr, supra; Winkler* v. *Andrus, supra* at 712; *Southwest Petroleum Corp.* v. *Udall, supra* at 657. Appellants herein note:

> At the time the assignment was made and the final consideration paid, there was nothing in the casefile which would have put Exxon on notice that lease W-88886 may have been improperly issued. It contained the application; the recommendations of the U.S. Forest Service relative to issuance and stipulations; evidence of unit joinder; the clearlisting; and had been reviewed all the way to the State Director's office prior to lease issuance.

(SOR at 21).

with specific reference to the second reason given by the Forest Service and BLM for cancelling the lease, we note that nothing in the record at the time of assignment indicated any lack of compliance with

[8] In response to a request by counsel for appellants, the Wyoming State office, in a letter dated Apr. 9, 1986, verified that copies of the correspondence between the Regional Forester and the State Director (dated May 29, June 10, and July 25, 1985) relating to the suspension of oil and gas leasing in the Bridger-Teton National Forest were not placed in the casefile until "on or about December 15, 1985." The letter explained: "The subject exhibits were placed in casefile W-88886 * * * because of the comments made by [the Regional Forester] dated December 4, 1985 (received December 12, 1985 * * *."

the NEPA requirements. Rather, on record was the October 31, 1984, Forest Service report stating it had "no objection" to lease issuance provided certain stipulations were executed by Williams. The Regional Forester concluded the report by stating: "Our recommendations are based on environmental analysis reports for the Bridger-Teton National Forest. We do not believe an environmental statement is needed at this time." This is the last statement by the Forest Service relating to environmental compliance found in the record up to the December 4, 1985, letter objecting to lease issuance placed in the casefile on December 12, 1985.

In the present case, the October 31, 1984, report, which was the only Forest Service statement in reference to the Williams' lease offer on record at the time of lease issuance, effectively averred that sufficient environmental analysis of lease impacts had occurred. Further, stringent stipulations designed specifically to protect the land from environmental impacts and requiring its restoration after the completion of any surface-disturbing activities had been agreed to by Williams. These stipulations were formulated by the Forest Service in conjunction with its review of potential environmental impacts from oil and gas leasing. Thus, there was nothing to indicate to Exxon the purported lack of NEPA compliance upon which BLM relied to cancel the lease. We further agree with appellants that the documents in the record gave every indication that the lease had been properly issued. In particular, we note that the Wyoming State Director, in a memorandum dated October 8, 1985, expressed the opinion that the lease offer should "no longer be 'held' " but should be processed for clearlisting and lease issuance.[9] *See also* Memorandum to the State Director from the District Manager dated November 12, 1985. In light of the fact there was no indication in the record or elsewhere that Exxon was or could have been aware of any impropriety in lease issuance, and the fact Exxon meets the other qualifications of a bona fide purchaser, we hold that the protection provided under 30 U.S.C. § 184(h)(2) (1982), precludes BLM from cancelling lease W-88886 as to Exxon. *Cf. Champlin Petroleum Co.*, 99 IBLA 278 (1978).[10]

[9] This memorandum also undercuts BLM's assertion that lease issuance was unauthorized. This memorandum, which is dated after the correspondence between the Regional Forester and the State Director with reference to the suspension of oil and gas lease issuance in the Bridger-Teton National Forest, would certainly give rise to the conclusion that issuance of this lease was not forestalled by the agreement.

[10] The record also reflects that prior to the lease assignment to Exxon, Williams had conveyed a 2-percent overriding royalty interest to various individuals. This assignment is dated Dec. 2, 1985, and is noted on the Exxon assignment. There is nothing to show that this assignment was not done in good faith, without consideration, or with any knowledge of the grounds cited by BLM for cancelling the lease. Accordingly, it is proper to extend bona fide purchaser protection to these assignees as well.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision cancelling noncompetitive oil and gas lease W-88886 is reversed.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

APPEAL OF RHC CONSTRUCTION

IBCA-2083 Decided: *July 26, 1988*

Contract No. 5-CC-20-02770, U.S. Bureau of Reclamation.

Sustained in part.

Contracts: Disputes and Remedies: Termination for Convenience

Where a construction contractor, to assure compliance with the contract completion period, engages in planning and organizational activities prior to the actual performance period, the settlement process, under a subsequent termination for the convenience of the Government, requires reimbursement of the reasonable costs incurred by such contractor for such activities, as well as reimbursement of the reasonable costs incurred in preparing and supporting his settlement proposal. The contrary result would penalize the conscientious contractor and be out of harmony with contract clauses and regulations pertaining to terminations for the convenience of the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

A solicitation for bids was issued by the Bureau of Reclamation (BOR) on September 28, 1984, entitled, Rock Barrier Outlet Works Stilling Basin, Trinity Dam, Trinity River Division, Central Valley Project, California. The scope of the work consisted of drilling submerged holes for support pipes; furnishing, fabricating, and placing support pipes and rock barrier panels; grouting the support pipes permanently in place; and removal of debris from the stilling basin. The subject fixed-price contract was awarded to RHC Construction (appellant or RHC or contractor) in the amount of $197,150 pursuant to a letter dated December 21, 1984.

RHC is a small, one-man construction company, normally just doing one job at a time, with the owner himself acting as field supervisor, performing common labor on most of the contracts, and handling the

typing, bookkeeping, and other necessary office work, including drafting and charting (Tr. 14-16). On January 15, 1985, by telegram, the contract was terminated for the convenience of the Government and the contractor notified that all work was to cease immediately. The explanation for the termination was given at the hearing (Tr. 95-98), in substance, as follows:

> At Trinity Dam, there is an auxiliary outlet works, a main outlet works, and a main power plant. Those three diversions are capable of taking water out of Trinity Lake. Around the time of the bid opening for the subject contract, the BOR was in the midst of a rewind of one of the power units, so the power plant was down and water could not be put through that diversion. The auxiliary outlet works was under construction and that contract was almost completed, but, after award of the subject contract, the BOR engineers felt that the auxiliary outlet works construction should be tested before proceeding with the subject contract, to be sure that while the subject contract was being performed, flood flows could be controlled. The auxiliary outlet works diversion was tested on January 10, 1985, and the gates were found to be defective. Therefore, it was decided that the subject contract should be postponed and the termination for the convenience of the Government issued.

Mr. Richard E. Crepeau, the owner of RHC, was notified by telephone on November 17, 1984, that he was the successful bidder for the project. Upon being advised that he was the successful bidder, Mr. Chapeau immediately began working on the project, particularly, by lining up the required steel pipe, which was not easily obtainable and which had to be fabricated. Some pipe manufacturers would have required longer to supply the pipe than the Government allowed to complete the whole job. He did manage to find a firm with steel pipe in stock and another firm which could fabricate it within 4-1/2 weeks. The Government had allowed only 8-1/2 weeks for the entire contract performance. Mr. Crepeau also felt it necessary to, and did, locate a qualified underwater drilling firm to do the highly technical underwater work, so that it would be ready to perform in a timely fashion. The following chronology of correspondence highlights, in substance, the setting from which this dispute developed:

1. Letter dated 1/17/85 from the United States Bureau of Reclamation (USBR) to RHC confirmed telegraphic termination for the convenience of the Government under Clause I.2.17, "Termination For Convenience of the Government" (Fixed-Price Construction) (Apr. 1984) Alternate I (Apr. 1984)," contained detailed instructions to contractor and offered to provide the necessary settlement forms upon request.

2. Letter dated 1/23/85 from USBR to RHC acknowledged request for and transmitted Standard Forms (SF) 1436 and 1438. The CO included the following, as the last sentence of the letter: "Although SF 1436 is sent to you as per your request, it is suggested you first consider using SF 1438, short form, assuming your proposal will be less than $10,000."

3. Letter dated 1/31/85 from RHC to USBR transmitted Settlement Proposal Form 1436 requesting payment in the amount of $15,417.57,

together with Schedule of Accounting Information Form 1439, and advising that if the bonds are returned to RHC, their cost may be deducted from the settlement proposal.

4. Letter, dated 2/7/85 from the contracting officer (CO) to RHC, in response to settlement proposal, requested extensive backup documentation for proper evaluation of proposal.

5. Letter, dated 2/11/85 for RHC to USBR, wherein Mr. Crepeau stated that, under Section 49.201 of the Federal Acquisition Regulations (FAR), he felt the demands of the letter of 2/7/85 were "totally unwarranted," and that enough information had been given to permit final negotiation of the settlement proposal.

6. Letter, dated 2/14/85 from the CO to RHC, responded by construing the contractor's letter of 2/11/85 as a refusal to verify costs, denied all of the claimed costs, and returned the contractor's performance and payment bonds, as he had previously requested.

7. Letter, dated 2/19/85 from Mr. Crepeau to CO, stated that CO had misconstrued the letter of 2/11/85; that he would provide the information requested, but that it would simply add to the costs to assemble it; that if the CO would reconsider his position he, the owner of RHC, would be happy to meet and negotiate a settlement–as contemplated by the regulations.

8. Letter, 2/25/85 from CO to Mr. Crepeau, disagreed with Mr. Crepeau's interpretation of the regulations, but did agree to meet and discuss the amount of the claim provided the backup data previously requested was furnished at the meeting or beforehand.

9. Letter, dated 3/3/85 from Mr. Crepeau to CO, stated that he was convinced that further arguing about the regulations was fruitless; that it would not be easy to prepare and submit the documentation the CO was demanding and to do so, he would be engaging the services of his attorney and accountant, whose fees would be added to the original proposal.

10. Letter, dated 4/15/85 from RHC to CO, answered questions asked in CO's letter of 2/9/85, requested reconsideration of the determination previously made denying all of the claimed costs, and enclosed Exhibits A through G which included backup documentation and a revised Settlement Proposal Form 1436, requesting $16,091.42.

11. Letter, dated 7/19/85, was the transmittal of the CO's determination of RHC's Revised Settlement Proposal wherein the CO allowed only $3,411.87 of the $16,091.42 claimed. The general breakdown of the categories shown in the determination are as follows:

Schedule from Form 1436	*Claimed*	*Allowed*
Schedule A - Indirect Factory Expense	None	None
Schedule B - Other Costs	$9,743.12	$1,676.22
Schedule C - G & A Expense	487.16	83.81
Schedule D - Profit	974.31	176.00
Schedule E - Settlement Expense	4,633.02	1,475.84
Schedule F - Settlement with Subcontractors	253.81	0.00
Total	$16,091.42	$3,411.87

The CO's determination was based primarily on two premises: (1) That the contractor's alleged expenses for *performance* of the contract were only allowable if incurred between the date of receipt by the contractor of the notice of award, December 22,1984, and the date of the notice of termination on January 15, 1985; and (2) that the contractor's alleged settlement expenses were allowable only if they, in kind and amount, "would have been incurred by a reasonable and prudent businessman in settling with subcontractors, suppliers, and the Government" (AF-28).

The major single item difference between the contractor's proposal and the CO's determination was with regard to Mr. Crepeau's salary. The appellant claimed 7 weeks at $1,240 per week or $8,680 for contract performance salary and 2 weeks at the same rate, or $2,480, for his salary as part of the settlement expenses.

Having received the Government's allowance of $3,411.87, Mr. Crepeau on appeal to this Board requests the balance of his revised settlement proposal, or $12,679.55.

Discussion

RHC contends that its settlement proposal was prepared in conformance with the contract specifications and the Federal Acquisition Regulations (FAR) regarding settlements arising out of terminations for the convenience of the Government, while the CO's determination was not. RHC also alleges generally that the Government did not attempt to abide by the intent and spirit of the regulations, that is: to negotiate reasonably and avoid hair splitting.

The terminated contract involved here contained the standard Termination for Convenience of the Government (Fixed-Price Construction) clause (Alternate I, April 1984). This clause provided, in substance, that if the contractor and the CO fail to agree on the whole amount to be paid the contractor because of the termination of work, the CO shall pay the contractor the amounts determined as follows:

> (1) For the cost of contract work performed before the effective date of termination, including the cost of settling and paying terminated subcontracts and a sum as a profit on the cost of the contract work, as determined under 49.202 of the Federal Acquisition Regulation (FAR); and
>
> (2) For the reasonable costs of settlement of the work terminated, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data.

This clause also provided that the cost principles and procedures under Part 31 of FAR, in effect on the date of the contract, shall govern all costs claimed, agreed to, or determined under this clause.

Significant FAR provisions applicable here are 31.205.42, pertaining to Termination Costs under Contract Cost Principles and Procedures, and Subpart 49.2--Additional Principles for Fixed-Price Contracts Terminated for Convenience. Section 31.205.42(c) provides that, under

termination situations, initial costs, including starting load and preparatory costs are allowable, and that preparatory costs incurred in preparing to perform the terminated contract include such costs incurred for initial plant rearrangements and alterations, management and personnel organization and product planning. The *general* principles to be applied in determining the costs to be allowed a contractor where his fixed-price contract is terminated for convenience are delineated in 49.201 FAR as follows:

(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgement and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgement, as distinguished from strict accounting principles, is the heart of a settlement.

(b) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs and profit comprising this amount.

(c) Cost and accounting data may provide guides, but not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting related to settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

Other regulations relevant to this appeal include 31.205-32 FAR relating to precontract costs and 31.109 FAR pertaining to advance agreements. Read together, these two regulations provide: (1) That precontract costs, those incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award and necessary to comply with the proposed contract delivery (completion) date, are allowable to the extent they would have been allowable if incurred after the effective date of the contract; and (2) that to avoid possible subsequent disallowance or dispute, contracting officers and contractors should seek advance agreement on treatment of special or unusual costs; nevertheless, an advance agreement is not an absolute requirement and the absence of an advance agreement on any costs will not, in itself, affect the reasonableness or allowability of that cost.

For case authority dealing with the foregoing contract clause and FAR regulations, *see Superior Asphalt & Concrete Co.*, AGBCA 7542 (Nov. 16, 1977), 77-2 BCA par. 12,851; *Codex Corp.*, Court of Claims Order, No. 371-77 (Feb. 14, 1981), 226 Ct. Cl. 693, 23 G.C. par. 239; *Building Maintenance Specialists, Inc.*, DOT CAB 71-4 (June 28, 1971), 71-2 BCA par. 8954; *Kassler Electric Co.*, DOT CAB 1425 (May 21, 1984), 84-2 BCA par. 17,374, 26 G.C. par. 17,326; *Cellesco Industries, Inc.*, ASBCA 22,460 (Mar. 30, 1984), 84-2 BCA par. 17,295; and *General Electric Co.*, ASBCA 24,111 (Mar. 30, 1982), 82-1 BCA par. 15,725.

In his letter to RHC, dated February 14, 1985, the CO stated the Government's position to be: (1) That the intent of FAR 49.201 was "to allow for flexibility in negotiating a settlement of a termination for

convenience, not to relieve the terminated contractor from all obligations to verify his alleged costs"; (2) that it should be emphasized that FAR 49.201(c) requires the minimum amount of recordkeeping and accounting to be *compatible with the reasonable protection of the public interest*; and (3) that "the public interest is not protected or served by honoring unsubstantiated claims for payment."

The record here clearly shows that the CO made no reasonable attempt to negotiate a settlement amount with Mr. Crepeau. Instead, the CO remained aloof, directed his representatives to meet with appellant, and took no initiative to ascertain what documentary support appellant might have, but which had not yet been furnished. Also, nowhere in this record do we find any citation of authority for the Government position, taken in it July 19, 1985, settlement determination, that the contractor's costs were unallowable if incurred prior to the contract award. In fact, that position appears to be contrary to the provisions of FAR 31.205-32 discussed above. Finally, although we appreciate the CO's concern for the public interest, its application as a *generality* is inappropriate where the regulations *specifically* require flexible negotiation.

We observe that the evidence produced by RHC in this appeal consisted of appellant's exhibits 1-16A supplementing the Appeal File, the testimony of Mr. Crepeau at the hearing (Tr. 7-93), and appellant's hearing exhibits A-H. Appellant's hearing exhibit H is a detailed recapitulation of the activities of Mr. Crepeau from November 29, 1984, through April 15, 1985. This exhibit shows that he spent a minimum of 285 hours on the subject project, including the preparation and support of his settlement proposal. The other documentation and his testimony corroborate the claim of time spent, and the documentary evidence includes receipts and vouchers showing that out-of-pocket expense was incurred for such things as telephone communications, travel, lodging, rental of diving gear, preparation of a critical path chart, and negotiating and preparing subcontracts.

The Government's evidence, on the other hand, is conspicuous by its sparsity. Other than the Appeal File, it consisted of one hearing exhibit (GX-1) and one witness. The hearing exhibit was a copy of Mr. Crepeau's calendar appointment book, by which, under cross-examination, the Government unsuccessfully attempted to discredit Mr. Crepeau's testimony. The one Government witness was Mr. Matthew Rubmoltz, Chief of the Civil Engineering and Repayment Division in Shasta Dam. His relationship with the subject contract was that he was the representative of the designated Administrative CO. His testimony consisted of an explanation of the rationale for the termination, summarized above and his communications, or lack thereof, with Mr. Crepeau (Tr. 93-100). Although appellant's accounting system was unorthodox and incomplete in many respects,

the Government failed to contradict appellant's evidence of time spent and expenses incurred.

Appellant's evidence clearly preponderated over that adduced by the Government, and on the basis of the entire evidentiary record, and our analysis thereof, we make the following ultimate findings of fact.

Findings of Fact

1. In order to assure timely performance of the subject contract, appellant spent a minimum of 157 hours, prior to termination, in planning and organizing by preparing work schedule charts, lining up materials and subcontractors, and making site visits to determine working conditions.

2. The work performed and time spent by appellant on the subject contract before termination would likewise have been performed and spent by any conscientious and prudent contractor, under similar circumstances, and would have been necessary to perform the contract in the time allowed had there been no termination.

3. Because of the rigid requirements imposed by the CO for backup documentation and detailed proof of work hours and costs in support of appellant's settlement proposals, appellant after termination, was required to, and did, spend a minimum of 128 hours, and incurred costs, with respect to the preparation of, and furnishing documentary support for, his settlement proposals.

4. Contrary to the intent and purpose of the FAR regulations pertaining to terminations for the convenience of the Government, the CO and his representatives failed to negotiate and attempt settlement with appellant on a business judgment approach, but instead, attempted settlement by strict accounting procedure.

Although we conclude appellant's evidence adduced in this appeal is sufficient, on a business judgment basis, to support entitlement to substantially all he has claimed in his final settlement proposal, we find that his accounting system and cost records do not permit precise calculation of his actual costs. Therefore, we further conclude that a jury verdict approach is in order for our decision.

Decision

We hold that when a construction contractor undertakes a course of action to assure compliance with a contract completion period by engaging in planning and organizational activities in advance of the actual performance period, the settlement process, pursuant to a subsequent termination for the convenience of the Government, requires reimbursement of the reasonable costs incurred by such contractor for such advance planning and preparation, as well as reimbursement of the reasonable costs he incurred in preparing and supporting his settlement proposal. The contrary result would penalize the conscientious contractor and be out of harmony with the purpose

and intent of the contract clauses and regulations pertaining to terminations for the convenience of the Government.

Accordingly, based on the preceding findings and conclusions and on a jury verdict approach, it is our decision that appellant is entitled to recover from the Government the total sum of $11,000, plus interest as allowed by law from April 15, 1985, the date of the final settlement proposal.

DAVID DOANE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1988 O - 219-188 : QL 3

August 8, 1988

APPEAL OF QUALITY SEEDING, INC.

IBCA-2297 Decided: *August 8, 1988*

Contract No. 5-CS-5D-04180, Bureau of Reclamation.

Sustained.

1. Contracts: Disputes and Remedies: Appeals--Evidence: Admissibility

A document gathering, compiling and restating items in evidence as supplemented by items not in evidence and developed through the use of assumptions based on items not in evidence or on faulty interpretations of items in evidence was ordered struck from the Government's post hearing brief, because the record was closed and because the document presented additional matter which was not subject to cross-examination and rebuttal by the appellant.

2. Contracts: Disputes and Remedies: Damages: Generally--Contracts: Disputes and Remedies: Termination for Convenience

In a termination for convenience case, where the contractor proved its cost to complete the terminated portion of the work, the record provided all of the figures necessary to determine the proper amount of profit to be included in the quantum; when the Board considered the profit factors set out in FAR 49.202 as the contract required in a termination for convenience, it found that the amounts proved entitled the contractor to an amount of profit consistent with the quantum amount requested and granted the appeal in that amount.

APPEARANCES: Peter N. Ralston, Oles, Morrison, Rinker, Stanislaw & Ashbaugh, Seattle, Washington, for Appellant; Emmett M. Rice, Department Counsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal by the contractor from a final decision of the Contracting Officer (CO), dated January 6, 1987, following a partial termination for the convenience of the Government. Because the parties were unable to settle the claim, the Government, through the final decision, undertook to settle the dispute by determination. The decision resulted in a payment to appellant, Quality Seeding, Inc. (QSI), of $31,119.55 above payments already made during the performance period. QSI now contends that it is entitled to $70,345 above the determination amount, but has waived its right to any amount in excess of $50,000.

Background

The Bureau of Reclamation (BOR) was in charge of the development and construction of various water conveyance channels as part of a larger water project in Colorado known as the San Luis Valley Project (Tr. 152). As the channels were completed, there arose a need to reclaim the areas contiguous to the channel that had been disturbed

during construction. To that end, BOR contracted with QSI to accomplish that reclamation on 198 acres of land, that we now refer to as Reach B, contiguous to such a channel near Alamosa, Colorado. The contract called for QSI to seed, fertilize, mulch, and water the area during a period beginning May 1, 1985. As originally planned, QSI was to complete the seeding, fertilizing, and mulching portions of the work by June 15, 1985, and then under a separate pay item to continue irrigating the areas until the first killing frost after September 1, 1985, using a temporary irrigation system which it was to furnish, install, operate, and then remove (Appeal File (hereinafter referred to as "AF"), Tab 48).

As QSI prepared to mobilize, BOR contacted QSI to notify the latter of a deferral, to mid-May, of the start date for the work. As the middle of May approached, BOR notified QSI that the delay would be longer. The reason for the delays was that the contractor constructing the channel found it necessary to work beyond its expected completion date (albeit still within the performance period allowed by its contract) (Tr. 26-28).

At that time BOR suggested a modification to the contract which would have QSI doing similar work along a 62-½-acre area contiguous to another channel in the project, some 8 to 10 miles away from Reach B. QSI agreed to the suggestion, and Modification 1 to the contract added the work in an area we refer to herein as Reach A (Tr. 27-28, 30). Although the work, seeding, fertilizing, mulching, and irrigating, was similar for Reach A to that contemplated for Reach B, there were differences for the Reach A work which resulted in its being considerably more difficult on a proportional basis than the contemplated work on Reach B. These differences included different soil and grading conditions which required changes in the materials specifications and the methods for performing the work, proportionately greater numbers of physical obstacles in and adjacent to the Reach A channel interfering with operating efficiency, and other differences which required the modification of some contractor equipment and the mobilization of additional specialized equipment to be used only on Reach A (Tr. 29-32). Also, there were two construction contractors on Reach A at the same time QSI was there, and their presence obstructed and delayed QSI's work on a regular basis. QSI contends that it did not expect to have such problems with other contractors and that BOR had not notified it that they would be present (Tr. 34-36).

By the middle of June 1985, the Reach A non-irrigation work was close enough to completion that QSI was beginning to think about transferring its efforts to Reach B. It appeared, however, that the construction contractor still had work to complete there so that entry by QSI to perform its contract at that time was extremely problematic (Tr. 38-42). BOR's solution was to terminate for its convenience "all remaining work on Reach B" (AF, Tab 7).

There followed a lengthy period of efforts by the parties to settle the claim arising from the partial termination for convenience. Because the parties were unable to agree, the CO settled the claim by determination in a decision dated January 6, 1987. The decision, after taking prior payments of $180,580 into account, directed additional payment of $31,120 to QSI. (The contract amount for completed work was $297,893, including the Modification 1 (Reach A) work and an additional purchase order in the amount of $4,410 (AF, Tab 42, at 44; Tab 32, at 1; Tab 45). It is because QSI believes it is entitled to substantially more than the $31,120 found due by the CO that it has taken the current appeal.

Discussion

Much hearing time and briefing have been expended on a great number of issues that we find unnecessary to decide because of the peculiar circumstances of this case, namely that QSI has reduced its claimed entitlement to $50,000. [1] Our view of the case is that we may decide it by referring only to a profit analysis using as a basis certain cost figures conceded by both parties to be proper.

The CO directed that the total cost approach be used as QSI presented its settlement proposal (Tr. 49; AF 13; QSI Br. at 11). BOR in fact appears to contend that the "total cost approach would be the most equitable to both parties because of the lump sum items" (BOR Br. at 2). Normally the total cost approach is used only to determine the proper recovery for an extra or additional work or quantities where the circumstances make a delineation between the original work and the added work difficult or it is otherwise impractical or impossible to segregate the costs of the two components. *See J.D. Hedin Construction Co.* v. *United States*, 347 F.2d 235 (Ct. Cl. 1965); *Rondo Electric*, IBCA-2020 (June 29, 1987), 87-3 BCA par. 19,966, 24 IBCA 157; *Robert McMullan & Sons, Inc.*, ASBCA No. 19120 (Aug. 10, 1976), 76-2 BCA par. 12,072. In this instance, the total cost approach avoids the necessity of dividing costs between the Reach B and Reach A components. The allocation process is always difficult and the total cost approach avoids the need for allocation of particularly troublesome overlapping items, especially mobilization and demobilization costs. Insofar as the parties agree on applicability of the total cost approach, we use it as an aid in our decision of the case.

Accepting the allowable costs proposed by BOR for direct cost items and G&A expenses about which issue was joined but which we have declined to consider (see note 1 and the first paragraph of this Discussion section) and adding to that figure the amount of costs that QSI would have incurred if it had completed the project, we may reach

[1] We note that our determination of quantum using the total cost approach including the calculation of profit as a percentage based on the work accomplished precludes the necessity of detailed consideration of many specific cost items on which the parties differed. All the specific cost items are subsumed in our determination of quantum.

a sum that provides a total projected cost. By deducting that sum from the total contract price, QSI provides a basis for what it contemplated would be its "profit" (in the Government cost accounting sense). Using this information, we can reach a profit allowance to be added to the allowable costs and the settlement expenses and from that total deduct payments already made to reach the proper quantum in this case. There are six figures involved in this analysis; four of them are already known. The first is the total contract price, $297,893. The second is the amount already paid to QSI, $211,700. The third is the amount of allowable costs expended during the period "before" the partial termination, as determined by the CO, $173,825 (AF, Exhibit 45 at 15). (Some costs, being associated with QSI's effort on Reach A, were incurred *after* the date of partial termination but are properly allowed, the only performance costs cut off at the termination date being those associated with Reach B. Also, we have not forgotten that QSI claims costs in excess of that amount by $9,831 (*see* QSI's analysis of internal errors in BOR's analysis, at pages 25-26 of QSI's brief), but we have assumed that QSI would agree with the BOR figure as the minimum allowable costs for purposes of this exercise.) The fourth amount (which is not in dispute) is settlement costs in the amount $17,015 (AF, Exhibit 45, at 14). Therefore, to complete the numbers necessary to determine the quantum we need find but two amounts, the amount of the costs to complete the project as originally intended and the proper profit allowance.

The contract requires that the CO make an allowance for profit as part of the termination settlement. It also requires the use of FAR 49.202 as the background for the CO's determination of a fair and reasonable profit allowance (Contract, AF, Tab 48, at 19). Apparently, both parties expect that the guidelines presented in that regulation control the determination of allowable profit here (QSI Br. at 35; BOR Br. at 11), and, following the path of authority cited here, we agree. The regulation directs consideration of nine factors in determining the proper profit allowance, and one of those is the "rate of profit that the contractor would have earned had the contract been completed" (FAR 49.202(b)(7)). The need to consider that factor requires a determination of the expected costs to complete the project.

It is the contractor's burden to prove the expected cost to complete the contract. Here it attempted to do so by referring to an appeal file exhibit (Exh. B) which was part of its settlement proposal to BOR (AF, Tab 21, at 25-32; AF, Tab 42, at 35-39). QSI's general manager explained the nature of the exhibit generally and related the method he used in preparing it (Tr. 51-55). A principal portion of the document is Exhibit B-2 which presents a calculation of the actual production costs necessary to complete the work on Reach B. It breaks down the total work uncompleted into separate component activities necessary to be performed and calculates the costs for each. It further segregates the activities according to whether they are to be performed in the north end or the south end of Reach B, because the expected amount

of difficulty in performing the work on these separate sections of the Reach differed by reason of differences in terrain, frequency of obstacles encountered, the nature of the obstacles, and similar factors (AF, Tab 21, at 25-32; Tr. 53). Another important portion of the document is Exhibit B-3 which complements the actual productions costs analysis of Exhibit B-2 by presenting a calculation of variable supply and repair costs, overhead, and G&A costs contemplated by and associated with the production efforts the costs of which are presented in Exhibit B-2 (AF, Tab 42, at 40-42). (We relate the details of these exhibits in order to facilitate our analysis of BOR's position thereon.)

We believe that QSI's presentation establishes a prima facie showing that its expected cost to complete is $29,642 (AF 42, at 42). That shifted the burden of overcoming that showing to BOR. BOR did not present any case of its own as to the cost to complete, but it need not do so to prevail. It may prevail by showing any factual and logical invalidities there are in QSI's case using any evidence in the record and any argument and legal authority available to it. Essentially, BOR presents three points in an attempt to undermine the validity of QSI's presentation of the projected cost to complete. The first is that QSI's presentation is "based on the contractor's bidding procedure and not actual cost" (BOR Br. at 13). QSI responds that insofar as the work for which the projection was presented was not completed, there are no actual costs and that only an estimate using its normal bidding procedures as a reasonable basis therefor may be given (QSI Rep. Br. at 21-22). We agree with QSI. When the circumstances make actual costs unavailable, estimated costs must serve as a basis for a projection. To the extent that an estimate is reasonable, it will be accepted for the purpose of establishing a cost to complete in a termination for convenience case. Here, QSI's detailed "estimate" is considered to be reasonable. Moreover, as QSI notes (QSI Rep. Br. at 21), there are at least 11 factors in the projection which are patently not estimates, including the length and acreage of the contract area, the varying nature of the terrain in the area, various capacities of the equipment including size, speed, production quantity capabilities, and fuel usage, the distance to materials source, contractual time requirements, and labor rates. We also note that the "estimates" contained in QSI's Exhibit B-2 (AF, Tab 21, at 25-32) are not only very detailed but also consistently make apparently reasonable allowances for inefficiencies, *i.e.*, "20% loss for moves," "30% loss for calibration and moves," "time required to bypass obstacles," etc. Finally, BOR has not attacked any of these projections of inefficiency, or any of the individual components of the QSI projection; its only criticism is that actual costs were not used in favor of an "estimate * * * based on the contractor's bidding procedures." We find in this position no reason for rejecting QSI's projected costs.

The second point BOR raises in attempting to undermine QSI's projection is that a "thorough review [of Exh. B-2] shows that the contractor included only costs for labor; materials; and fuel, oil, and gas [sic]" and that the QSI "estimate did not include any costs for equipment, either rented or company owned, nor did QSI include any costs for supplies and repairs which always occur" (BOR Br. at 13).

QSI responds that it always represented its Exhibit B-2 as reflecting nothing more than costs for labor, materials, and equipment fuel. Its "estimate" of cost to complete, however, consisted of figures drawn not only from Exhibit B-2. On its Exhibit B-3 (AF, Tab 42, at 40-42), QSI takes the Exhibit B-2 figures and adds to them amounts for supplies and repairs, project overhead, and G&A. Of BOR's complaints regarding the inadequacies of QSI's approach, only equipment costs remain. Citing AF 42 at 29, QSI states that it did not include any additional costs for equipment for the terminated portion of the work as all of the equipment was rented or available for the work and the costs already incurred. As QSI points out, BOR has not shown that QSI needed additional equipment beyond that already available nor that the equipment actually available, the costs of which have already been accounted for, was inadequate to do the Reach B work if it were required (QSI Rep. Br. at 23-25). We find in BOR's position no reason for rejecting QSI's projection.

The third point BOR raises is that QSI's estimate of the cost to complete Reach A was put at $37,663 while its consultant at the hearing put the figure at $65,000, thus raising a question over the accuracy of the Reach B cost-to-complete projection (BOR Br. at 13). QSI replies by pointing out that BOR is mistaken as to the record evidence. QSI contends that BOR has taken the $37,663 from the former's Exhibit B-2, which seems apparent (AF, Tab 21, at 32). The problem with using that figure taken from Exhibit B-2 is that it represents only the material, labor, and fuel costs (as has already been determined) while the consultant-witness's $65,000 figure was an estimate for *all* of the costs to do the work on Reach A absent the prorated allocation of home office overhead. Given a figure of $37,663 of direct costs, a total of $65,000 for such costs, plus allocated equipment costs, mobilization, and demobilization costs, and other one-time costs seems not unreasonable, and BOR has presented no sound reason to question that estimate. We find in this position no reason for rejecting QSI's cost to complete.

[1] BOR asks that we consider Attachment B to its brief as the "most viable method" for projecting the cost to complete to the exclusion of QSI's method which should be discarded based on BOR's challenges thereto just discussed (BOR Br. at 13). We have determined that BOR's challenges do not provide any reason to reject QSI's cost-to-complete program. Moreover, QSI has moved that Attachment B be stricken. It points out that BOR contends that Attachment B presents the "most viable method," because it is based on actual allowable costs incurred "with some judgement of how to apply those costs to Reach B" (QSI

Rep. Br. at 26, quoting from BOR Br. at 13). It is the "judgments" used to apply those costs to which QSI objects because they amount "to an attempt to insert new evidence and material into this proceeding which was not testified to at the hearing and which is not supported by any documents contained in the Appeal File or which are evidence before this Board" (QSI Br. at 26). To measure the accuracy of QSI's description of Attachment B in order to respond to the motion to strike, it was necessary to review Attachment B.

We note that Attachment B makes use of a number of information items that are indeed in evidence. It also, however, makes use of a number of assumptions of questionable reliability. We agree with QSI's criticisms regarding the validity of a number of these assumptions. For instance, BOR in reaching a per-acre cost for Reach B as compared to the same cost for Reach A used a purportedly reasonable assumed factor of 2.5, being the factor by which Reach A cost per acre exceeded Reach B cost per acre (BOR Br. at 14). The assumption was based on two pieces of testimony, one by QSI espousing a 3:1 ratio of costs and one by BOR (using two witnesses) espousing a 2:1 ratio of costs. The problem with the assumption is that the BOR witnesses never testified to costs but to "effort" (Tr. 162, 176) and "difficulty" (Tr. 170, 176) and for that matter these witnesses' testimony was based only on their observations of the physical differences between the two sites and did not take into account the fact that, according to the specifications, the work to be performed on Reach A was to be different in some respects from the Reach B work (Tr. 170). It seems that this assumption affecting the figures in Attachment B is not reasonably based. In another instance, BOR attempts to prove the reasonableness of Attachment B's labor costs for the terminated work, which it derived using the 2.5 factor, by comparing the per acre labor costs of a follow-on contract let to another contractor the following year. In making this comparison BOR cites its hearing Exhibit A. There was no testimony adduced as to that exhibit's content, however, and QSI had no opportunity for meaningful cross-examination or rebuttal. On that basis (and others), QSI wants the Board to ignore the exhibit. This is a sufficient basis for us to do so.

Also there was considerable testimony to the effect that there were significant differences between the follow-on contract and the terminated work (Tr. 59-69, 144-48, 199-200). That suggests that there is not a reasonable basis for comparing the costs of the follow-on project with the costs of the terminated work, and BOR has dealt with that suggestion only by acknowledging that "there was some testimony related to the difference between what QSI planned and what [the follow-on contractor] actually did" (BOR Br. at 15). BOR has not acknowledged many of the differences and has insufficiently treated the differences it does acknowledge for its Exhibit A to serve as proof of the reasonableness of its per acre costs conclusions in its

Attachment B; nor does Exhibit A itself explain how its information is useful in light of the differences between the two contracts.

We now return to consideration of appellant's motion to strike Attachment B to BOR's posthearing brief. As is reflected in the above discussion, Attachment B is predicated in part upon assumptions for which there is no supporting evidence. On a number of occasions the various boards of contract appeals have been confronted with the question of what effect, if any, should be given to evidence proffered for the first time with a post-hearing brief. See, for example, *K Square Corp.*, IBCA-959-3-72 (July 19, 1973), 73-2 BCA par. 10,146, and cases cited including, *Araco Co.*, VACAB No. 532 (June 27, 1967), 67-2 BCA par. 6439 from which the following is quoted:

> This board has never regarded statements of counsel made in their posthearing briefs as evidence of facts in issue, and where counsel has attempted to present additional evidence in such manner, it has consistently been disregarded. Similarly, we do not accept counsel's personal allegations of fact except to the extent we find they derive from or are supported by the evidence of record * * *.

In this case we have found that some of the assumptions upon which Attachment B is based are assumptions for which there is no evidence of record and concerning which appellant's counsel was afforded no opportunity to cross-examine. For these reasons and upon the basis of the authorities cited, appellant's motion is granted and BOR's Attachment B is hereby stricken from the record.

BOR's challenge to QSI's cost-to-complete estimate uses assumptions and other evidence not of record, which makes its principal vehicle for attempting to establish the doubtful validity of the QSI estimate susceptible to a motion to strike. As noted, QSI presented a prima facie case of its projected cost to complete, and BOR has thus failed to counter it, so we find that the cost to complete the terminated portion of the contract is $29,642 (AF, Exhibit 42, at 41).

[2] Having determined the cost to complete, we have determined the last numerical item necessary to utilize the FAR guidance for profit the contractor would have earned had the contract been completed. Thus, we now turn to the nine factors in the FAR provision, using the parties' discussions on the factors in our deliberations.

Two of the factors have no application to this case. The factor at FAR 49.202(b)(8) reads, "The rate of profit both parties contemplated at the time the contract was negotiated." The contract here was not negotiated but awarded after competitive bidding, so there would be no occasion for both of the parties to have a rate of profit in contemplation. The factor at FAR 49.202(b)(9) reads, "Character and difficulty of subcontracting," etc. There were no subcontracts on this contract, so this factor is also irrelevant.

We discuss the remaining seven factors, in the order of their appearance in the FAR provision, as follows:

> "(1) Extent and difficulty of the work done by the contractor as compared with the total work required by the contract * * *" (FAR 49.202(b)(1)).

BOR's analysis of the case as related to this factor is as follows:

(1) Extent and difficulty of work.--The contract did not require difficult work in either Reach A or Reach B. The work consisted of preparing the area by plowing, planting seed using a Government-owned seeder, applying mulch for protection, applying fertilizer, and watering the area during the growing season. The task was not difficult on either Reach A or Reach B.

(BOR Br. at 11).

We note first that BOR does not cite any record evidence to support its conclusions on the difficulty of the work, nor are we able to find any. While thus apparently attempting to introduce evidence in its brief, BOR appears to have failed to grasp the significance of the FAR factor. The difficulty and extent of work spoken of in the FAR provision are to be used in a comparison--the difficulty and quantity of work done compared with the difficulty and quantity of work that would be done if the contract were completed.

QSI on the other hand approaches the question as the FAR factor seems to contemplate. The record is clear enough that the principal amount of the effort for this contract consisted of the set-up. Once the materials delivery program was established, the planning of the work accomplished, the specialized engineering of the equipment and its mobilization completed, and the labor scheduled, the more difficult part of the entire project was over. The production efforts might take a longer time to accomplish, but they were nevertheless less difficult. In this case, as QSI points out (QSI Br. at 36-37), all of the pre-production efforts had already taken place, and, for that matter some of the production efforts were virtually complete. Also, the work on Reach A was complete and, according to all accounts as discussed above, it was significantly more difficult than the Reach B unfinished work (albeit on a smaller acreage). Thus, it is reasonably clear that the work remaining, being only production efforts on Reach B, was relatively less difficult compared to the total of the pre-production efforts plus Reach A production efforts. The implication of the FAR provision is that as the extent and difficulty of the completed work becomes greater as compared to the terminated work then the profit determined should also be greater. As the contractor comes closer to finishing the work and the difficult parts of it, its profit should come correspondingly close to the full profit contemplated.

"(2) Engineering work, production scheduling, planning, technical study and supervision, and other necessary services" (FAR 49.202(b)(2)).

Regarding this factor, QSI points out that it had completed all engineering work to design and develop the specialized equipment to be used, had scheduled its work, and arranged for the labor and equipment to do the job and had completed the technical study on the seeding and irrigation portions of the project, thus addressing all of the technical elements mentioned in FAR profit factor 2, except technical supervision, which apparently refers to the production stage which was not reached because of the termination. (QSI Br. at 37; Tr. 16, 28-9; AF,

Tab 3, at 7-10; AF, Tab 4; AF, Tab 5; AF, Tab 6, at 2, 4, 12). The BOR reply is as follows: "(2) Engineering work, scheduling, planning, etc.–The contract specified the planting dates and the length of time for watering. The contractor was responsible only for acquiring materials and equipment and completing the work. Complex scheduling, planning, and supervision were minimal" (BOR Br. at 11).

We agree with QSI's response that the BOR position is unsupported by any evidence cited or presented and that it is contrary to the evidence that was presented, as detailed above (QSI Rep. Br. at 17-18);

"(3) Efficiency of the contractor with particular regard to–(i) Attainment of quantity and quality production; (ii) Reduction of costs; (iii) Economic use of materials, facilities and manpower; and (iv) Disposition of termination inventory" (FAR 49.202(b)(3)).

QSI, in analyzing the facts pertinent to this factor, emphasizes the completion of mobilization and construction of specialized equipment, the successful, completed results on Reach A, and its "unique and imaginative approach to the irrigation portions of the contract" as manifested in a substantially lower price for the irrigation portions of the contract than that of any of the other bidders (AF, Tab 2). The BOR reply is as follows: "(3) Efficiency of contractor.–The contractor efficiency is considered to be average for the work involved and there is no dispute that work would have been completed within the times required by the contract" (BOR Br. at 11).

Again, QSI responds that the BOR statement is an attempt to present evidence in its brief, and we agree. There is sufficient evidence in the record about QSI's efficiency, in particular with regard to its plans for irrigation (Tr. 19-20, 194-200), for us to conclude that QSI's relative efficiency, if anything, would have a positive effect on its expected profit.

"(4) Amount and source of capital and extent of risk assumed" (FAR 49.202(b)(4)).

QSI's position on this factor emphasizes the highly leveraged nature of the project from its point of view–that it financed the project largely through borrowed capital–and also emphasizes that the high materials and equipment costs on the project meant that its out-of-pocket cost and risk were substantial. QSI thus interprets the factor's use of "risk" to have reference to the degree of financial burden. BOR, on the other hand, while acknowledging the importance of financial costs to the factor, interprets "risk" differently, stating:

> The contractor apparently relied heavily on borrowed capital as evidenced by the $9,456 in interest. However, the contractor's risk was limited because the contractor was not required to warrant his work (TR 73, ln 25 to TR 74, ln 6), (*i.e.*, he did not have to guarantee that planted seed would grow).

(BOR Br. at 11). (The $9,456 interest figure is claimed but is subsumed under one of the issues we declined to decide. *See* note 1.)

QSI's responds that the hearing evidence BOR cites as proof that QSI was not required to warrant its work in fact establishes only that QSI

was not responsible for germination of the seed. The contract makes it liable for rework or reduction in price if the work performed did not conform to the specifications and other requirements of the contract (AF, Tab 48, at 11-12). QSI also notes that the CO believed that the risk factor was fairly substantial (AF 45 at 13) (QSI Rep. Br. at 18-19).

In light of the evidence and argument just reviewed, we agree with BOR that QSI relied heavily on borrowed capital, but, to the extent that "risk" has the meaning BOR appears to believe it does, we conclude that QSI did not assume appreciably less risk than any contractor in a contract where the design and specifications are the Government's and the contractor's performance is measured only against that design and those specifications and not against an expectation of the result of performance.

"(5) Inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance" (FAR 49.202(b)(5)).

QSI emphasizes the inventiveness it displayed, in particular with regard to the irrigation program, as it analyzes the evidence on this factor, and it points out the future availability to the Government of its "inventions," as proved by the fact that the follow-on contractor used a variation of QSI's irrigation program (QSI Br. at 38; Tr. 26). BOR's statement on this factor is as follows:

> (5) Inventive contributions and cooperation with Government.–QSI brought a boat to the contract area to use in the watering operation. The boat was essentially a small version of boats used to fight fires in harbor areas; however, the boat was not used under the contract, and its effectiveness and efficiency is unproven. The portable pumping units were little more than pumps and nozzles mounted on a trailer. These units were merely larger versions of traveling sprinklers used to water lawns. QSI's cooperation with Government was average.

(BOR Br. at 12).

We note first those portions of the BOR analysis that are demonstrable: that QSI brought the irrigation barge to the project and that it was not used on the project. The rest of the statement references no record evidence and appears to be totally unsupported by the record. As QSI points out, the effectiveness and efficiency of the barge were tested in the follow-on contract, the disparaging characterizations of the QSI equipment do not undermine QSI's inventiveness in developing them, and the existence of that inventiveness is supported by the fact that QSI expended over $3,500 (an expense allowed by the Government auditor) for the assistance of a consultant in the design and development of its irrigation plan (QSI Rep. Br. at 19; Tr. 24-26, 194-200; App. Hrg. Exh. E; AF, Tab 45, at 8). We discussed the virtues and benefits of QSI's irrigation plan in connection with our analysis of factor 3 above, and BOR has presented nothing to dissuade us from concluding that QSI's irrigation plan was characterized by more than pedestrian inventiveness.

"(6) Character of the business, including the source and nature of materials and the complexity of manufacturing techniques" (FAR 49.202(b)(6)).

QSI notes that it is "a seasonal and specialty contractor," meaning that it must cover year-round specialized equipment costs, overhead expenses, and profit during an abbreviated working period usually consisting of the spring and fall. This means that its "profits" on the projects it is able to do must be higher on a proportional basis than those of a year-round contractor or a manufacturer in order to cover the burden expenses that continue year round despite the lack of contracts for most of the year to which they might otherwise be charged. To support its position on this, QSI references testimony that indicated that its profit rate on other contracts in the year in question was 29 percent of allowable costs (QSI Br. at 38-39; Tr. 14-15, 123-25, 132). BOR's response is as follows:

> (6) Character of business.–The character of the contract was seasonal as are other contracts in San Luis Valley, Colorado, because of the winters at the construction site (Tr 163, ln 12). QSI's witness testified that QSI worked in the spring and fall; however, in 1985, QSI also worked during the summer because of the irrigation involved in the contract.

BOR has not addressed the specialty and seasonal characterizations of QSI's business as they relate to profit and has thus provided no basis to reject QSI's reasoning and proof on this matter.

"(7) The rate of profit that the contractor would have earned had the contract been completed" (FAR 49.202(b)(7)).

We have already discussed the issue which forms the essence of the dispute under this factor, and found the cost-to-complete amount to be $29,642. Using the BOR figure of $173,825 for allowed costs to the point of termination, we calculate the total projected cost of the contract by adding the pre-termination allowed costs ($173,825) to the cost-to-complete figure ($29,642) and arrive at $203,467 for total costs. Deducting that amount from the total contract price, which is conceded to be $297,893, we find that the profit QSI would have earned if it had completed the work would have been $94,426 ($297,893 less $203,467). There remains the question of how much profit should be allowed for this termination, and we undertake to answer that question using the FAR profit factors as a matrix.

Regarding the FAR provisions they are meant to be guidelines only and not rigid rules. They provide, for instance, that in negotiating or determining profit, the CO "may use any reasonable method to arrive at a fair profit" (FAR 49.202(a)), Also, there are no explicit directions on how to use the information developed in addressing the individual factors. Despite the lack of clear directions on how to use that information, we make certain inferences from the language used and the circumstances to conclude that the aim of the guidelines is to reward the contractor by allowing profit in a convenience termination in an amount that is reasonably commensurate with the contractor's expectations based on the amount of work done or an amount

otherwise appropriate because of certain economic realities or some excellence or other positive conduct or characteristic of the contractor. We see then that factors (1) (extent and difficulty of work done before termination compared to the total contract work), (2) (engineering work, production scheduling, planning, technical study, etc.), and (7) (rate of profit to be earned for full contract performance) all relate to actual work accomplished. It follows that the closer the contractor is to full performance at the time of termination the greater should be its share of the full profit contemplated.

Factors (3) (efficiency of the contractor), (4) (amount and source of capital and extent of risk assumed), (5) (inventive and developmental contributions, etc.), and (6) (character of the business) all pertain to economic realities. These suggest how a particular contractor may program its profit expectation. Thus an efficient or inventive contractor (factors 3 and 5) may have a proportionately higher expectation of profit than one less efficient or inventive while still submitting a competitive bid. Similarly, a contractor who borrows heavily to finance the project (factor 4) may be expected to have a proportionately greater amount of profit (in the Government procurement accounting sense) in mind than one that need not borrow heavily. One that assumes a relatively great risk will likely have a greater profit contemplated to compensate for contingencies or to assure a healthy economic picture over several contracts when bearing high risk on all those contracts may result in a loss on one or more. When the character of the business (factor 6) mandates that a contractor cover a full year's burden expenses during a part year operation period, it is reasonable to expect that its profit as a percentage of allowable costs will be greater than for a contractor who can charge allowable burden costs for a greater part of the year.

All of the factors can be related to a contractor's excellence but particularly (2) (engineering and other pre-production work) (3) (efficiency), and (5) (inventiveness). The underlying presumption is that the excellence and competence of the contractor, which promises a good result for the Government, should be rewarded even when the work is not completed as a result of the termination for convenience.

The record makes clear, as discussed above, that the great bulk of the work, whether pre-performance planning and scheduling, mobilization, or Reach A performance, had already been done. Consistent with the total cost approach, we measure the proper profit to be allowed by comparing the pre-termination allowed costs to the total costs of the entire project. The percentage of the total cost of $203,467 represented by the assumed pre-termination allowed costs of $173,825 is approximately 85.4 percent. If we take 85.4 percent of the $94,426 profit contemplated for the whole project, we arrive at $80,640.

Conclusion

We now calculate the quantum to include the presumed costs of $173,825, profit of $80,640, and agreed settlement costs of $17,015 for a total of $271,480. Because this amount exceeds the $211,700 QSI has already received by more than $50,000, and QSI has waived its right to any greater amount, we sustain the appeal in the amount of $50,000 plus interest calculated in accordance with the provisions of the Contract Disputes Act of 1978 from February 13, 1987 (AF, Exhibit 46, at 2).

WILLIAM F. MCGRAW
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

RUSSELL C. LYNCH
Chief Administrative Judge

ESTATE OF AARON FRANCIS WALTER

16 IBIA 192 Decided: *August 17, 1988*

Appeal from an order after reopening issued by Administrative Law Judge Keith L. Burrowes in Indian Probate No. IP BI 26A 83-1.

Affirmed; recommended decision adopted.

1. Indian Probate: Inventory: Property Erroneously Excluded or Included

In order to be successful in a legal challenge to the inventory of a deceased Indian's trust or restricted estate prepared by the Bureau of Indian Affairs, it is necessary to establish by a preponderance of the evidence that Bureau employees either did something they should not have done, or did not do something they should have done, and that such error or omission was responsible for the transaction not being completed during the life of the decedent.

APPEARANCES: Ross W. Cannon, Esq., Helena, Montana, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF INDIAN APPEALS

On March 21, 1988, the Board of Indian Appeals (Board) received a notice of appeal and brief on appeal from the Estate of John Walter (appellant).[1] Appellant seeks review of a February 18, 1988, order

[1] John Walter originally brought this suit, but died before it was concluded. His estate was substituted as appellant. The term "appellant" is used to apply both to John Walter personally and to his estate.

after reopening issued by Administrative Law Judge Keith L. Burrowes in the estate of Aaron Francis Walter (decedent).[2] For the reasons discussed below, the Board affirms that order, and adopts Judge Burrowes' recommended decision.

Background

Decedent, Allottee 3410 of the Blackfeet Indian Reservation, Montana, was born on September 12, 1912, and died intestate on June 8, 1982. Judge Burrowes held a hearing to probate decedent's trust and/or restricted estate on May 26, 1983. The evidence adduced at the hearing showed that decedent's heirs included 4 brothers and sisters and 19 nieces and nephews.

Appellant, who was one of decedent's brothers, filed a claim against the estate for $11,000. Appellant alleged he had paid that amount to decedent in exchange for a gift deed to part of decedent's trust estate, namely, Lots 1 and 2, W½ NE¼, E½ NW¼, N½ N½ NE¼ SW¼, E½ NE¼, of sec. 7, T. 36 N., R. 11 W., principal meridian, Montana, containing 315.5 acres, more or less. Appellant's attorney made an offer of proof to the effect that decedent had agreed to sell the property to appellant; a purchase price of $11,000 had been agreed upon; the money was paid to decedent; decedent filed a gift deed application with the Superintendent, Blackfeet Agency, Bureau of Indian Affairs (Superintendent; BIA); decedent's brother,Thomas, visited the agency and inquired about the adequacy of the purchase price for the property;[3] BIA interpreted this inquiry as a question concerning decedent's competence; BIA began an investigation of decedent's competence; the investigation was not completed when decedent died; the property was never conveyed to appellant, but was included in decedent's estate at the time of his death.

At the close of the hearing, Judge Burrowes granted a continuance of the proceeding in order to allow the family members an opportunity to discuss the situation and perhaps reach an agreement in regard to the disposition of the disputed tract. No settlement was reached. During the time the proceeding was continued, however, appellant obtained additional information from BIA concerning the processing of decedent's gift deed application. This information was included in the probate record.

Judge Burrowes issued an order in decedent's estate on January 14, 1985. He found the evidence showed decedent and appellant agreed upon a purchase price of $11,000 for the property; on May 21, 1981, this amount was paid by appellant to decedent and was deposited into decedent's account in the First National Bank of Browning; and also on May 21, 1981, an application for a gift deed was filed with the

[2] Decedent was apparently also known as Bill Walter.

[3] The record indicates that $11,000 was considerably below the estimated value of the property which BIA provided to Judge Burrowes for probate purposes.

Superintendent. The Judge further found decedent was residing in a nursing home when the transaction was discussed, and left the nursing home to prepare the gift deed application and present it to BIA. Decedent then returned to the nursing home, where he remained for only a few days before moving to the home of his brother, Thomas. He remained with Thomas until returning to the nursing home shortly before his death.

In his order, Judge Burrowes held he did not have authority to review BIA's inventory of a deceased Indian's trust or restricted estate. He granted appellant's claim against decedent's estate for $11,000, the amount paid to decedent for the property. The disputed property remained in decedent's estate, and was distributed to his heirs, including appellant.[4]

On March 11, 1985, appellant filed a petition for rehearing, alleging that the gift deed should have been retroactively approved in accordance with the Board's decision in *Wishkeno* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982), because BIA had negligently failed to process the application. Appellant noted decedent lived for over a year after the gift deed application was filed.

By order dated May 30, 1985, Judge Burrowes denied appellant's motion, stating that this same argument was raised and decided against appellant in the original proceeding. Appellant did not appeal this order to the Board, but on July 3, 1985, filed a motion to reconsider with Judge Burrowes. This motion was based upon the Board's decision in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169, 92 I.D. 247, decided on May 31, 1985.[5] *Ducheneaux* held that Departmental regulations in 25 CFR Part 2 and 43 CFR Part 4, Subpart D, were adequate to give Administrative Law Judges hearing Indian probate cases the authority during the probate proceeding to take evidence concerning alleged erroneous inclusions or omissions of property from BIA's inventory of a deceased Indian's trust or restricted estate and to issue a recommended decision concerning the property that should be included in the decedent's estate.

By order dated August 9, 1985, Judge Burrowes reopened decedent's estate. An additional hearing was held on August 28, 1985. Evidence was taken at that hearing concerning BIA's usual practice in reviewing gift deed applications and the particular circumstances surrounding the gift deed at issue here. Conflicting evidence was also presented concerning decedent's competency during the last years of his life.

On February 18, 1988, Judge Burrowes issued an order reaffirming his original order and holding there was insufficient evidence to allow

[4] Appellant received an undivided 1/8 interest in all of decedent's trust or restricted property, including the tract at issue here.

[5] *Ducheneaux* was appealed to Federal court on another issue. The Board's standing order, considered in the present case, was not addressed on appeal. *See Ducheneaux* v. *Secretary of the Interior*, 645 F. Supp. 930 (D.S.D. 1986) (rev'g the Board on other grounds); *rev'd*, No. 87-5024 (8th Cir. Jan. 26, 1988); *cert. denied*, ____ U.S. ____, 56 U.S.L.W. 3848 (June 13, 1988).

him to recommend that the property at issue be removed from decedent's estate and transferred to appellant.

Discussion and Conclusions

The proceeding allowed under the Board's standing order in *Ducheneaux* provides an opportunity for a Departmental judicial officer to consider a legal challenge to the inventory of a deceased Indian's trust or restricted estate at an early point in the proceedings.[6] This inventory is prepared by BIA and provided to the Administrative Law Judge for use in the probate proceeding. The procedure contemplated in *Ducheneaux* is, admittedly, a hybrid, allowing consideration of a BIA administrative action within the context of a probate case. Consideration of BIA administrative actions would normally follow the procedures set out in 25 CFR Part 2 and 43 CFR 4.330-4.340. Consequently, *Ducheneaux* requires the Administrative Law Judge to inform the BIA officials who would normally be involved in a proceeding under 25 CFR Part 2, of the challenge to the inventory. In cases raising a *Ducheneaux* challenge, the Judge's final order in the estate will include a recommended decision on whether or not the inventory should be altered. That recommended decision is final unless appealed to the Board.[7]

[1] Judge Burrowes here properly determined that the challenge presented to him fell within the standing order in *Ducheneaux*, and allowed full presentation of evidence concerning the transaction at issue. He stated his understanding of what Ducheneaux required at page 2 of his February 18, 1988, order:

> In order to be successful in a challenge to an inventory it is necessary to establish that agency employees either did something they should not have done or did not do something that they should have done, and that such error or omission was responsible for the property not being taken care of during the life of the supposed grantor.

The Board agrees with this statement of the required proof, but with the modification that such error or omission was responsible for the

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[6] Provisions for administrative corrections to the inventory are found in 25 CFR 150.7 and 43 CFR 4.272-4.273. Administrative corrections most frequently result from errors in the description of property or errors or backlogs in recordkeeping, such as the failure to note that a decedent owned trust or restricted property under the jurisdiction of a second or third agency or to record transactions occurring during the decedent's lifetime.

In distinction, legal challenges to the inventory result from an allegation that BIA either took or failed to take some action with respect to trust or restricted property that either resulted in property being in the decedent's estate that should have been transferred to another person, or in property not being in the decedent's estate that should have been transferred to the estate.

[7] As discussed in detail in *Ducheneaux*, in the absence of the Board's standing referral order, cases raising legal challenges to the estate inventory would proceed as follows: The challenge would be raised to the Administrative Law Judge during the probate proceeding. Because the Judge would not have authority to consider the challenge at that point, the issue would remain unaddressed, both in the evidence taken at the hearing and in the Judge's order. Any petition for rehearing on the inventory question would have to be denied. On appeal to the Board, it is almost certain that factual issues would need to be addressed. Therefore, the Board would have to refer the matter to an Administrative Law Judge for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a). Following an additional hearing and order, it is still conceivable that the matter would have to be referred to the Assistant Secretary–Indian Affairs under 43 CFR 4.337(b), if the discretionary approval of a deed remained at issue. *See Estate of Arthur Wishkeno*, 8 IBIA 147 (1980). This cumbersome procedure is not conducive to the efficient and effective use of judicial time, is excessively burdensome to parties and witnesses, and ensures that probate will not be concluded for several years.

transaction not being completed during the life of the decedent. The decedent may have been either the grantee or the grantor in the transaction. The Board adds that the proper standard of proof in these cases is a preponderance of the evidence.

Here, Judge Burrowes found BIA records indicated a question of decedent's competency arose a few days after the gift deed application was filed, and a competency evaluation was requested. That evaluation was not completed. He further found there was a backlog of gift deed applications on file at the agency and no evidence was presented indicating there was anything unusual about the length of time for processing decedent's application, or that decedent's application was treated differently from other similar applications. Accordingly, he concluded there was insufficient evidence for him to recommend that the property at issue be transferred from decedent's estate to appellant. In terms of the required proof, Judge Burrowes held appellant had not shown by a preponderance of the evidence that BIA officials failed to take actions they should have taken in order for the transaction to have been completed during decedent's lifetime.[8]

Based on its review of the record, the Board agrees with Judge Burrowes' conclusion and hereby adopts his recommended decision.[9]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 18, 1988, order of Judge Burrowes is affirmed, and his recommended decision adopted.

KATHRYN A. LYNN
Chief Administrative Judge

I CONCUR:

ANITA VOGT
Administrative Judge

ROBERT LIMBERT, OTIS SCHOOLCRAFT

104 IBLA 154 Decided: *September 6, 1988*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, rejecting an application to open lands to mineral entry pursuant to the Act of April 23, 1932, 43 U.S.C. § 154 (1982). I-20938.

Affirmed.

[8] This holding does not condone the length of time this application was pending. It does recognize that BIA agencies have a large workload, are frequently short-staffed, and backlogs occur. Without a showing that this delay was significantly longer than those occurring with other similar cases, the Board cannot say the transaction should have been completed earlier.

[9] Assuming *arguendo* that BIA should have completed the processing of decedent's gift deed application sooner, such a conclusion would not result in the Board's approving the deed retroactively, as appellant argues. If this conclusion had been reached, the Board would be required under 43 CFR 4.337(b) to refer this matter to BIA for the exercise of its discretion in determining whether or not the deed should be approved retroactively. *See Estate of Arthur Wishkeno, supra; Wishkeno* v. *Deputy Assistant Secretary, supra.*

September 6, 1988

1. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

2. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable for minerals. It is neither necessary nor desirable to require a determination whether the lands are known to contain valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

3. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

APPEARANCES: Robert Limbert, *pro se,* and on behalf of Otis Schoolcraft, partner.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Robert Limbert and Otis Schoolcraft have appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated July 30, 1986, rejecting their application to open lot 8, sec. 4, T. 4 N., R. 7 E., Boise Meridian, Idaho, to mineral entry. These lands are a part of the Payette Boise Reclamation Project, and subject to a first-form withdrawal dated October 7, 1904.

The application was originally filed on June 22, 1984, under the Act of April 23, 1932, 43 U.S.C. § 154 (1982). In 1984 the Bureau of Reclamation (BOR) submitted a memorandum to BLM recommending that the lands not be opened to entry, and BLM rejected the application pursuant to 43 CFR 3816.3. On appeal of that decision, we reviewed the applicants' proposed plan of operations and the BOR recommendations. The BLM decision was set aside and the case was remanded to BLM for a determination of whether the land was valuable for minerals and for further consideration of the applicants' proposal by BOR. *Robert Limbert*, 85 IBLA 131, 133 (1985).

In the *Limbert* opinion, the Board noted there was no indication whether the lands were considered to contain valuable minerals and directed BLM to examine this question during its further consideration. As a means of making this determination, on October 8, 1985, several BLM and Forest Service geologists conducted a field examination.

During the examination four mineral samples were taken on the site. All four samples were processed and concentrated with the "Denver Gold Saver" and were assayed for free gold by amalgamation. In the mineral report of the field examination, the examiners concluded that the tract could not support a mining operation. The report specifically stated:

> [A] mining operation would lose $3.49 per cubic yard or a total of $29,665, if the entire deposit were mined from Bench #2. Both an analysis of the early mining activity and our sampling program indicate that there is a low probability that a profitable operation can be sustained on Lot 8.

(Mineral Report at 7).

BLM transmitted the mineral report to BOR for its further consideration and recommendations. By memorandum dated July 10, 1986, BOR responded, recommending that the first-form withdrawal be retained on these lands and that mining operations be prohibited. The reasons for the determination were similar to those outlined in its original June 21, 1985, memorandum. BOR adhered to its earlier recommendations citing its previous bad experiences when withdrawn lands had been opened along critical drainways to project reservoirs, and lack of support for opening the land to mineral entry by other local agencies, stating:

> The Bureau of Reclamation has reconsidered opening the tract as directed in the IBLA opinion and has considered the impacts upon the project facilities from the loss of the withdrawal along the river. As we proposed in our April 25, 1985, memorandum to you, we requested comments from other agencies to aid us in determining impacts and mitigative measures that might be required if lands were opened. We sent out 17 letters and as of this date received 10 responses. The replies indicate that opening the withdrawn lands to mineral entry would also have a very significant impact on other agencies' programs in that area. Formal National Environmental Policy Act (NEPA) compliance, probably an environmental impact statement (EIS), appears necessary.

(BOR Memorandum of June 21, 1985, at 2.)

Appellants again object to BLM's refusal to open the land to mineral entry, contending that their estimates indicate the gravel at the site "runs about 10 to 17 dollars a cubic yard in gold and silver" (Statement of Reasons (SOR) at 1). Appellants assert that BOR has continually ignored their plan of operation and willingness to conduct their operation in a manner which would protect the interests of the United States. They also object to not having been given an opportunity to observe the sampling or participate in the selection of sample sites. Appellants further allege that, accepting the Government's sampling, at $4.50 a cubic yard they could "still make a good living at $250 to $350 a day" (SOR at 6).

[1] Sections 1 and 2 of the Act of April 23, 1932, provide the Secretary of the Interior with discretionary authority to restore land subject to a first-form reclamation withdrawal to mineral entry "when in his opinion the rights of the United States will not be prejudiced thereby" and to take certain other action. 43 U.S.C. § 154 (1982). The statute provides that the Secretary may

> [reserve] such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate * * * and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests.

When BOR recommends against restoration of land to mineral entry, BLM is required to reject an application for restoration under 43 CFR 3816.3.[1] As we noted in *Robert Limbert, supra*, there is no such limitation on the Board. However, we will affirm BLM's rejection of an application for restoration when that decision is based on cogent reasons indicating that restoration is contrary to the public interest. *Id.* at 133, and cases cited therein.

In the initial decision of the Board, we directed BOR to reconsider its decision because the record contained nothing that indicated that BOR had considered the restrictions afforded by existing law and imposition of limitations that would protect the interests of the United States. We have adhered to this same course of action in recent cases when we determined the records were not adequate to support the denial of a restoration application. *Kenneth Carter*, 98 IBLA 100 (1987); *John Yule*, 96 IBLA 379 (1987).

The BOR recommendation on remand restates its previous objections without addressing the issue of whether the interests of the United States could be protected by limiting mining and related activities on the lands.[2] In many cases, these interests can be protected by a

[1] The regulation provides:
"When the application is received in the Bureau of Land Management, if found satisfactory, the duplicate will be transmitted to the Bureau of Reclamation with request for report and recommendation. In case the Bureau of Reclamation makes an adverse report on the application, it will be rejected subject to right of appeal."

[2] On numerous occasions we have rejected arguments similar to those advanced by BOR when presented by individuals and public interest groups. The question raised by an application is whether the lands described in the

Continued

limitation on use set forth in the order opening the lands, by restrictive covenants and bonding requirements contained in a contract to be executed by the party desiring to conduct mineral exploration, development, or extraction activities on the land, and enforcement of existing state and Federal law.[3] Thus, a determination that the land should not be opened to mineral entry should be based on a site-specific determination, and take into consideration such mitigating measures as may be legally imposed to protect the irrigation interests.

On the other hand, there are sites which are so critical to the operations conducted by BOR that the imposition of necessary restrictions would under any mining operation infeasible. A BOR recommendation that the land not be opened to mineral entry will be affirmed by this Board if it addresses protective measures necessary to carry out the purpose of the withdrawal and makes a reasoned and supportable determination that the lands under consideration cannot be adequately protected or that the necessary protective measures would render a mining operation patently infeasible.

[2] In the previous decision the Board directed BLM to conduct a mineral examination, if needed, and determine whether the lands are valuable for minerals. *Robert Limbert, supra* at 133. BLM interpreted this statement as a directive to make a determination whether the lands are of such mineral character as to support a discovery. In our prior decision, we were apparently less precise than intended. It was not our intent to require an onsite physical examination sufficient to determine whether a discovery of a valuable mineral deposit existed within the land described in the application. Such examination is both unnecessary under 43 U.S.C. § 154 (1982), and inadvisable. Rather, it was our intent to have BLM determine whether the lands were "known or believed to be valuable for minerals."

The importance of this distinction becomes apparent upon examination of the purpose for opening lands for mineral entry and, conversely, the prohibitions placed upon the use of such lands until such time as they are opened to mineral entry. For example, a determination that lands are "believed" to contain valuable minerals could be made by geologic inference. There need not be a physical exposure of mineral in place in sufficient quality and quantity to support a discovery. Thus, if BLM is able to reach a conclusion that the lands are known or believed to be valuable for minerals through geologic inference, the conclusion would support a decision that the lands may be opened to mineral entry, if the other conditions set forth in the Act are met.

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application can be opened, not whether the opening of the specific lands might lead to further applications, or whether there is a possibility that if this and other future applications are granted an EIS may be required. *See Glacier-Two Medicine Alliance*, 88 IBLA 133, 146-47 (1985). An EIS is required only if the specific activity has significant environmental impact or if the cumulative impact of the contemplated activity, prior permitted activities, and planned future activities have significant environmental impact. Further, the determination that an EIS is required is made only after considering mitigating measures which may be imposed. *See Glacier-Two Medicine Alliance, supra* at 148, and cases cited.

[3] We note that the State of Idaho has a very strict dredge mining act which would be applicable to appellants' operations.

On the other hand, if a showing of valuable mineral in place is a prerequisite for a determination that the lands should be opened to mineral entry, a person may be tempted to go on the lands and conduct sufficient prospecting activities to disclose mineral of sufficient quality and quantity to support a discovery *prior to an application.*[4] Such a standard would virtually invite trespass on the public land by prospective claimants. Absent a physical exposure of a mineral deposit, they would otherwise be unable to show that the land was, in fact, valuable for minerals, even though there was a strong basis for a reasonable belief that the land was valuable for minerals. All such prelocation activities would, of course, proceed without any of the restrictions and reservations which might be made a part of the restoration order. Moreover, such an approach might have the anomalous effect of rewarding those who proceed in trespass while penalizing those who comport themselves with the dictates of the law.

[3] As noted above, the mineral examination conducted by BLM need only disclose sufficient mineral to support a finding that the lands are "believed to be valuable for minerals." *See Surprise Ventures Associates*, 7 IBLA 44 (1972). In the case before us, BLM conducted a more extensive mineral examination than was necessary for its determination. However, the fact that the examination was more extensive than necessary does not, of itself, invalidate the results, and the arguments on appeal are not sufficient to cause us to overturn the BLM decision based on that examination. Appellants' allegation that the lands are known or believed to be mineral in character must be supported by sufficient evidence to overcome the actual findings in the field, and the evidence submitted by appellants is not sufficient to overcome those findings.

Appellants freely admit they had prospected the land prior to submitting their application. *See* Statement of Reasons at 5. Yet nothing has been submitted to support the allegation that the land is believed to be mineral in character. For example, appellants assert that they took samples in 1983 which ran "as high as 45 dollars a yard," but have submitted nothing in support of that assertion. Likewise, appellants state that, based on the BLM assay results, they would be able to conduct operations making $250 to $350 a day. There is nothing in the record to show how this would be done or that this amount could be earned in an operation of the nature proposed by appellants, taking into consideration the extra cost resulting from taking those additional measures necessary to protect the public interest. The volume of minable material calculated by the mineral examiners is not contested by appellants, and this factor would have a

[4] In addition, if BLM were required to make a mineral examination sufficient to determine the existence of a "discovery" prior to considering opening the lands, the mere fact that the lands were being opened would lead to the conclusion that the lands contained mineral of sufficient quantity and quality to support a discovery. As no rights could accrue until after the land was opened, a land rush would ensue. As can be seen from reading *Scott Burnham*, 100 IBLA 94, 94 I.D. 429 (1987), this result is best avoided.

direct bearing on the profitability of any proposed mining operation. Appellants have failed to establish by a preponderance of the evidence that the BLM determination was incorrect.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. MULLEN
Administrative Judge

I CONCUR:

JAMES L. BURSKI
Administrative Judge

CSX OIL & GAS CORP., G. J. MORGAN

104 IBLA 188 Decided: *September 9, 1988*

Appeals from a decision of the Colorado State Office, Bureau of Land Management, upholding a prior decision which found that drainage had occurred from lands within oil and gas lease C-22214A and assessed compensatory royalties.

Vacated and remanded.

1. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Compensatory royalties for failure to protect against drainage commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. Such notice may be given by BLM or by a third party. If BLM can show that a lessee knew or a reasonably prudent operator would have known that drainage was occurring, the requirement of notice is satisfied.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for CSX Oil & Gas Corp.; G. J. Morgan, *pro se*; Mary Katherine Ishee, Esq., William R. Murray, Esq., Office of the Solicitor, Washington, D.C., and Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

CSX Oil and Gas Corp. (CSX) and G. J. Morgan appeal from a decision of the Colorado State Director, Bureau of Land Management (BLM), dated December 8, 1986, upholding a prior decision which found that drainage had occurred from lands within oil and gas lease C-2214A and assessed compensatory royalties. Appellants each held a 50-percent record title interest in lease C-22214A when this lease expired some 14 months prior to the State Director's decision.

BLM found that lands within lease C-22214A, specifically, the S½ SW¼ NW¼ sec. 13, T. 8 N., R. 93 W., sixth principal meridian, Moffat County, Colorado, had been drained by the Damson Oil North Lay Creek well in the NW¼ SE¼ sec. 13. Drainage was found to have occurred between April 1, 1976, and September 30, 1985, the date of lease expiration.

After conducting a technical and procedural review of a decision of the Deputy State Director for Minerals, dated November 5, 1986, the Colorado State Director found that substantial drainage had occurred from the Almond Sand formation lying under the lands formerly leased to appellants. This finding was based upon his determination that 0.70 percent of production of the Damson well came from lands which had been subject to lease C-22214A.[1] Using the production and cost figures generated by CSX, the State Director also found that an economic protective well could have been drilled.

Oil and gas lease C-22214A was issued noncompetitively to Howell Spear effective October 1, 1975. At the time of lease issuance, the nearby Damson well was already producing gas. That well was completed in March 1969 and obtained first production in June 1972. Lease C-2214A was assigned to CSX[2] in November 1975. By decision of March 19, 1982, a portion of the land in lease C-22214A was designated as being within an undefined addition to an undefined known geologic structure (KGS). Appellant Morgan held a 50-percent interest in lease C-22214A from February 1984 to September 30, 1985.

CSX contends that the State Director erred in assessing compensatory royalty because BLM failed to notify lessees during the life of the lease that BLM believed drainage was occurring. It argues that such notice is a prerequisite to BLM's requiring an offset well or assessing compensatory royalty. In support of its position, CSX quotes from this Board's decision in *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982):

> The obligation to protect a leasehold from drainage arises not upon completion of the draining well, but only after the passage of a reasonable time subsequent to *notification by the lessor* that an adjoining well is draining the leasehold. *See U.V. Industries* v. *Danielson*, [602 P.2d] at 585. Thus, had appellant herein proceeded to complete an offset well *within a reasonable time after notice, there would have been no assessment for intervening drainage.* If compensatory royalty is designed to compensate the lessor for drainage occurring *because of a failure to complete a protective well*, it is difficult to understand why the lessor should be compensated for the period of time during which the lessee *was under no obligation to drill, viz.*, from completion of the offending well to a reasonable time *after notification.* [Italics added; footnote omitted.]

63 IBLA at 256-57, 89 I.D. at 217-18. The first notice from BLM that lease C-22214A was subject to drainage was received on June 9, 1986, some 8 months after lease expiration. CSX argues that when notice

[1] This figure, referred to as the drainage factor, represents a change from the Nov. 5 decision which held that the drainage factor was 4.675 percent.

[2] Appellant CSX was known as Texas Gas Exploration Co. at the time of assignment.

was given it was no longer the Government's lessee, and the Government cannot assess compensatory royalty after the expiration date. CSX contends that BLM's issuance of noncompetitive lease C-2214A, some 6 years after completion of the Damson well, and BLM's subsequent acceptance of rentals substantiate a reasonable belief that no drainage was occurring.

In the alternative, CSX contends that if the BLM notice that drainage was occurring had been tendered in a timely manner, CSX would not have been required to either drill an offset well or pay compensatory royalty because of the prudent operator rule. That rule, which *Ptasynski* describes as a limitation on a lessee's implied obligation to protect against drainage, states that "there is no obligation upon the lessee to drill offset wells unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well." *Olsen* v. *Sinclair Oil & Gas Co.*, 212 F. Supp. 332, 333 (D. Wyo. 1963). CSX calculates that it would have incurred a $158,026 loss had it drilled a protective well. Finally, CSX states that all production from the Damson well can be attributed to the 320-acre spacing unit on which that well is located, no part of which is within C-22214A.

Appellant Morgan objects to the decision on appeal because BLM has assessed him for 9½ years of compensatory royalty despite the fact that he held a 50-percent interest in lease C-22214A for only 20 months. He contends that the decision disproportionately impacts him and ignores the fact that "the federal lands from which drainage allegedly occurred were covered by at least two different Federal leases in the period from 1972 to 1985, and record title to said Federal leases was held by at least seven separate individuals or entities during the period."[3] Morgan complains that only he and CSX have been assessed for drainage from lease C-22214A.

Appellant Morgan also contends that BLM has the burden of proving that an economic well could have been drilled, and BLM wrongly placed the burden of proof in this area on the appellants. Morgan joins with CSX in reciting that *Ptasynski* requires notification from BLM before the duty to protect against drainage arises. Morgan notes that by giving notice of substantial drainage from the leased lands after the lease expired, BLM has deprived him of any ability to perform his contractual duties by drilling an offset well. He contends that BLM could have known of potential drainage as early as 1972 and did in fact know of such potential drainage in March 1982 when designating part of C-22214A as within a KGS. He similarly agrees with CSX that no drainage has in fact occurred from lease C-22214A, citing the drilling and spacing orders of the Colorado Oil and Gas Commission. Morgan contends that BLM's assessment of royalty for drainage commencing in April 1976 is barred by the applicable Colorado statutes of limitation.

[3] Our review of casefile C-22214A reveals that record title was in the names of six different entities between November 1975 and the date of expiration.

In response, BLM defends the State Director's decision, arguing that the Board erred in *Ptasynski* when holding that a lessee's obligation to protect a leasehold from drainage arises only after a reasonable time subsequent to notification by the lessor that an adjoining well is draining the leasehold. BLM contends that numerous courts and authorities have held that notice to the lessee of drainage is not ordinarily a prerequisite to a lessor's recovery of compensatory damages. BLM advances its position that in *Ptasynski* the Board's reliance on *U.V. Industries* v. *Danielson*, 184 Mont. 203, 602 P.2d 571 (Mont. 1979), was misplaced. BLM notes that *U.V. Industries* was a *damages* action, but all of the cases cited by the Montana Supreme Court as its basis for requiring notice in a *damages* action were cases involving *forfeiture*. BLM explains that a judicial declaration of forfeiture is an equitable decree that is regarded as a harsh and extraordinary remedy. Before a court will declare a forfeiture based on a lessee's failure to satisfy the implied covenant to protect against drainage, the lessor must notify the lessee, indicate that the breach was substantial, and allow a reasonable period for the lessee to drill, BLM states. Only after these events had occurred and the lessee still refused to drill, BLM notes, would a court terminate the lease contract by judicial decree.[4] BLM maintains its position that no such procedures are applicable in the present case.

In addition to the implied covenant to protect against drainage, BLM observes that express lease provisions and applicable regulations require the lessee to protect against drainage. According to BLM, these lease terms and regulations place the burden of protection, and indirectly the initial burden of drainage detection, on the lessee. It is BLM's position that the specific lease terms and Department regulations are consistent with the theory of implied covenant, which recognizes certain implicit duties owed by a lessee by virtue of his holding operating rights to the lease. BLM acknowledges that it did not detect drainage from lease C-22214A until after the lease expired, but charges that CSX was long aware of the offending Damson well and had even sought to purchase it. BLM contends that it is not required to detect drainage and, therefore, its issuance of lease C-22214A noncompetitively and its subsequent acceptance of rental should not preclude it from recovering compensatory royalties.

The lease provision that BLM refers to is section 2(c)(1) of the standard noncompetitive oil and gas lease (Form 3110-2 (Sept. 1973)). This section states:

[4] In support of this position, BLM cites 4 H.R. Williams, *Oil & Gas Law* § 682 (1985), wherein it is stated:
"The reason for requiring that notice and demand precede a suit for cancellation of the lease for breach of covenant is easy enough to discover. Whether the action be considered as one for extraordinary relief in equity or as one to enforce a right of entry for breach of a condition subsequent, forfeiture is the relief sought and accordingly the action is cognizable in equity. Since equity dislikes forfeiture and since one seeking equity must do equity, notice, demand and an opportunity to cure the breach are required."

Sec. 2. The lessee agrees:

* * * * * * *

(c) *Wells.* – (1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director.

Applicable regulations are 43 CFR 3100.3-2 (1982),[5] which virtually replicates the lease provision quoted above, and 30 CFR 221.21(c) (1982),[6] which states:

(c) The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor.

In *Ptasynski*, the Board held that the prudent operator rule was not extinguished by the express obligations imposed upon a Federal lessee by 30 CFR 221.21(c). The Board also held, relying on *U.V. Industries* v. *Danielson*, that royalties lost by a lessee's failure to drill an offset well do not commence on completion of the offending well, but upon the lessee's failure to drill a protective offset well within a reasonable time after notice.

BLM correctly points out that the Supreme Court of Montana relied on lease forfeiture cases when holding in *U.V. Industries* that notice was a prerequisite to an action for damages. However, BLM also points out the past practice of the Department to give such notice and the past policy to discourage collection of compensatory royalties for drainage which had occurred prior to such notice. We believe that a notice requirement is consistent with the prudent operator rule and with longstanding Departmental practice. We, therefore, decline to adopt the position urged upon us by BLM that no notice is necessary. Though we so conclude, we must also acknowledge the need to clarify *Ptasynski* to permit recovery of compensatory royalty if BLM can show that a lessee knew or a reasonably prudent operator would have known that drainage was occurring, regardless of BLM's failure to give formal notice of that occurrence.

In testing a lessee's performance of an implied covenant, such as the covenant to protect against drainage, the great majority of oil and gas producing jurisdictions apply the prudent operator standard. 5 Williams & Meyers, *Oil & Gas Law* § 806.3 (1986). This standard is described by Judge Van Devanter in *Brewster* v. *Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905), as one calling for the exercise of reasonable diligence: "Whatever, in the circumstances, would be reasonably

[5] This regulation was in effect from June 13, 1970, to Aug. 22, 1983, when it was changed slightly and renumbered as 43 CFR 3100.2-2. 48 FR 33662 (July 22, 1983); 35 FR 9670 (June 13, 1970). Minor changes have since occurred. 53 FR 17351 (May 16, 1988).

[6] This regulation was replaced by 30 CFR 221.22 on Nov. 26, 1982. 47 FR 47769. On Aug. 12, 1983, 30 CFR 221.22 was redesignated as 43 CFR 3162.2. 48 FR 36583. Minor changes have since occurred. 53 FR 17351 (May 16, 1988).

expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required." *Id.* at 814. The prudent operator standard is distinguishable from an absolute standard, whereby a lessee is liable without fault for nonperformance of an implied covenant, and it is also distinguishable from a standard based on a lessee's subjective good faith. Williams & Meyers, *supra* at § 806.

If we were to adopt the position urged by BLM and hold that notice of drainage is immaterial to an action for compensatory royalty, our holding would effectively erode the prudent operator standard and replace that standard with an absolute standard requiring an operator to warrant against any loss as a result of drainage. We expressly decline to do so.

Moreover, at least since 1932 the Department has provided a lessee with notice of drainage and has discouraged collection of compensatory royalties prior to such notice.[7] In a letter dated August 25, 1932, to the Director, Geological Survey, Acting Secretary Dixon wrote:

> It has always been the practice of the Department in land and mining cases, where certain acts are required to be done or payments to be made to serve notice upon the parties in interest of the requirements, or allow them to show cause why certain action should not be taken. A similar practice should be followed in these cases of oil and gas leases; when the Department ascertains that offset wells are necessary the parties should be advised in *writing* that they must drill the necessary offsets diligently, or in lieu thereof pay compensatory royalty to the Government.
>
> Hereafter in all such cases *written notice should be given to the lessees* and other parties in interest of the Department's requirements. In all pending cases, where such notice was not given in the past, the demand for "back royalties" should be dropped. [Italics in original.]

This practice was likely changed, BLM states, as a result of the dramatic increase in oil and gas activity during the 1970's, when the resources and personnel of Geological Survey were stretched to accommodate new volumes.[8]

BLM also acknowledges that it continues to provide a lessee with notice of drainage when it identifies such drainage within 1 year of completion of the offending well. BLM Manual 3160-2.11C provides that the authorized officer will notify a lessee by certified mail that a potential drainage situation exists and will request that the lessee submit plans within 60 days for protecting the lease. If compensatory royalty is thereafter assessed, it will be due from the day next following expiration of the reasonable period of time stated in the notice.[9] *Id.*

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[7] *See* BLM Answer brief at page 30, filed May 6, 1987, in IBLA 86-1572, an appeal by Chevron USA, Inc., involving Tribal lease No. 0258-2198. BLM has specifically incorporated by reference pages 12-35 of this pleading in its Answer.

[8] Id. at 31 n.7.

[9] This policy applies to "current drainage cases," *i.e.*, those in which BLM has identified drainage with 1 year of completion of the offending well. A distinct policy is applied to "older drainage cases." *See* BLM Drainage Protection Handbook at H-3160-2 IIB.

BLM's action in the instant case appears to be contrary to a longstanding Departmental policy in favor of granting notice to a lessee. This fact and the well-established principle requiring that a lessee act prudently in protecting the leasehold from drainage are the basis for our holding here. If BLM seeks to recover compensatory royalty without the need for notice, it may effect such change by rulemaking. *Bruce Anderson*, 80 IBLA 286, 301 n.7 (1984).

[1] Our review of *Ptasynski* prompts us to clarify that case in one regard. If BLM has not notified a lessee of drainage, but can prove that such lessee knew or that a reasonably prudent operator would have known that drainage was occurring, BLM may recover compensatory royalties. In such instance, the compensatory royalties would begin to accrue after the passage of a reasonable time following the date of the lessee's knowledge. This clarification is consistent with a prudent operator's duty to exercise reasonable care and diligence in protecting the lessor against drainage. *U.V. Industries* v. *Danielson*, 602 P.2d at 578.[10] If formal notice is given by BLM, that notice is a basis for a subsequent assessment of compensatory royalties. However, if BLM is to assess compensatory royalties for any period prior to the time it gives formal notice, the burden of proving that a lessee knew or that a reasonably prudent operator would have known of drainage rests with BLM. *See Lafitte Co.* v. *United Fuel Gas Co.*, 177 F. Supp. 52, 59 (E.D. Ky. 1959). Our clarification of *Ptasynski* in this respect allows BLM to assess compensatory royalties if BLM is able to prove that a lessee actually knew or a reasonably prudent operator would have known that drainage was occurring.

BLM never gave appellants notice of drainage during the life of lease C-22214A and has not attempted to prove that appellants knew or that a reasonably prudent operator would have known of such drainage. Therefore, the State Director's decision must be vacated. If, upon remand, BLM should issue a decision assessing compensatory royalties, that decision should set forth the facts necessary to demonstrate appellant's knowledge of drainage. The decision should also set forth the legal basis for assessing appellant Morgan for drainage during periods when he was a stranger to the lease and the legal basis for not joining all parties who held an interest in the lease during the period that drainage was occurring. Any such decision should also set forth the legal basis for assessing compensatory royalty for periods that appear to be beyond the reach of applicable statutes of limitations. *Indian Territory Illuminating Oil Co.* v. *Rosamond*, 190 Okla. 46, 120 P.2d 349 (1941).[11]

[10] "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it." *Wood* v. *Carpenter*, 101 U.S. 135 (1879), quoting from *Kennedy* v. *Green*, 3 Myl. & K. 722. "It will not do to remain willfully ignorant of a thing readily ascertainable." *Williams* v. *Woodruff*, 35 Colo. 28, 85 P. 90, 95 (1905), quoting from *McQuiddy* v. *Ware*, 87 U.S. (20 Wall.) 14, 22 L.Ed. 311 (1874).
See also Comments to Article 136, Title 31, Louisiana Revised Statutes (1980).

[11] We do not reach the question of whether an offset well is commercially practical. If it can be shown that lessees knew or that a reasonably prudent operator would have known that drainage was actually occurring, the determination that an offsetting well was commercially feasible (and the calculation of compensatory royalties due) must be based on conditions existing after the expiration of a reasonable time from the date of notice.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Director is vacated and remanded.

R. W. MULLEN
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

UNITED STATES FOREST SERVICE *v.* WALTER D. MILENDER

104 IBLA 207 Decided: *September 12, 1988*

Appeal from an Administrative Law Judge's decision permitting placer mining operations within a powersite.

Affirmed in part, reversed in part, modified in part.

***United States Forest Service* v. *Walter D. Milender*, 86 IBLA 181, 91 I.D. 175 (1985), modified.**

1. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

2. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

3. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

4. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

5. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

6. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

In June 1982, Walter D. Milender located the Agate One and Red Rock placer mining claims, each consisting of 20 acres. These claims, with the exception of the southeastern portion of the Red Rock, are situated within Powersite Classification No. 179 in the Plumas National Forest. After Milender filed location notices with the Bureau of Land Management (BLM), BLM inquired of the United States Forest Service (FS) if it had objections to the conduct of placer mining operations on the claims pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1982). FS objected to the proposed placer mining operations, asserting that the claims would substantially interfere with other uses of the land. Following a hearing on the issues thus raised, Administrative Law Judge L. K. Luoma prohibited placer mining on the Red Rock and Agate One claims, and on three other claims which are no longer an issue in this case, those three having been subsequently relinquished. The testimony at the original hearing is summarized in *United States Forest Service* v. *Milender*, 86 IBLA 181, 183-89, 92 I.D. 175, 177-81 (1985).

Milender appealed. In the subsequent Board decision, *United States Forest Service* v. *Milender, supra*, the Board examined the standard used to determine whether or not placer mining operations should be prohibited on powersite lands. The Board focused on the term "unrestricted mining" as used in *United States* v. *Bennewitz*, 72 I.D.

183, 187-88 (1965). *Bennewitz* employed this term to describe the Secretary's perceived inability under the Act to limit or condition the claimant's right to mine following commencement of mining operations; this approach had become the criterion for subsequent decisions which followed the *Bennewitz* reasoning.

In the *Milender* decision, we rejected this rationale. Therein, the Board held that it is error to prohibit placer mining on powersite lands pursuant to the Act merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on mining claims, and (2) all land has some other use or value which would be affected by mining, so that prohibiting mining for that reason would foreclose mining on all powersite lands and effectively nullify the Act. The Board stated that whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation. The Board held that the proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal operations, subject to regulatory restraint, might interfere with such uses. The Board also expressly overruled *United States* v. *Cohan*, 70 I.D. 178 (1963), to the extent that case precluded consideration of the effect other law, regulations, precedent, police powers, and remedies may have upon the Department's ability to regulate mining.

Because the Board had enunciated a new standard, it set aside Judge Luoma's finding that "unrestricted placer mining on the claims will substantially interfere with timber management." The Board found that there must be an objective evaluation of the value of timber management use and the reasonable and realistic extent to which such use might be impaired by lawful placer mining operations which are subject to such constraints as may be imposed for the protection of other resource values. The Board remanded the case to the Hearings Division with instructions to reopen the hearing for the limited purpose of determining, consistent with the opinion, whether the potential interference with the use of the land for timber management is sufficient to warrant issuance of an order prohibiting mining.

The Administrative Law Judge found on remand that Milender's plans for exploring his claims would have little or no effect on timber management, but that a large scale open pit mining operation such as he would conduct "would effectively take the disturbed acreage out of timber production for the foreseeable future, in spite of best efforts to restore the surface to its present conditions" (Decision on Remand, dated Sept. 27, 1985, at 11). He concluded, however, that placer mining operations on the two remaining claims here involved, the Agate One and Red Rock, would not substantially interfere with other uses of the

land and that such placer mining should be permitted on the condition that, following operations, the surface of the claims should be restored to the condition in which it was immediately prior to these operations. *Id.* at 11-12. FS filed a timely appeal.

On January 9, 1986, FS also filed a request for reconsideration of our earlier decision, *U.S. Forest Service* v. *Milender, supra*, and for consideration of this pending appeal en banc. FS argued, correctly, that the Board in the *Milender* case discarded the "unrestricted placer mining test" postulated by the decision in *United States* v. *Bennewitz, supra*.[1] FS pointed out that the *Milender* Board was not unanimous in regard to the "balancing test" described by that opinion and asks that the Board set aside this holding or clarify it. Good cause appearing, this appeal is therefore considered by the entire Board. All prior proceedings before the Department concerning the two claims which remain at issue are presently before us for review. We will consider the issues on appeal separately as they apply to each claim, and will not limit our review to the Administrative Law Judge's decision on remand, but will consider the entire dispute insofar as concerns the two remaining claims open to review.[2]

The purpose of the Mining Claims Rights Restoration Act of 1955 was to open the approximately 7 million acres of public lands then withdrawn or reserved for power development or powersites to entry under the Federal mining laws.[3] Section 2 of the Act, now 30 U.S.C. § 621 (1982), "limit[ed] the effect of entry in four respects."[4] The fourth of these, now contained in 30 U.S.C. § 621(b) (1982), "gives the Secretary of the Interior authority to hold public hearings to determine whether placer mining operations would be detrimental to other uses of the lands involved."[5]

Section 621(b) provides, in part:

> The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of 60 days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining

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[1] The rationale of the *Bennewitz* decision was twice rejected by our *Milender* opinion. It was generally disapproved in a note approving *United States* v. *Mineral Economics Corp.*, 34 IBLA 258 (1978), as the sole viable precedent remaining from prior Departmental decisionmaking on this subject. Later, use of the *Bennewitz* rationale was denounced as "unwarranted and conceptually improper." *U.S. Forest Service* v. *Milender*, 86 IBLA at 194, 92 I.D. at 183. *Milender* rejects the thesis, expressed by *Bennewitz*, that the Department can "act only once" to control placer mining. The *Milender* opinion is wholly predicated upon the fact that current regulation of mining has become continuous, whatever may have been the practice when *Bennewitz* was decided. The dissent mistakenly assumes that *any* interference with another use is "substantial." If other uses than powersite use are insubstantial, there cannot be a substantial interference with such uses.

[2] References to the 1983 transcript of hearing will be cited: 1983 Tr. References to the remand hearing held in 1985 will be cited: 1985 Tr.

[3] S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S. Code Cong. and Ad. News at 3006. This purpose is realized in 30 U.S.C. § 621(a) (1982), which provides:

"All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes * * *."

[4] S. Rep. No. 1150, *supra*, note 1, at 3006. Significantly first among the limitations was the retention of "all power rights" by the United States. Obviously interference with those rights is not allowed. Powersite use remains the primary use of this land.

[5] Id. at 3007.

operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining.

[1] It is at once apparent that there is no statutory requirement that there be a hearing before placer mining operations are allowed.[6] The Secretary may, in his discretion, allow the 60-day period established by the Act to expire, thus enabling the placer miner to conduct operations despite their effect upon other uses. In the event a hearing is held, however, the Secretary's order must provide for one of three stated alternatives, although nothing in the Act links any available alternative to a particular finding, and any limitations placed upon the proper exercise of Secretarial discretion exist only to the extent legal constraints require reasonableness in actions affecting the public lands. Since the Act does not require any particular result, the third, and most liberal alternative to the miner, a "general permission" to engage in placer operations, is always a possibility. A "general permission" to engage in placer mining means that "mining, development, beneficiation, removal, and utilization of the mineral resources of such lands * * * [are] all to be carried out under existing laws regulating such activities."[7]

Our first *Milender* opinion was concerned with the definition of the statutory term "substantially interfere," or rather with the redefinition of that term following a series of decisions which the Board found to have been wrongly decided, based upon a misconception originating in *United States* v. *Cohan, supra.* So as to give effect to the apparent purpose of the Act, which was to restore mining to powersite areas where it had been prohibited, we proposed, by way of example, an approach to decisionmaking in these cases, which required the use of a balancing test:

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[6] It is noted that FS provided evidence at the remand hearing through a member of the staff of the Regional Office, Pacific Southwest Region, to the effect that in FY 1985 in 6 out of 44 placer mining applications made in the Region, it was determined that a hearing should be conducted; in the 38 cases in which no hearing was sought, a finding was made that placer mining would not substantially interfere with other uses of the land affected without conducting a hearing (1985 Tr. 18-19).

[7] S. Rep. No. 1150, *supra*, note 2, at 3006.

The decision in each specific case, then, must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operation,[1] with due regard for the extent to which such operations might be controlled, inhibited and/or mitigated by existing law and regulations.

[1] Since [*United States* v.] *Cohan*, [70 I.D. 178 (1963)] only one Departmental decision has authorized placer mining on powersite land, and that was the only decision which correctly evaluated the value of the "other use" of the land against placer mining and concluded that even though the other use might be substantially impaired, mining could proceed anyway. In *United States* v. *Mineral Economics Corp.*, 34 IBLA 258 (1978), the Board affirmed the finding of the administrative law judge that the "likely destruction" of a dove nesting and breeding site was insufficient cause to prohibit mining where the number of doves which would be lost was negligible when compared to the annual number harvested annually by hunting.

86 IBLA at 204, 92 I.D. at 188.

[2] The note to our holding in *Milender*, quoted above, is essential to an understanding of the *Milender* opinion, first because it disapproves *all* our prior decisionmaking in this area, including the *Bennewitz* decision, and, more importantly, because it provides us with an example of a case in which the restoration statute was correctly applied by the Board - *Mineral Economics*. In *Mineral Economics* it was presumed, as it now is presumed with Milender's claims, that mining would remove vegetation which was being managed for another purpose. In the *Mineral Economics* case, the competing use was wild dove production. As in this appeal, the vegetation present on the claims was not of uniform quality, nor was the vegetation of a unique type. Weighing the diminution of the dove population which total removal of the vegetation would cause against the potential benefits of mining, the Board found that the United States had failed to "sufficiently establish such a substantial use of the land for uses other than mining which warrants a prohibition of mining." *Id.* at 262. The use of this sort of balancing test is at the center of our *Milender* decision. And central to the balancing test to be applied is the concept that competing uses must be substantial if they are to be used to prohibit placer mining.

[3] Under the Act the Secretary may hold a hearing to determine whether placer mining operations would substantially interfere with other uses of land included within a placer claim, although he need not do so. Admittedly, all land has other uses which would necessarily be interfered with if extensive, lawful placer mining is conducted. However, the purpose of the Act cannot be effectuated if mining is prohibited in every instance where any impairment of another use is identified at a hearing. Obviously, Congress intended that placer mining should, in general, be permitted, and that some interference with other uses must be tolerated. Congress, however, provided that mining could be prohibited if the Secretary determined that mining would substantially interfere with other uses. But even should the Secretary find there to be substantial interference with other uses, nothing in the Act or in the legislative history of the Act prevents the Secretary from granting "general permission to engage in placer

mining," provided that such an order be "appropriate." Such an order would be "appropriate," we find, when the competing surface use has less significance than a proposed placer mining operation. This requires that the importance of the competing interests be compared and judged on whatever grounds are relevant in the individual case.

As we stated in our first *Milender* decision, the proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal operations, subject to regulatory restraint, might interfere with other uses. And as we found in *Mineral Economics*, the showing of a slight diminution of another resource is insufficient to justify a total prohibition of mining. It is also, of course, recognized that the single purpose of FS regulation of mining is to ensure that the surface of the national forests is not disrupted: FS does not, under its regulations, attempt to balance mining development against competing uses of the forest, nor is FS charged with responsibility for minerals management in the forest. *See generally* 36 CFR Part 228. That responsibility must be borne by this Department. 30 U.S.C. § 621(b) (1982).

Our original decision herein, *U.S. Forest Service* v. *Milender, supra*, contained two independent holdings. First, the panel unanimously held that, in determining whether placer mining would result in substantial interference with other uses of the land, the proper focus of analysis was not whether "unrestricted placer mining" would substantially interfere with other uses, but, rather, whether "legal, normal operations, subject to regulatory restraint, might interfere with such uses." *Id.* at 198, 92 I.D. at 185.

[4] Second, proceeding from the first holding, the majority then held that in determining whether substantial interference had occurred, the decision in each case "must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operations, with due regard for the extent to which such operations may be controlled, inhibited and/or mitigated by existing law and regulations." *Id.* at 204, 92 I.D. at 188. The Board held that, in determining whether or not there was substantial interference, the Department was required to undertake a weighing process in which the benefits of mining were to be set off against the injury to the other uses of the land. It was this second holding from which Judge Irwin dissented in the original decision, a dissent reiterated herein. And it is this holding which the appellant, FS, seeks to have reconsidered in the present appeal.

Judge Irwin dissents on the view that, under the statutory scheme, once it is shown that placer mining will substantially interfere with *any* existing use of the land, placer mining must be prohibited. Thus, he states, "The Act provides for a determination 'whether placer mining operations would substantially interfere with other uses of the land included within the placer claim,' not whether those uses are

substantial or whether they are less significant or valuable than the proposed placer operations." *Infra* at 179. This argument is flawed for two reasons. First as observed in *Milender*, by its nature placer mining necessarily interferes to a substantial extent with any other use, at least during the period of active mining. *Id.* at 200, 92 I.D. at 186. Thus, the position taken by the dissent requires the total prohibition of placer mining activities on lands withdrawn for powersite purposes, a result which is clearly inconsistent with the intent of Congress to open some powersite lands to placer mining.

Second, and more critically, there is a legal error in the dissent's analysis. As pointed out previously, there is simply no provision in the Act which requires the Secretary to prohibit placer mining even if he affirmatively finds that substantial interference with other uses will occur as a result. If Congress had intended that placer mining be prohibited whenever it was shown that it would substantially interfere with any existing use, Congress clearly could have expressly so provided in the Act. No such language exists.

FS attacks the balancing test enunciated in *Milender* from a different angle than does the dissent. Thus, FS argues that, regardless whether such a test can be theoretically justified, as a practical matter it would prove impossible to administer. As an illustration of this contention, it points to the decision which Administrative Law Judge Luoma entered in the instant case.

FS argues that Judge Luoma found both that large-scale open pit mining operations "would effectively take the disturbed acreage out of timber production for the foreseeable future," but that "if a mining operation reached the stage of full-scale open pit mining the mineral values would of necessity far outweigh the timber management values" (Decision at 11). FS argues that the reasoning utilized by Judge Luoma is inherently flawed:

> It appears that Judge Luoma reasons the mining claimant will not conduct a large-scale mining operation unless he is able to sell his gold for more than it costs to produce, etc. Further he reasons if the miner is making a profit, the value to the public of the gold he produces is greater than the value to the public of all other resources lost as a result of this mining operation.
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> The flaw is there is no linkage between mining profitability and other values, i.e., timber. The profitability of a mining operation, or the price/value of gold produced thereby, has absolutely no relationship to the price/value of timber (or other resources) lost as a result thereof.
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> Under the foregoing reasoning the mining claimant can operate in total disregard of the timber destroyed, or other uses lost, because the lost timber values, etc., come out of someone else's pocket, e.g., the public treasury. Expressed otherwise, the profits to the miner from his gold in an ongoing operation may be at the expense of the public in the loss of timber or other resources, but this does not constitute substantial interference and grounds for refusal to approve the placer mining claim.

(Statement of Reasons at 11).

While it may be true that no prudent individual will mine where the costs of mining far outstrip the return to the miner, this fact has relevance only to those costs which the mining claimant must absorb. Costs which are incurred by someone other than the mining claimant

will not affect his decision to initiate full-scale development. Thus, the mere fact that a mining claimant will not proceed to full-scale mining unless he has a reasonable likelihood of making a profit, while relevant, is not dispositive of the question whether the value of the land for mining exceeds the value of the land for other purposes.

The question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes. In the instant case, while there was substantial evidence tendered by FS concerning the effect of full-scale mining on the value of the land for timber management purposes, there is little information from which to guess at the ultimate value of the land for mining purposes.

Walter Milender, the mining claimant, testified at the second hearing about his lack of knowledge of the extent of mineralization on his claims:

> There seems to be a gap in the fact that the mining law says you are to stake a claim once you find enough mineral you are to stake - you can stake a claim, and then you can prospect the claim to find a lode or seam, or whatever.
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> And the Forest Service seems to have the idea that once I stake the claim I'm ready to go mining, and I am not. I should be ready to go mining, and once I find mineral enough on the claim, then I would have time enough to make application for mining through the standard practices of mining. You have to get an application, you have to go through the Forest Service, you have to go through the state laws to do any mining at all, and this is the part I'm confused on.
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> But either I'm doing it wrong or the Forest Service is doing it wrong, that somehow I wasn't prepared to answer all these questions on all the mining. I know what type of mining it would have to be, yes, pit mining, but if I have time enough, once I have the claim, I have time enough to prospect it or even drill it if the claim is mine.

(1985 Tr. 76). Milender reiterated this point later in the hearing:

> If I were granted the mining claims, then I could go ahead and prospect the area and see if there is enough to spend more money in the area to see if the sample I have go all through the area or even get better deeper, because we are on top of the mountain and it's - then after you find this out, why, then you would be - and start mining or thinking about mining, then, of course, you would have to go to the Forest Service and make an application to mine, you would have to go probably to the State, you would have to make an environmental report, you would - it goes on, it's endless, you know.
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> So there are just plenty of laws that, after you find enough material, but there isn't any reason to spend money looking for material when you don't know if you can have the mining claims or not.

(1985 Tr. 136).

This testimony highlights a shortcoming in the legislative scheme with respect to the opening of powersite lands hinted at by our first *Milender* decision. While the mining laws clearly contemplate the making of a discovery prior to the location of a mining claim, it has long been recognized that, as a practical matter, location normally precedes discovery. Indeed, it was awareness of this reality that originally led to the legal recognition of pedis possessio. Thus, the

Supreme Court noted in *Union Oil Co. of California* v. *Smith*, 249 U.S. 337 (1919):

> For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working *against all others having no better right*, and while he remains in possession, diligently working towards discovery, is entitled - at least for a reasonable time - to be protected against forcible, fraudulent and clandestine intrusions upon his possession.
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> And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, *provided no rights of third parties have intervened.* [Citations omitted; italics supplied.]

Id. at 346-47.

Two salient facts must be kept in mind with reference to the instant case. First, the rights appurtenant to the operation of the doctrine of pedis possessio do not apply against the United States. Since the United States holds paramount legal title and has permitted the taking up of mineral lands only upon the making of a discovery, pre-discovery locations gain the locator no rights vis-a-vis the United States, which may at any time withdraw the lands from location under the mining laws and thereby defeat any inchoate rights flowing from a mere location.

Second, and more critically for Milender, the statute opening up lands within powersite withdrawals to mineral entry expressly requires that the locator of a claim file a copy of his notice of location in the appropriate BLM office within 60 days of the date of location. 30 U.S.C. § 623 (1982). It further provides, in the case of placer locations, that no operations may be conducted in the ensuing 60 days. If, within those 60 days, the Secretary of the Interior notifies the claimant that he intends to hold a hearing to determine whether placer mining operations would substantially interfere with other uses of the land, no operations may be conducted until such time as the Secretary enters one of the three orders set forth above. 30 U.S.C. § 621(b) (1982). Thus, with respect to claims located within a powersite withdrawal, a placer mining claimant is forestalled from performing any discovery work after the filing of his notice of location until *after* the Secretary has determined either that placer mining would not substantially affect other land uses, or until it has been determined that despite such interference the value of mining in a specific case exceeds the loss suffered by interference with other uses.

The problem is obvious. Since we held in *Milender* that proper adjudication under 30 U.S.C. § 621(b) (1982), requires a balancing of the benefits and detriments flowing from placer mining operations, any prospective locator who files a notice of location prior to completion of exploration activities runs the risk that he may be unable to show that

the benefits accruing from placer mining will, in fact, outweigh the detriments. Most locators would be somewhat reluctant to proceed with full exploration before locating the claim since it might make them subject to topfiling by another locator. But even if they were protected by pedis possessio in pre-location prospecting activities, they would have no assurance that, should they ultimately make a discovery, mining might nevertheless be prohibited under 30 U.S.C. § 621(b) (1982), because the Secretary deemed the damaging effects of mining outweighed the benefits of full-scale development.

Thus, the prospective locator is faced with the Hobson's choice of either locating his claim upon relatively meager showings and running the risk that, should a hearing be held, he will be unable to establish the benefits that might flow from full-scale mining, or of forgoing the location of the claim until exploration is completed, thereby running the risk that, even should he succeed in making a discovery, it will count for nothing should placer mining ultimately be prohibited. This is precisely the dilemma which Milender faced here. And this is the source of FS' contention that, in practice, the balancing test must necessarily prove unworkable.

The fact that we recognize that a locator is faced with a difficult choice cannot justify absolving a locator from the effects of the choice actually made. Milender elected to proceed to locate the claims based on relatively preliminary exploration. He was therefore placed at a distinct disadvantage in his attempts to show that the benefits of placer mining operations outweighed the detriments. The question then is whether for each of Milender's claims, FS has shown that substantial interference with timber management practices will be caused by full-scale placer mining, conducted in accordance with normal practices, subject to legal and regulatory restraints.

At the remand hearing, several FS employees testified concerning the probable effects of placer mining on the two Milender claims. Two of these witnesses, District Ranger Michael Robert Wickman and Zone Soil Scientist Denny Michael Churchill, described a nearby placer mine, the Cal-Gom operation, using it as an example of placer development in the vicinity. The operating plan for the Cal-Gom mining operation had been approved by FS in November 1984. At the time of the hearing, approximately 5 tons of overburden had been removed for each ton of gold-bearing material recovered. The Cal-Gom operation involved the widening of a road to approximately two to three times the width needed for normal forest management uses and also involved a disposal site for the overburden. After consultations with other Federal and state agencies, the plan of operations was approved in November 1984, and a $280,000 performance bond was posted by Cal-Gom. Certain restrictions were imposed in the operating plan including restrictions for the protection of water and for the safety of the workers and the general public.

According to Wickman, FS determined that the Cal-Gom area could not be restored for timber production because the area would be an open pit which could not economically be filled. Therefore, the rehabilitation plan of the Cal-Gom pit operation calls for establishing a covering of grass and brush and will forgo the immediate opportunity to grow timber in the future.

The present Cal-Gom operating plan, which contemplates a 20-year life, is now approved for a 3-year period in which approximately 91 acres of land will be disturbed. In the initial mining pilot set-up, there were disclosed values of gold which appeared to weigh in favor of going ahead with the operating plan. Under the operating plan, topsoil which was moved was to be stored and used later to cover the area that was to be excavated. However, Wickman testified, there was no way that the topsoil would cover completely the restored area. Movement of topsoil from other areas was considered but found to be uneconomic.

After describing the Cal-Gom operation, Wickman went on to testify about the timber production on Milender's claims, the Red Rock and Agate One claims. The existing volume of timber on the Red Rock claim is about 14,000 board feet per acre; this is considered a low volume and the claim is considered a poor timber site. It is capable of growing 20 cubic feet of timber annually on an acre of land. The Agate One claim lies in a better timber growing site, presently containing about 30,000 board feet per acre for harvesting. This site was previously logged. An acre of this land is capable of producing 50-80 cubic feet of wood annually or about 16,000 board feet per acre. Wickman said that timber production of that volume every 120 years into the future is the management purpose planned for both claims by FS. He expressed the opinion that if a moderate to large-scale open pit mining operation, similar to the Cal-Gom operation were to occur, it would be very difficult to manage timber on the land afterward.

Churchill, FS soil scientist, testified at length on the types of soils found on the two claims and concluded, as did Wickman, that it would be very difficult, if not economically impossible, to restore either site to viable timber production following an open pit mining operation such as the Cal-Gom operation described by Wickman.

The soils on the Red Rock claim were badly eroded: Churchill testified that the soil on this claim had been "highly impacted by some previous logging" (1985 Tr. 88). While the Red Rock soil was generally of similar quality to that found on the Agate One, Churchill said the productivity of the Red Rock site "has been markedly lowered by surface erosion from previous management practices" (1985 Tr. 89). The Red Rock soils were characterized by Churchill as two types: Deadwood and Kinkel, with Kinkel being the better soil. Because of erosion the land was "less than satisfactory" for timber production (1985 Tr. 92-93).

The Agate One claim was of better soil quality. It was comprised also of Kinkel-Deadwood soils, estimated to be potentially productive of 50-80 cubic feet of wood per acre annually (1985 Tr. 92). Deadwood soils

are shallow and nonproductive, timber production on such soil falling below 20 cubic feet per acre annually, but the presence of the Kinkel type raises the estimate of productive value on the Agate One claim, which contains about 25 percent Deadwood soil. Kinkel-type soil comprises about 60 percent of the area (Churchill Soil Report at 2). Like the Red Rock, the Agate One claim was logged at one time, a circumstance which lowers the present harvest value of this acreage.

Churchill testified, concerning the mineral potential of the Red Rock and Agate One claims, that the geology is basically the same as it is at the Cal-Gom operation, which consists of disseminated gold in loose material. The zones of highest concentration at Cal-Gom range anywhere from 60 to about 140 feet below the surface. Potential mining on the Milender claims would cover approximately 30 to 40 acres compared to close to 100 acres on the Cal-Gom operation. Churchill's opinion about the Milender minerals relied on his feeling that the geological type is the same as in the Cal-Gom operation, and being neither a geologist nor a mining engineer he really could not say how actual mining would be done on the claims. Churchill stated that FS, when it entered into the plan of operations with Cal-Gom, knew that it would completely destroy the forest management program at that point. He said FS decided in that case to sacrifice timber production in favor of mining.

While it is clear that FS established that full-scale placer mining would cause interference with timber management on both Milender claims, it is obvious that the adverse effects which could be anticipated vary substantially between the Agate One and the Red Rock. Nor does the value of the standing timber which is presently merchantable have any relevance to this question. Since these claims were located after the adoption of the Surface Resources Act, 30 U.S.C. §§ 601-615 (1982), FS may harvest the timber prior to commencement of mining operations, and, consequently suffer no loss to the merchantable timber presently found on either claim.

The same, however, does not apply to the growing timber which is not presently merchantable. FS presented testimony that a significant part of the Agate One claim had been partially cut in 1975 (Exh. 17 at 3). While the remaining overstory would be recoverable now, the understory timber would not have reached sufficient maturity to be marketable if a clear cut were undertaken at the present time. Thus, this timber would constitute a total loss. The loss of over 10 year's growth of timber on this land could not be deemed insignificant. Moreover, during any period of full-scale mining development, obviously no timber can be grown on the land. This, too, represents a demonstrable loss.

FS has also argued that, since its experience with the Cal-Gom operation had shown that it would be virtually impossible economically to restore the land to its present condition, timber management would

also be adversely affected on Milender's claims because the land might never be able to be managed for timber production in the future. The dissent agrees with this position when arguing that FS has established placer mining would substantially interfere with timber management.

This contention misapprehends the nature of the order entered by Judge Luoma. Pursuant to the statute, Judge Luoma allowed placer mining "upon the condition that, following placer mining operations, the surface of the claims shall be restored to the condition in which it was immediately prior to those operations." Thus, under the Judge's order, if the claimant wishes to mine, he is obligated, upon completion of mining, to return the land to the condition which existed prior to mining. With respect to the Agate One, since the testimony was unequivocal that the majority of the land was capable of sustained yield at the rate of 50 to 84 cubic feet per acre per year, Milender would be required to return the land to that condition, *regardless* how much it cost. This is true even if these costs, by themselves, made mining prohibitively expensive.

[5] It seems likely that the parties were misled by FS' experience with the Cal-Gom operation. Thus, FS's witnesses recounted the damage which they were unable to prevent and assumed that they were equally fettered with respect to the instant case. In this, they made a fundamental error. There is one crucial difference between the Cal-Gom operation and the two claims here at issue - the Cal-Gom operation is not within a powersite withdrawal, while all of the Agate One and half of the Red Rock are.

With respect to mining operations occurring on otherwise unreserved National Forest lands, FS may well be limited to imposing only those restrictions which do not effectively foreclose otherwise legitimate mining operations, even if to allow mining means that there will be a loss of land from the permanent forest base. But this is so precisely because FS has no general authority to precondition mining plan approval on the return of mined acreage to its pre-mining condition. The Department of the Interior, however, possesses just such authority with respect to lands within powersites under section 2 of the Mining Claims Rights Restoration Act.

While it is true that the Department has no authority to issue an order directing specific operations, it may nevertheless accomplish the same result by requiring that, after completion of operations, the surface be restored to the prior condition. Such a requirement may well compel a mining claimant to forgo certain activities since the cost of ameliorating them will prove excessive. Issuance of an order requiring restoration of the surface to the status quo ante may prevent the most damaging effects of mining precisely because the costs of conducting the clean-up operation would exceed any profit obtained. By requiring restoration, the Department forces the *mining claimant* to absorb certain environmental costs. His right to mine the claim is made subordinate to his obligation to restore the surface upon the completion of mining. If this obligation ultimately precludes

development of the claim, the claimant has no cause for complaint, since he has no right to mine unless and until he agrees to restore the land.

Pursuing this analysis, therefore, there can be no costs attributable to the ultimate destruction of the surface, since Milender is required to restore the surface to the same condition which existed prior to his mining activities. If he finds this too expensive, he may elect not to proceed. But, to the extent that he disturbs any part of the surface, he is required to return it to its pre-mining condition.

Nor must FS simply rely on his assurances that he will reclaim. Section 2 of the Act provides that the Secretary may make such rules concerning bonds as he deems desirable. *See* 30 U.S.C. § 621(b) (1982). Under the terms of 43 CFR 3738.1, should a limited order be issued, as was done here, the mining claimant *is required* to provide a bond, in an amount set by the Administrative Law Judge, for the purpose of assuring surface reclamation after mining is complete. Thus, the costs attributable to the removal of the land from the permanent forest base are not properly computed within the confines of the balancing test mandated by our original *Milender* decision.

Therefore, with reference to the Agate One claim, we find FS has established that there will be a loss in the mortality to those trees which have not yet reached maturity, as well as a loss in annual growth throughout the period in which full-scale mining is occurring. The mining claimant, on the other hand, has provided virtually no information on which one could make a finding that the benefits from mining would outweigh the losses directly attributable thereto. Applying the balancing test required by our first *Milender* decision, Judge Luoma's decision allowing mining on the Agate One claim is reversed.

The Red Rock claim, however, located only partially within the powersite withdrawal, is of marginal commercial timber value, having been damaged by prior logging operations which caused substantial soil erosion.[8] Within the withdrawal, it comprises about 10 acres. Even assuming that the worst case, as exemplified by Cal-Gom, could occur on this claim, therefore, nothing in the record before us shows that interference with timber use on the Red Rock claim is an interference with a substantial interest which would warrant a prohibition of mining operations. The existing volume of timber on that portion of the Red Rock claim which is within the withdrawal is low. This stand is only marginally commercial timberland, owing to erosion and to a low site capacity because of poor soils. FS has classed this land at the lowest commercial timber category. It will not regenerate successfully for silvicultural purposes. Since the order entered by the

[8] FS has not analyzed the effect of mining on the southeastern part of the Red Rock claim. As to mining this portion of the claim, therefore, there has been no objection.

Administrative Law Judge requires that this tract be restored, following mining, "to the condition in which it was immediately prior to those operations," it cannot be assumed that FS will allow the Cal-Gom operation to be repeated here. The land will, therefore, only be affected by mining during the life of the mining operation. In any event, even should the principal regulatory mechanisms for controlling mining operations prove to be somehow ineffective in this instance, a bond must be obtained to ensure that the reclamation ordered by Judge Luoma will take place.

[6] Judge Luoma, however, made no provision for a bond in his decision, although the regulations governing powersite mining operations require the Administrative Law Judge to set a bond. 43 CFR 3738.1. Moreover, a review of the record fails to disclose a foundation for setting the amount of a bond in this case. It is apparent this requirement was overlooked by all parties to this proceeding. Accordingly, we must direct that FS and Milender attempt to reach an agreed-upon amount for a bond. If this cannot be done, another fact-hearing will be required, limited to the question of the proper amount of bond to be furnished.

Following the approach taken in *Mineral Economics*, therefore, we find, as did the Administrative Law Judge, that loss of timber production on the Red Rock claim would not substantially interfere with other uses of the land, because the competing use described by FS, cultivation for commercial timber, was not shown at the hearing to be a substantial competing alternative so as to justify a prohibition of mining. Particularly at this early stage in the mineral development of the Red Rock claim, it is clear that the marginal timber located on this claim does not reasonably justify an order prohibiting placer mining, since, as the Administrative Law Judge found, the possibility that a claim might contain a profitable gold mining opportunity merits exploration of this otherwise marginally productive tract of land. Subject to regulation and reclamation, therefore, Milender should be allowed to explore the mineral value of this claim.

This realistic approach to decisionmaking is the approach outlined by our prior decision in *Milender*. The first consideration in determining whether mining is to be preferred over some other use in any given case is that Congress generally intended to open powersite lands to mining. FS has not submitted sufficient evidence to establish that an order prohibiting mining is necessary for the Red Rock claim. It has, however, established that mining should be prohibited on Agate One. The relative merits of the known competing uses are therefore found to be weighted in favor of the gold mining operation on the Red Rock and in favor of the timber values which have been shown to be more substantial on the Agate One. We conclude, therefore, that the Administrative Law Judge was correct when he concluded that mining

should be allowed, subject to site reclamation, on the Red Rock claim.[9] We reverse his decision as to the Agate One claim, finding that the comparative values of silviculture on that claim outweigh any evidence of the value of the claim for gold. A bond must be posted before mining can proceed on the Red Rock.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge at the hearing on remand is affirmed as to the Red Rock claim and reversed as to the Agate One claim; upon reconsideration of our opinion in *Milender, supra*, that decision is affirmed as explained herein.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

JOHN H. KELLY
Administrative Judge

R. W. MULLEN
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I am in agreement with the result reached in the majority decision, I wish to write separately to underline a conclusion which I believe is necessarily implicit in that decision, viz., the mining claimant bears the ultimate burden of showing by a preponderance of the evidence that benefits resulting from placer mining outweigh the injuries caused by mining to other uses of the land. This holding is, of course, directly contrary to a subsidiary holding of our original decision in this case. *See United States Forest Service* v. *Milender*, 86 IBLA 181, 204, 92 I.D. 175, 188 (1985).

Thus, in our earlier decision in *Milender*, the Board held that "the party who seeks an order prohibiting mining" is required to prove by a preponderance of the evidence that such an order is necessary. *Id.* No support was cited for this proposition other than a general reference to the intent of section 2 of the Act of August 11, 1955, 69 Stat. 682, *as*

[9] Since three members of the Board feel there is an issue in this case concerning the manner of the allocation of the burden of proof which warrants separate emphasis, it should be noted that we agree with the analysis of that question stated in the concurring opinion. The rule as stated by the separate opinion is the rule generally applied by the Board and correctly describes the approach taken by this opinion. Since it is apparent that the dissenter also does not quarrel with this aspect of the decision as written, there is complete unanimity in the Board on this matter.

amended, 30 U.S.C. § 621 (1982), to open up powersite land to mining. I perceive two problems with this analysis. First of all, the Act of August 11, 1955, exhibits two discrete intents. One *was* to open up some powersite lands to mining. The other, however, as shown by Judge Irwin in his dissent, was to protect other uses presently occurring on powersite lands. Nothing in the Act supports the implicit assertion in our original decision in *Milender* that congressional desire to open up lands closed to mining was intended to predominate over its desire to protect other uses of the land from substantial interference.

Second, under the structure of the Act, hearings are not held in response to a request from a "party who seeks an order prohibiting mining." On the contrary, the Act clearly vests the authority to initiate a hearing in the Secretary of the Interior whenever he wishes to determine *whether* placer mining would substantially interfere with other land uses. 30 U.S.C. § 621(b) (1982). While other individuals or entities such as the Forest Service may request that the Secretary issue such a notice, only the Secretary, through his authorized delegate, can initiate the statutory process. In this regard, it would seem to me that there was no justification for departing from the well-recognized procedures with which the Department regularly conducts contest hearings: The Government is required to put on a prima facie case that placer mining will substantially interfere with other uses of the land and then the burden devolves to the claimant to overcome this showing by a preponderance of the evidence. What evidence may be used to overcome this showing is, of course, at the heart of the present appeal. But I think it imperative to keep in mind that, once the Government shows substantial interference with a use, it is the mining claimant's obligation to overcome this showing and, if he or she is unable to do so, for any reason, placer mining operations may properly be prohibited. [1]

The question, then, is whether, for each of the two claims, the Forest Service has shown that substantial interference with timber management practices will be caused by full-scale placer mining, conducted in accordance with normal practices, subject to legal and regulatory restraints. [2] If the answer to this question is in the

[1] I also agree with the majority rationale for rejecting the dissent's contention that if substantial interference with *any* existing use is shown, placer mining must be prohibited. Moreover, the interpretation espoused by the dissent is clearly more restrictive than that which has been applied by the Forest Service. Thus, at the second hearing, in order to dispel any misconception as to its operations under the Act of Aug. 11, 1955, *supra*, testimony was presented showing that, with respect to 44 notices of placer locations in powersite withdrawals, which the Forest Service Region 5 had received during the period from June 1, 1984, through May 31, 1985, the Forest Service had recommended that a hearing be held in only six instances. *See* 1985 Tr. 17-19; Exh. 19. It seems obvious from these statistics that the Forest Service was not mechanistically challenging every filing, but rather was engaged in its own weighing process, a process which the dissent suggests is contrary to congressional intent.

[2] Inasmuch as the Board's prior decision in this case expressly limited the hearing on remand to the effect of full-scale placer mining operations on use of the land for timber management (*see United States Forest Service* v. *Milender*, *supra* at 208, 92 I.D. at 190), no further testimony was presented as to the impact of placer mining on either visual resource values or potential degradation of the North Fork of the Feather River. Indeed, a review of the hearing clearly indicates that both Judge Luoma and counsel for the Forest Service were of the opinion that the Forest Service was absolutely precluded from introducing further testimony on either of these two questions. *See* 1985 Tr. 6-7. Since the Forest Service neither petitioned for reconsideration of that holding nor reargued its original contentions in the context of this appeal, I must agree with the majority opinion that, in this case, only the impact of placer mining on timber management is properly before the Board.

affirmative, the issue then becomes whether appellant has established that the benefits from placer mining outweigh the detriments engendered thereby. Inasmuch as I agree with the majority that the quality of the evidence from the point of view of the initial showing by the Forest Service differs substantially between the Agate One and the Red Rock, I will review the two claims separately.

With respect to the Agate One placer claim, the Forest Service presented testimony showing that the Agate One presently contains approximately 24 to 30 mbf per acre and that the site is capable of growing 50 to 80 cubic feet per acre per year (1985 Tr. 61, 88). Thus, District Ranger Mike Wickman estimated that, based on past timber harvests and the present amount of merchantable timber on the site, the land within the Agate One was capable of producing 31 mbf per acre every 120 years into the indefinite future (1985 Tr. 68).

Zone Soil Scientist Denny Churchill testified as to a soil survey he had conducted on the Agate One. *See* 1985 Tr. 86-93; Exh. 21, Attachment 4. Churchill noted that there were two dominant soil types on the claim, the Kinkel and the Deadwood. He stated that the Kinkel soil, which he described as "fairly well-developed deep soils, fairly productive soils" was the dominant soil on the Agate One (1985 Tr. 88). The Kinkel soils had the potential of sustaining an annual growth of 50-84 cubic feet per acre and carried a Forest Service Site Class 5 rating, meaning it was to be managed for commercial forest production. His report, however, did note that Deadwood soils, which he described in his testimony as "shallow, rather rocky soils * * * essentially nonproductive (1985 Tr. 88)," made up approximately 25 percent of the soils within the claim. Churchill noted that the areas where the Deadwood soils predominated, which were capable of maintaining a growth rate less than 20 cubic feet per acre per year and were therefore rated as Site Class 7, would be considered noncommercial forest land under the National Forest Management Act (1985 Tr. 92). But, overall, Churchill concluded that the land within the Agate One had good to excellent potential for regeneration after a timber harvesting, at least insofar as the Kinkel soils were concerned (1985 Tr. 93). Churchill subsequently noted that Site 5 land constituted 40 percent of the 900,000 acres in the entire Plumas National Forest and over 60 percent of the total land base in the Greenville Ranger District, and encompassed the majority of the land actually managed for commercial forest production in the Plumas National Forest (1985 Tr. 118).

In discussing the effects that full-scale placer mining would have on use of the land within the Agate One claim for commercial timber purposes, both Wickman and Churchill referred to the nearby Cal-Gom operation, also known as the Goldstripe mine, a large open-pit mine located approximately 2 miles from the claim, but totally outside the powersite withdrawal. The plan of operations for this mine had been

approved by the Forest Service pursuant to its surface management regulations (*see generally* 36 CFR Part 228). Nevertheless, even though mining activity was proceeding in a prudent, responsible manner, and appropriate reclamation activities were being pursued, it was clear that the disturbed area, which was already scheduled to aggregate approximately 91 acres, would not be returned to commercial forest production. Indeed, Wickman testified that there would be insufficient topsoil to fill the 21 acres of open pits, and that, while Cal-Gom was going to replace the stored topsoil on the 51 acres being used for overburden dumps and residue disposal, the Forest Service had determined that timber production in the area would not be possible for "some time," without significant expenditures by the Forest Service (1985 Tr. 48-9). [3]

Wickman explained that the Forest Service had approved the plan of operations, even though it realized the timber resource loss which would occur, because of its view that it could not impose conditions on mining, beyond those necessary for compliance with statutory environmental or water quality requirements, if those conditions, because of the expenses necessitated thereby, would make the mining economically infeasible. *See* 1985 Tr. 50-52. Thus, the Forest Service expected to absorb a significant loss in timber production capability within the area of the Cal-Gom operations, even though the operations were being conducted in a responsible manner.

Assuming that similar development would be undertaken on the Agate One claim,[4] Wickman asserted that significant interference with existing timber production use would occur (1985 Tr. 72). In this conclusion, he was supported by the testimony of Churchill, who was the Forest Service's liaison with Cal-Gom and, therefore, had first-hand knowledge of the adverse impacts associated with its open-pit mining activities (1985 Tr. 110).

In their testimony related to that part of the Red Rock placer claim which was located within the powersite withdrawal, [5] both Wickman and Churchill noted that the timber-growing potential of the lands within that claim were significantly below that of the lands within the Agate One. This difference was primarily occasioned by the fact that all of the soils within the Red Rock exhibited severe erosion, much of which was directly attributable to past logging practices under Forest Service contracts (1985 Tr. 88-89, 118-19). As a result, the Kinkel soils within the claim carried a Class 6 rating, meaning they were capable of producing only from between 20 to 49 cubic feet per acre per year, the lowest commercial rating. Churchill noted that "the productivity of

[3] Thus, Churchill testified that insofar as the areas disturbed by Cal-Gom were concerned "[o]ur main point is to simply stabilize disturbed areas so that they create no other impacts, no off-site adverse impacts, and that is usually only in terms of regenerating, let's say, annual or perennial grasses. That is as best as we can do" (1985 Tr. 94).

[4] In this regard, it is important to note that the Forest Services' witnesses were not testifying that the mineral deposit located within the two claims was comparable with that being developed by Cal-Gom. On the contrary, Churchill expressly testified that he had seen no specific data related to the mineral potential of either the Agate One or the Red Rock claims (1985 Tr. 97, 108-110).

[5] Approximately half of the Red Rock claim was located outside the powersite withdrawal and, accordingly, was not covered by the proceedings (1983 Tr. 32, Exh. 3).

this site has been markedly lowered by surface erosion from previous management practices" (1985 Tr. 89). Indeed, in discussing clear-cut harvesting of the timber on the claims, he stated that while the likelihood of successful regeneration on the Agate One would be good to excellent, "it would be less than satisfactory on the Red Rock claim because of previous damage that has occurred on that site" (1985 Tr. 93).

While I think that it is clear that the Forest Service established that full scale placer mining would cause interference with timber management on both claims, I also think it is obvious that the adverse effects which could be anticipated vary substantially between the Agate One and the Red Rock.

Thus, with respect to the Agate One, while I agree with the majority that, under the restriction which Judge Luoma imposed, namely that the surface of the land be restored to its pre-mining condition, the Forest Service will not suffer any loss attributable to the removal of the land from the permanent forest base, I also agree with the majority that the Forest Service has established that it will suffer an increase in the mortality to those trees which have not yet reached maturity as well as the loss of a substantial amount of annual growth throughout the period of full-scale mining. The mining claimant, on the other hand, has provided virtually no information on which one could predicate a finding that the benefits from mining would outweigh the losses directly attributable thereto.

Thus, as the majority notes, the claimant repeatedly admitted that further prospecting was necessary in order to determine whether any development was warranted. While he had submitted assay results at the first hearing (Exh. A), he was unable to say which ones came from the five claims at issue, much less which specific claims were related to which assays (1983 Tr. 153-55). Moreover, his subsequent tender at the second hearing of Master Title plats for Ts. 26, 27 N., R. 8 E., Mount Diablo Meridian (Exhs. B and C), which depict a number of mineral surveys and patented mineral entries in the two townships can scarcely be said to establish that the specific land within his claim is mineral in character, to say nothing of showing the specific values which would outstrip the losses absorbed by timber management should full-scale mining occur. In short, I cannot agree with the decision below that application of the balancing test mandated by our previous *Milender* decision supports permission to mine the Agate One. Accordingly, I agree with the majority that Judge Luoma's decision permitting placer mining on the Agate One claim must be reversed.

I find the situation with respect to the Red Rock claim much more problematic. While the paucity of evidence on behalf of the benefits derived from mining which characterized the Agate One is also manifested with respect to this claim, I found the Forest Service's evidence of damage much less convincing. In fact, my reading of the

record supports the view that, while the land within the Red Rock claim is presently managed as commercial forest land, it would be unlikely to retain such a rating after the timber now standing thereon was harvested. Such being the case, it is difficult to perceive exactly how timber management would be adversely affected by full-scale mining, which, itself, would not occur unless there were adequate indications that mining would be sufficiently remunerative not only to support a mining operation but to recover the cost of returning the surface to the condition it was in prior to mining. Moreover, while I would not necessarily consider damage to 10 acres to be a matter of insignificance, I do believe the small acreage involved in this claim, coupled with the Forest Service's evidence, is a factor which weighs on allowing appellant's mining activities to proceed, subject to the requirement of ultimate surface restoration. As a result, I find myself in agreement with the majority that, subject to surface restoration, placer mining may be allowed on the Red Rock claim.

Since I believe that the majority decision has correctly allocated the burden of proof, and in view of my agreement with the majority's conclusions concerning the legal and factual issues presented by this appeal, I concur with its disposition of the instant case.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

With this decision the Board disfigures the Mining Claims Rights Restoration Act of 1955.

Although that Act was designed to open public lands that were withdrawn or reserved for power development or powersites to mineral development under the general mining laws, [1] it did so "subject to conditions and procedures." [2] One of the conditions is applicable to the owner of any unpatented mining claim located on land described in the Act, *i.e.*, the requirement for filing a copy of the notice of location within 60 days of location. [3] One of the conditions, however, applies only to a person who has located a placer mining claim. [4] This

[1] S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S. Code Cong. and Ad. News 3006. One reason for the interest in the legislation is indicated in the explanation provided for H.R. 3915, the similar bill considered by the 83rd Congress: "Included in the minerals the location and patenting of claims for which would be authorized by this measure on lands now withdrawn is uranium. Large deposits of uranium are believed to exist in several areas set aside for a power site." S. Rep. No. 1532, 83rd Cong., 2d Sess. (1954) at 1.

[2] S. Rep. No. 1150, *supra*, note 1, at 3006.

[3] *See* 30 U.S.C. § 623 (1982).

[4] "The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after filing of a notice of location pursuant to section 623 of this title." 30 U.S.C. § 621(b) (1982).

condition is the subject of this appeal. It "limits the effect of entry * * * under Federal mining laws" by giving "to the Secretary of the Interior authority to hold public hearings to determine whether placer mining operations would be detrimental to other uses of the lands involved." [5]

The Congress implemented its concern about the effects of placer mining with a special procedure. It prohibited the locator of a placer claim under the Act from conducting mining operations within 60 days of filing a copy of the notice of location with the district land office of the land district in which the claim is situated. [6] If, within this time, the Secretary notifies the locator of his intention to hold a public hearing "to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim," then mining operations on the claim are further suspended until the hearing has been held and the Secretary has issued "an appropriate order." [7] Such an order

> shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. [8]

This language of this provision of the Act originated with the Department of the Interior. Assistant Secretary Orme Lewis, in a July 18, 1955, letter to Senator Murray, chairman of the Committee on Interior and Insular Affairs, while agreeing fully "with the need for encouraging mineral development in public-land areas not now subject to mining location," observed:

> The various provisions in the bill which are designed to protect these lands for other uses appear well justified. Powersite lands are often quite valuable for other surface uses. For example, many of the lands withdrawn for power-site purposes are timbered lands situated in national forests. The timber on these lands usually constitutes an integral part of large timber tracts which should be managed on a sustained yield basis. * * * [I]t is particularly important that the Secretary of the Interior be advised immediately when placer claims are initiated since the most serious conflict between mining activities and other land uses occurs when placer mining and dredging operations are involved. The mining of monazite sands by dredging in flat meadow areas has recently caused serious problems in the West because such operations interfere with recreational, grazing, and scenic values of these lands. [9]

The language of the Assistant Secretary's proposed amendment was adopted verbatim by the Congress. [10] The Board has previously said:

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[5] S. Rep. No. 1150, *supra*, note 1, at 3006-7.

[6] 30 U.S.C. § 621(b) (1982).

[7] *Id.*

[8] *Id.*

[9] S. Rep. No. 1150, *supra*, note 1, at 3010-11.

[10] See Conference Report 1610, July 30, 1955, Statement of the Managers on the Part of the House, *id.* at 3013. In explanation, the Managers stated:

"In addition, language has been adopted in the form of a new subsection added to section 2 affecting placer-mining claims which may be located on lands opened to mining entry by H.R. 100. The House managers agree that the

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Inasmuch as such reports represent views of senior officials of this Department which served as the basis for legislative action, this Board is not generally disposed to apply enacted legislation in a manner inconsistent with such statements. * * * Such a conclusion is especially compelling where, as here, Congress enacted *verbatim* the statutory language proposed by the agency. [Italics in original.]

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53, 77, 94 I.D. 394, 408 (1987). [11]

The Board's decision, however, applies section 621(b) of the Act in a manner that is inconsistent with the views of the Department when it was proposed and with the intent of the Congress when it was enacted.

If a hearing is held under that section, the majority says:

[N]othing in the Act links any available alternative [order] to a particular finding, and any limitations placed upon the proper exercise of Secretarial discretion exist only to the extent legal constraints require reasonableness in actions affecting the public lands. Since the Act does not require any particular result, the third, and most liberal alternative to the miner, a general permission to engage in placer operations, is always a possibility.

(Majority Opinion at 159). [12]

I disagree. The three alternative orders the Congress provided in section 621(b) authorize either a prohibition of or a permission to conduct placer operations on the condition the lands are restored to their previous condition afterwards if it is shown at the hearing that there are other land uses that placer mining would substantially interfere with, and a general permission if it is not. [13] Although the Congress opened powersite lands to mining generally, it was concerned about the "serious conflict [that] frequently arises between mining activity and other land uses when placer mining and dredging operations are involved," and therefore provided that such operations be subject to special procedures and conditions. If the evidence presented at a hearing demonstrates no serious conflict, then a general

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Secretary of the Interior should be advised immediately when placer claims are initiated since serious conflict frequently arises between mining activity and other land uses when placer mining and dredging operations are involved, as this amendment provides. The language adopted would give the Secretary authority in the case of placer-mining claims to hold public hearings to determine whether placer-mining operations in the areas would be detrimental to other uses of the lands." *Id.*

The language of this provision has only been amended to allow for the use of certified mail in providing notice to the locator of the Secretary's intention to hold a public hearing. Section 1(27), P.L. 86-507, June 11, 1960, 74 Stat. 202.

[11] "[C]ourts have generally accepted such appended reports and letters from officials of this Department as evidence of legislative intent. *See e.g., Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 50, 55-56 (1983); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 407 n. 1 (1917); *United States* v. *Union Oil Co.*, 549 F. 2d 1271, 1277 (9th Cir.), *cert. denied sub nom. Ottoboni* v. *United States*, 434 U.S. 930 (1977). So has this Board. *E.g., Western Nuclear, Inc.*, 35 IBLA 146, 157, 85 I.D. 129, 135 (1978), *aff'd, Watt* v. *Western Nuclear, Inc., supra; Cecil A. Walker*, 26 IBLA 71, 76 (1976)." *Id.*

[12] The language of H.R. 3915 in the 83rd Congress did not contain this alternative, but provided:

"[M]ining operations on such claim shall be further suspended until the Secretary holds the hearing and issues an appropriate order prohibiting or permitting such operations or permitting such operations upon the condition that, following such operations, the surface of the claim shall be restored by the locator substantially to its condition immediately prior to such operations." S. Rep. No. 1532, *supra*, note 1, at 5.

The report of the Senate Committee on Interior and Insular Affairs explained:

"The Secretary can then prohibit mining operations altogether, or may permit them only on condition that the locator file a bond or undertaking to restore the surface of the land substantially to its condition prior to such mining operations, if the Secretary deems the public interest to require such action." *Id.* at 2.

The general permission alternative was added to the bill enacted by the 84th Congress to authorize mining in accordance with existing laws, without posting a bond, where the hearing revealed that placer mining operations would not substantially interfere with other uses of the land. *See* note 13, *infra*.

[13] A general permission to engage in placer mining operations means they would be "carried out under existing laws regulating such activities." S. Rep. No. 1150, *supra*, note 1, at 3006; *U.S. Forest Service* v. *Walter D. Milender*, 86 IBLA 181, 92 I.D. 175 (1985).

permission to engage in placer mining operations may be granted. If, however, the evidence presented at the hearing demonstrates that placer mining operations would cause such a conflict, *i.e.*, would substantially interfere with other land uses, the conflict must be resolved by requiring the restoration of the lands *or* by prohibiting the operations. To do otherwise ignores the conditions under which the Congress authorized placer mining operations. If there is evidence of substantial interference, it would be outside the range of choices available to the Secretary to grant a general permission anyway, and it would be arbitrary and capricious, an abuse of discretion, and not in accordance with law to do so. 5 U.S.C. § 706(2)(A) (1982); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-16 (1971). *See Hurley* v. *United States*, 575 F.2d 792 (10th Cir. 1978). That is, it would violate "legal constraints [that] require reasonableness in actions affecting the public lands."

The Board adopts an approach to decisionmaking under section 621(b) that requires the use of a balancing test. Central to this approach "is the concept that competing uses must be substantial if they are to be used to prohibit placer mining" (Majority Opinion at 160). The majority says "Congress intended that placer mining should, in general, be permitted," and finds that an order granting general permission to engage in placer mining would be appropriate "when the competing surface use has less significance than a proposed placer mining operation." *Id.* at 161. Elsewhere the majority says "[i]f other uses than powersite use are insubstantial, there cannot be a substantial interference with such uses." *Id.* note 1 at 158. "The question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes," according to the majority. *Id.* at 220.

The Congress intended that mining, in general, be permitted on powersite lands, but limited the circumstances under which placer mining could be. The Act provides for a determination "whether placer mining operations would substantially interfere with other uses of the land included within the placer claim," not whether those uses are substantial or whether they are less significant or valuable than the proposed placer operations. Granting a general permission to engage in placer operations in the face of evidence demonstrating other land uses would be substantially interfered with would be outside the scope of the Secretary's authority and would therefore be arbitrary and capricious. *Citizens to Preserve Overton Park* v. *Volpe, supra.*

The majority observes that, because 43 CFR 3738.1 requires that a bond be posted if an order conditioning permission to conduct operations on restoration of the lands involved is issued, "there can be no costs attributable to the ultimate destruction of the surface" (Majority Opinion at 169). Its "calculation" of relative values results in

an application of the balancing test that disallows placer mining on the Agate One claim because the locator did not provide sufficient information to overcome the Forest Service's showing of the loss of immature trees that could not be marketed before mining, and of annual growth during the mining operation. *Id.* at 169. Because the land within the Red Rock claim "is of marginal commercial timber value," however, the majority concludes that "nothing in the record before us shows that interference with timber use * * * is a substantial interest which would warrant a prohibition of mining operations," and allows placer mining subject to restoration of the surface and the accompanying bond. *Id.* [14]

The majority's decision concerning the Red Rock claim contradicts the conclusion of the Administrative Law Judge, based on the evidence at the hearing on remand, that the kind of placer operation that would be conducted "would effectively take the disturbed acreage out of timber production for the foreseeable future, in spite of best efforts to restore the surface to its present conditions." [15] Just as it would be arbitrary and capricious to grant a general permission where the evidence shows placer mining operations would substantially interfere with other land uses, it is arbitrary and capricious to authorize such operations where the evidence shows that restoring the surface of the claim to the condition in which it was immediately prior to those operations is not possible. Where, as here, the evidence shows that this alternative will not avoid substantial interference with other land uses, the only order the Secretary is authorized to issue is one prohibiting placer mining operations.

The majority does not define what other land uses it regards as substantial or significant. In this case the lands are precisely the kind cited by the Department in its letter to the Congress as an example of those "quite valuable for other surface uses," *i.e.*, "timbered lands situated in [a] national forest * * * which should be managed on a sustained yield basis," and they are so managed by the Forest Service. Even so, and even where the worth of the use could be measured in relatively objective terms, the majority finds this use is not substantial enough on one claim involved in this case, and implies that it might well have found the same for the other claim if the locator had provided a little more information about the benefits from the

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[14] The majority's calculation with respect to this claim says nothing about the values of the proposed placer mining. The concurring opinion observes: "[T]he paucity of evidence on behalf of the benefits derived from mining which characterized the Agate One is also manifested with respect to this claim." *Supra* at 175.

[15] Decision on Remand dated Sept. 27, 1985, at 11; *see* Exhibit G 21, report of Mike Wickman, District Ranger, Greenville Ranger District, Plumas National Forest, dated June 25, at 2-3:

"*Impacts of Mining on the Timber Resource*

"We believe that wherever topsoil is stripped on these claims in conjunction with mining, the producitivity of the site will be reduced to the extent that it will no longer be commercial timerland (productivity will drop below 20 ft.^{3}/acre/year).

"Productivity would be impacted due to changes in the physical and chemical characteristics of the site. This would hold true even if soil were stripped and stockpiled for eventual use in reclaiming the site (as would be a provision of the Plan of Operations). Soil handled in this way has reduced nutrient levels. Bulk density is also impacted. The main obstacle to restoring commercial timber site is rooting depth. Following reclamation, the site would be characterized by a thin soil mantle sitting on top of bedrock. Such a situation does not provide sufficient rooting area to maintain productive timberland." *See also* Tr. 47-49, 51-52, 70-72, 94-97, 100, 110.

proposed placer mining. Nor does the majority consider the "recreational, grazing and scenic values of these lands," or their other values, under the balancing approach. It does not because the scope of the hearing on remand did not allow for evidence on those values. How will such less tangible values be weighed in the balance where they are involved?

I agree that the Congress intended to restore rights to locate mining claims, as the name of the Act indicates. However, the Congress also recognized that certain land uses and land-use values cannot be restored after placer mining and sought to protect them. In its apparent concern to prevent the frustration of one purpose of the Act in some future case by the assertion of some fabricated use or imaginary value, the Board ignores the other purpose of the Act and sacrifices silviculture on national forest lands involved in this case.[16] The discretion that the majority says is afforded under section 621(b) exceeds the scope of the authority the Congress delegated. The result in this case is an abuse of the discretion that is delegated and is arbitrary and capricious. The balancing approach the majority adopts offers neither objectivity nor methodology and makes it impossible to predict how land-use values will be weighed against proposed placer mining values in future cases.

The Congress charted a straightforward course: Are there other land uses? If there are not, no hearing is necessary. If there are, will placer mining substantially interfere with them? If not, it may be granted a general permission. If so, can the use be restored? If it can, placer mining may be permitted on the condition the land is restored. If it cannot, it must be prohibited. The Board discards both the chart and the compass.

I dissent.

WILL A. IRWIN
Administrative Judge

NATIONAL MINES CORP. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

104 IBLA 331 Decided: *September 23, 1988*

Petition for discretionary review of a decision of Administrative Law Judge Joseph E. McGuire denying petition for review of notices of violation and assessing civil penalties. CH 5-19-P.

Affirmed in part and affirmed as modified in part.

[16] When the Act was enacted there were approximately 3½ million acres of national forests located within power withdrawals. H. Rep. No. 86, 84th Cong., 1st Sess. (1955) at 6.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

OSMRE properly issues a notice of violation for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that water used to control dust on the permittee's access road was carrying suspended solids in excess of the allowable limit set by 30 CFR 717.17(a)(3) off the permit area and into a river.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness

An assignment of 15 points for probability of occurrence is proper where the violation cited is failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow and the evidence shows that suspended solids in amounts substantially greater than allowable limits were being carried off the permit area and into a nearby river.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness

The Board will reduce the points assigned for extent of potential or actual damage for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that, while damage would extend outside the permit area, there was no evidence as to the extent or duration of potential or actual damage.

4. Board of Lands Appeals--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

When the Board of Land Appeals reduces the number of points assigned for a violation to fewer than 30, and that violation is not contained in a cessation order, in accordance with 30 CFR 723.12(c), the assessment of a civil penalty is discretionary and the factors in 30 CFR 723.13(b) are to be taken into consideration.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

As a general rule, where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed by the permittee's operations, the discharge from the sedimentation pond must meet the effluent limitations of the regulations. However, where a person charged with a violation of the effluent limitation can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations, the person may escape responsibility for the violation. However, a failure to provide such evidence will result in an affirmation of the violation.

APPEARANCES: Joseph M. Karas, Esq., and Chester R. Babst III, Esq., Pittsburgh, Pennsylvania, for petitioner; Lynne N. Crenney, Esq., Office of the Field Solicitor, Pittsburgh, Pennsylvania, and Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

September 23, 1988

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

By order dated November 7, 1986, the Board granted the petition of the National Mines Corp. (National Mines) for discretionary review of a September 11, 1986, decision of Administrative Law Judge Joseph E. McGuire denying National Mines' petition for review of notices of violation (NOV) Nos. 82-1-36-2 and 82-1-36-3 issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) and assessing civil penalties in the amount of $3,600.

This case was initiated when OSMRE inspector Thomas F. Koppe issued the two NOV's to National Mines on April 16, 1982, for violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *as amended*, 30 U.S.C. §§ 1201-1328 (1982), at National Mines' underground mining operations, known as the Isabella Mine, in Fayette County, Pennsylvania. The NOV's were issued following an inspection of the Isabella Mine on March 29 and 31, 1982, by Koppe. He issued NOV No. 82-1-36-2 for failure to maintain two roads, the access road from the scalehouse to the preparation plant and the access road to the scrap yard, so as to prevent additional contributions of suspended solids to the streamflow in the Monongahela River, in violation of 30 CFR 717.17(j)(1) (Respondent's Exh. 27).

Koppe issued NOV No. 82-1-36-3 for discharges from sedimentation pond 004 for the active refuse pile which failed to meet the numerical effluent limitations for pH and total manganese, in violation of 30 CFR 717.17(a) (Respondent's Exh. 39). In each case, the NOV required certain abatement measures to be undertaken immediately and completed by June 16, 1982.[1] Subsequently, on June 17, 1982, Koppe modified the two NOV's to require completion of abatement by July 16, 1982. *See* Respondent's Exhs. 28, 40. Koppe granted the extensions of time in order to permit a subcontractor hired by National Mines to complete the necessary work.

By notices dated April 30, 1982, the Assessment Office, OSMRE, informed National Mines that OSMRE proposed to assess civil penalties of $1,500 and $1,400, for NOV No. 82-1-36-2 and NOV No. 82-1-36-3, respectively. *See* Respondent's Exhs. 29, 41.

On October 7, 1983, National Mines filed a petition for review of the proposed assessment of civil penalties in connection with the two NOV's, which petition was amended on February 22, 1984.[2] In

[1] NOV No. 82-1-36-2 required National Mines to prevent additional contributions of suspended solids to the Monongahela River by, among other things, constructing sumps, redirecting runoff to existing ponds and/or cleaning and removing silt from ditch lines. NOV No. 82-1-36-3 required National Mines to prevent discharges exceeding 4.0 milligrams per liter (mg/1) total manganese and a pH range not greater than 9.0 and less than 6.0 by, among other things, installing, operating, and maintaining adequate treatment facilities.

[2] As amended, National Mines' petition for review challenged the amount of the proposed assessments, asserting that OSMRE had assigned an incorrect number of penalty points and failed to assign any good faith points. The petition also challenged the fact of the violation cited in NOV No. 82-1-36-3 on the basis that the violative discharges from the sedimentation pond were not caused by National Mines' active refuse pile, but prior surface mining operations of the Luzerne Coal Corp. (Luzerne) on reclaimed land adjacent to the permit area.

conjunction with filing its petition for review, National Mines paid the proposed civil penalties. On September 18, 1985, Judge McGuire conducted a hearing on the petition. Following the close of the hearing, Judge McGuire issued his September 1986 decision from which National Mines (hereinafter petitioner) has been granted a discretionary right of review, pursuant to 43 CFR 4.1270. For the sake of clarity, we will review the two violations cited by OSMRE separately, both as to the fact of violation and the proper civil penalty, if any.

Failure to Maintain Access Road

At the time of his March 29 inspection, OSMRE Inspector Koppe testified that he observed turbid water entering the Monongahela River. He testified that he determined the water was originating from a 4-inch hose laid along the side of the access road near the scalehouse and that the purpose of the system was to water down the road to control fugitive dust (Tr. 29-30, 82, 85-86). Koppe testified that he traced the water down the access road towards the preparation plant, around a bend in the road into a ditch along the access road to the scrap yard, from the ditch into a culvert which passed under the access road, from the culvert into an unnamed tributary running parallel to the river, and from that unnamed tributary into another unnamed tributary which then flowed into the river (Tr. 31). The flow of water is indicated in green on a sketch map of the Isabella Mine prepared by Koppe (Respondent's Exh. 1) and is documented in photographs taken by Koppe (Respondent's Exhs. 2-16). *See* Tr. 32-40.

Koppe also testified that he took four water samples, using the grab method (Tr. 30, 41). Sample No. 1 came from the ditch along the access road to the scrap yard (Tr. 35; Respondent's Exh. 17). A test revealed it contained 6,785 mg/l of suspended solids (Tr. 53; Respondent's Exh. 23). Koppe took sample No. 4 from the first unnamed tributary where it intersected the second unnamed tributary (Tr. 38; Respondent's Exh. 20). It tested at 759 mg/l of suspended solids (Tr. 57; Respondent's Exh. 26). Sample Nos. 2 and 3 were taken, respectively, where the second unnamed tributary entered the river and upstream in the river from that point (Tr. 39; Respondent's Exhs. 18, 19). They contained 343 mg/l and 16.1 mg/l of suspended solids, respectively (Tr. 56-57; Respondent's Exhs. 24, 25). Koppe testified that, following receipt of the test results, he issued NOV No. 82-1-36-2 during an April 16, 1982, followup inspection (Tr. 58).

Petitioner offered the testimony of James R. Bearden, who at the time of issuance of the NOV was a mining engineer employed by petitioner. Bearden testified that the access road near the scalehouse was maintained by periodic scraping and, when necessary, a "sprinkling type system" (Tr. 151). Bearden described the system as consisting of a 1-inch hose laid along the side of the road with a flattened pipe or nozzle inserted in the end which sprayed water on the road, the hose being connected to a fire hydrant which was just barely

opened[3] (Tr. 151-53). Bearden testified that the system was unmanned (Tr. 177), but that it worked "fairly well" to control fugitive dust (Tr. 154). He also testified that OSMRE's water samples could have been influenced by drainage other than that which originated at the hose, viz., drainage from sedimentation pond 005 which entered the first unnamed tributary, as well as drainage from sedimentation pond 004, drainage around that pond, and drainage from the town of Isabella, all of which entered the second unnamed tributary (Tr. 158). Following receipt of the NOV, Bearden testified that petitioner ceased using the sprinkler-type system and, on June 15, 1982, began to employ, as an alternative means of controlling fugitive dust, a water tank mounted on a truck which dispersed water on the access road (Tr. 159-62).

After reviewing all of the evidence adduced at the hearing with respect to NOV No. 82-1-36-2, Judge McGuire concluded that the NOV was properly issued because petitioner had failed to maintain the access road so as to prevent the additional contribution of suspended solids to streamflow. Judge McGuire particularly relied on the fact that OSMRE's sample Nos. 1, 2, and 4 showed suspended solids in water running down from the access road near the scalehouse and entering the Monongahela River, in amounts which exceeded the maximum allowable concentration set forth in 30 CFR 717.17(a)(3), *i.e.*, 70 mg/l (Decision at 5-6).

[1] The regulation which petitioner was cited as violating is 30 CFR 717.17(j)(1), which provides that access roads in the case of underground mining

> shall be constructed, maintained, and reclaimed so as to the extent possible, using the best technology currently available, prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable State or Federal law.

We conclude that the evidence clearly establishes that petitioner violated this regulation. Petitioner's sprinkler-type system in use on March 29, 1982, was part of its maintenance activities undertaken on the access road near the scalehouse. Koppe testified that turbid water could be visually traced from the hose laid along the side of that road eventually into the Monongahela River. *See* Tr. 29-30. Water sample No. 1 taken in the drainage ditch along the access road to the scrap yard and sample No. 4 taken from the first unnamed tributary just before its intersection with the second unnamed tributary both exhibited high concentrations of suspended solids, far in excess of the allowable limit.[4] Thus, it is clear that solids picked up by the water

[3] Koppe was asked whether he could recall a nozzle at the end of the hose that he observed. He replied: "Not offhand" (Tr. 82).

[4] Petitioner contends that sample No. 1 is suspect because it was taken a significant distance from the receiving stream and, therefore, does not reflect any "settling out" of suspended solids which would occur before the runoff reached the stream (Petitioner's Brief at 9). However, the amount of settling out which occurred by the time the runoff

Continued

from the hose were being carried into the streamflow of the second unnamed tributary in excessive quantities.

Petitioner maintains that, because OSMRE offered no evidence of upstream samples which would establish the background concentration of suspended solids in the second unnamed tributary (*see* Tr. 93-94), OSMRE failed to prove that water from the hose was contributing additional suspended solids to the river[5] (Petitioner's Brief at 9). It is true that OSMRE introduced no upstream samples; nevertheless, exhibit 13 is a photograph taken March 29, 1982, of the intersection of the two tributaries. It shows the second unnamed tributary as clear, while the tributary carrying the water from petitioner's access roads is visibly turbid. The turbid water was carried into the river and is reflected in an excessive concentration of suspended solids in sample No. 2 (343 mg/l), which is not accounted for by the background level in the river, as reflected in sample No. 3 (16.1 mg/l). Given OSMRE's exhibit 13, the failure of OSMRE to submit an upstream sample from the second unnamed tributary is not significant.

Thus, we conclude that the evidence establishes that petitioner's access road was not maintained so as to prevent additional contributions of suspended solids to streamflow, in violation of 30 CFR 717.17(j)(1). *See Island Creek Coal Co.*, 1 IBSMA 285, 86 I.D. 623 (1979). Accordingly, we affirm Judge McGuire's September 1986 decision to the extent he affirmed issuance of NOV No. 82-1-36-2.

We turn, therefore, to the question of what is the appropriate civil penalty to be assessed for NOV No. 82-1-36-2. The record indicates that OSMRE assessed a civil penalty in accordance with the point system and conversion table set forth in 30 CFR 723.13 and 723.14. OSMRE assigned a total of 35 points, allocated as follows: probability of occurrence - 14 points; extent of potential or actual damage - 9 points; and negligence - 12 points, equating to a civil penalty of $1,500 (Respondent's Exh. 29 at 4). In his September 1986 decision, Judge McGuire increased the civil penalty to $2,200 based on his determination that 15 points should have been assigned for both probability of occurrence and extent of potential or actual damage for a total of 42 points.

[2] In its brief, petitioner disputes Judge McGuire's assignment of 15 points for probability of occurrence. This category measures the "probability of the occurrence of the event which [the] violated standard is designed to prevent." 30 CFR 723.13(b)(2)(i). Petitioner argues that a 1-inch hose with a flow restricting nozzle discharging at a point 1/4 mile from the Monongahela River "would have virtually no

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reached the second unnamed tributary is reflected in the decrease in suspended solids from 6,785 to 759 mg/l, as between sample Nos. 1 and 4. Sample No. 1 is significant because it indicates that water from the hose was picking up solids as it flowed down the road and drainage ditch. Sample No. 4 shows that, even with the settling occurring, the concentration of suspended solids where the water intersected the second unnamed tributary was significantly in excess of the allowable limit.

[5] Petitioner also challenged all of OSMRE's test results as "questionable" because the samples were not "preserved," *i.e.*, they were gathered without acidification (Tr. 104-05) (Petitioner's Brief at 8). However, there was no evidence that the fact that the samples were not preserved had any effect on the test results for suspended solids.

probability of contributing additional solids to the river" (Petitioner's Brief at 13). The record, however, clearly contradicts that argument. Although the record is not clear regarding the size of the hose, the evidence shows that the cumulative flow from the hose was sufficient on March 29, 1982, to create the flow carrying the suspended solids into the river. Thus, the event which 30 CFR 717.17(j)(1) was designed to prevent did, in fact, occur. Under 30 CFR 723.13(b)(2)(i), 15 points are properly assigned.

[3] Petitioner also disputes the assignment of 15 points for extent of potential or actual damage, contending that no additions of suspended solids to streamflow occurred on or off the permit area. Under 30 CFR 723.13(b)(2)(ii), 0 to 7 points are to be assigned if the damage which the violated standard is designed to prevent would remain within the permit area and 8 to 15 points if it would extend outside the permit area, with the actual points to be determined according to the duration and extent of the damage. It is clear that, since additional suspended solids were, in fact, contributed to the river as a result of petitioner's access road maintenance practices, damage would extend outside the permit area. However, there was no evidence regarding the extent or duration of the actual or potential damage resulting from the violation observed on March 29, 1982. Although there is evidence that petitioner had been utilizing the sprinkler-type system prior to March 29, 1982, on an as-needed basis (Tr. 151), there is no indication that the volume of water used on other days was such as would have resulted in the same circumstances as occurred on March 29, 1982. Accordingly, only eight points should have been assigned under this category.

Petitioner also disputes the assignment of 12 points for negligence. Under 30 CFR 723.13(b)(3)(i), up to 12 points may be assigned for negligence, with the actual points dependent on the degree of negligence. OSMRE's notice of proposed assessment contained a section entitled "Assessment Explanation." Under the heading of "Negligence," only the number 12 appears without any explanation for that assignment.[6]

Petitioner contends that its actions did not constitute negligence where, according to Bearden, the sprinkler-type system was a reasonable method of controlling fugitive dust (Tr. 154). However, regardless of the efficacy of the system as a dust control measure, it had obvious consequences with respect to water quality. OSMRE seeks the imposition of 20 points based on its contention that petitioner's conduct exhibited a greater degree of fault than negligence. We disagree. Where the water from the hose was creating a clearly observable flow of turbid water which eventually entered the river, we

[6] Although there is no explanation for the assignment of 12 points, we note that the Mar. 1980 version of OSMRE's Penalty Assessment Manual provides that the assessor "should always start at twelve (12) points and work down for any moderating circumstances." One of the examples given in the manual of when to assess lower points for negligence is when "the permittee is trying to do something but is doing it wrong."

must conclude that petitioner's failure to prevent the contribution of additional suspended solids to the river was "due to indifference, lack of diligence, or lack of reasonable care." 30 CFR 723.13(b)(3)(ii)(B). There is no evidence of a greater degree of fault than negligence. Here, petitioner was attempting to address one problem and through inattention it created another. We find that under 30 CFR 723.13(b)(3)(i), the assignment of 12 points was too many; six points are properly assigned.

Finally, petitioner contends that 10 points should be subtracted for petitioner's good faith efforts to abate the violation. Under 30 CFR 723.13(b)(4), between 1 and 10 points may be subtracted for good faith if the person to whom the notice or order issued achieved rapid compliance. "Rapid compliance"means the person took "extraordinary measures" to abate the violation in the shortest possible time and abatement was achieved before the time set for abatement. 30 CFR 723.13(b)(4)(ii)(A). Bearden testified that use of the sprinkler-type system ceased when petitioner received the NOV and the truck-mounted system was purchased and began operation on June 15, 1982, prior to the deadline for abatement originally set in the NOV (Tr. 159, 161-62). Despite this testimony by Bearden, the record shows that on June 17, 1982, OSMRE Inspector Koppe issued a modification of NOV No. 82-1-36-2 extending the abatement time from June 16 to July 16, 1982 (Respondent's Exh. 28). Koppe testified that the modification was issued as a result of a June 17, 1982, visit to the minesite at which time he communicated with petitioner's staff and was informed that more time for abatement was necessary because "they needed to complete the work with the subcontractor" (Tr. 61).

We do not believe the record supports petitioner's claim of good faith, as defined in the regulations. Although Bearden states that the use of the sprinkler-type system ceased immediately following the receipt of the NOV and that the alternative system was in operation on June 15, 1982, he does not explain why a 30-day extension of the abatement period was necessary. Under the circumstances, no good faith points are warranted.

[4] Therefore, the total number of points that should have been assigned for this violation is 29 (15 for probability of occurrence, 8 for extent of potential or actual damage, and 6 for negligence). Under 30 CFR 723.14, 29 points translates to a civil penalty of $900. While the Board has the authority to waive the assessment of a civil penalty for a notice of violation where less than 30 points have been assigned (*see Lone Star Steel Co.* v. *OSMRE*, 98 IBLA 56, 67 (1987); 30 CFR 723.12(c)), we decline to do so where petitioner was negligent in creating a condition which clearly violates Departmental regulations.

Accordingly, we modify Judge McGuire's decision to the extent he imposed a $2,200 civil penalty for NOV No. 82-1-36-2. Petitioner is properly assessed a civil penalty of $900.

Discharges Exceeding Effluent Limitations

OSMRE issued NOV No. 82-1-36-3 to petitioner because discharges from sedimentation pond 004 exceeded numerical effluent limitations for pH and total manganese. Koppe testified that, at the time of his March 31 inspection, he took two water samples in order to judge the quality of the water in and around sedimentation pond 004 (Tr. 69-70). Sample No. 5 was taken at the discharge point for the pond (Tr. 69; Respondent's Exhs. 32 and 34). Koppe testified that the discharge from the pond enters a ditch which diverts water from an old spoil area around the edge of the pond and this water then flows down under the access road, eventually entering the second unnamed tributary and then the Monongahela River (Tr. 67-69, 101). Sample No. 6 was taken from groundwater seepage from the spoil area situated between the active refuse pile and sedimentation pond 004 (Tr. 70; Respondent's Exh. 35). Although at one point Koppe testified that this groundwater seepage was caught in a diversion ditch and carried off the permit area (Tr. 98), he later agreed that seeps from the spoil area would run into a ditch leading to the sedimentation pond (Tr. 101-02). Sample Nos. 5 and 6 were tested and determined to have, respectively, a pH of 4.88 and 4.34 and a total manganese content of 39.7 mg/l and 62.5 mg/l (Tr. 76; Respondent's Exh. 38). Koppe testified that the acceptable limits were no less than 6.0 or greater than 9.0 for pH and a maximum daily limit of 4 mg/l of manganese (Tr. 76).

The applicable regulation cited in the NOV as having been violated, 30 CFR 717.17(a), provides in relevant part that discharges from areas disturbed by the surface activities of an underground mining operation shall at a minimum meet certain numerical effluent limitations.[7] The maximum allowable limit is within the range of 6.0 to 9.0 for pH and 4 mg/l for manganese. 30 CFR 717.17(a)(3). The discharge from sedimentation pond 004, as reflected in sample No. 5, exceeded both effluent limitations. This would be sufficient to establish a prima facie case of a violation of 30 CFR 717.17(a). *See A&S Coal Co.* v. *OSMRE*, 96 IBLA 338, 345-46 (1987).

Petitioner maintains, however, that it is not responsible for the excessive pH and manganese levels in the discharge from sedimentation pond 004. In support thereof, petitioner offered the testimony of Bearden and Robert D. Volkmar, an environmental

[7] "Disturbed area" is defined in the regulations at 30 CFR 701.5 as

"an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as *disturbed* until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter is released." (Italics in original).

In addition, 30 CFR 717.17(a)(2) provides that:

"For purposes of this section only, disturbed areas shall include areas of surface operations but shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Disturbed areas shall not include those surface areas overlying the underground working unless those areas are also disturbed by surface operations such as fill (disposal) areas, support facilities areas, or other major activities which create a risk of pollution."

scientist with Baker TSA, Inc. (Baker), which was hired by petitioner to do an acid seepage study of the Isabella Mine. Bearden testified that the pond was originally built to catch surface runoff from the active refuse pile (Tr. 164) and that a diversion ditch was also constructed at that time "to divert water from the Luzerne strip mine operation off of our permit site, which was known to be bad water, around our treatment facilities" (Tr. 167). Bearden explained that petitioner subsequently constructed another diversion ditch above the first, at OSMRE's direction, in order to catch groundwater seepage from off the permit area south of the active refuse pile and bring it to the inlet of the pond for treatment (Tr. 167-68, 170-73; Petitioner's Exh. 2). Bearden stated that in the ditch line this water was treated with soda ash (Tr. 169).

In an effort to establish the source of this groundwater seepage, petitioner contracted with Baker (Tr. 174-75). Volkmar testified that, in conducting its study, Baker initially did a geophysical survey to determine areas of high conductivity, in order to guide the placement of boreholes (Tr. 187). Boreholes were then drilled in both the active refuse pile and adjacent spoil areas to the north and south in order to extract material and monitor groundwater (Tr. 188). Volkmar explained the location of certain of the boreholes as follows: "Holes MB1 and MB3 and MB7 were placed entirely in spoil material in areas uninfluenced by refuse material. Holes MB4 and MB5 were placed in refuse material. Holes MB2 and MB6 were located such that they would penetrate the refuse material at the surface and go through the spoil material underneath" (Tr. 188). The quality of groundwater in five of the boreholes was tested in samples taken on December 19, 1984, and April 15, 1985, and the results shown on petitioner's exhibits 3 and 4 (Tr. 189). In addition, the Acid Seepage Study, dated April 29, 1985, prepared by Baker is contained in the record and indicates, at pages 21-27, that Baker tested groundwater acid seepage at seven separate sites, identified as sampling points 53-55 and 58-61 on petitioner's exhibit 2. *See* Acid Seepage Study at 24. The test results of the seepage indicate a low pH and a high manganese content.

Volkmar also testified that weathering tests were conducted on material taken from the boreholes. The tests consisted of "subjecting samples of the material to actual additions of weathering and measuring the reaction products" (Tr. 193). Volkmar testified that, based on these weathering tests, the refuse material was generally considered to be "relatively non-acid producing," while the spoil material was considered to be a "very significant acid producer" (Tr. 192). He also stated that the manganese content would be higher in acid-producing material (Tr. 194). The relatively low pH and high manganese content of groundwater taken from spoil areas is reflected in petitioner's test results for boreholes MB1, MB3, and MB7 (Petitioner's Exhs. 3 and 4). The acid-producing nature of spoil material, as opposed to refuse material, is reflected on petitioner's exhibits 5 and 6, which are graphs indicating acid production for

boreholes MB5 and MB6 (Tr. 193-94). Volkmar testified that it was his opinion that the low pH and high manganese content of the discharge from sedimentation pond 004 was due to "acid seepage out of the spoil material immediately above the * * * pond" (Tr. 195).

In his September 1986 decision, Judge McGuire noted that a permittee is generally responsible for meeting effluent limitations for water discharged from a disturbed area where the water either originated from that area or, having originated from outside the permit area, became commingled with water from the disturbed area, citing *Consolidation Coal Co.*, 4 IBSMA 227, 89 I.D. 632 (1982), and *Jeffco Sales & Mining Co.*, 4 IBSMA 140, 89 I.D. 467 (1982). Judge McGuire held that in order to avoid responsibility for water coming from outside the permit area, a permittee must demonstrate that this water did not become commingled with water originating from the disturbed area. Judge McGuire found in this case that petitioner had failed to do so because

> petitioner's evidence demonstrated that it had diverted acid drainage originating on an off-permit area that had been previously mined by Luzerne Coal Company to its sedimentation pond 004, the structure which served its active refuse pile. Once commingled in that manner, the obligation of meeting the applicable effluent limitations was that of petitioner.

(Decision at 7).

In its brief, petitioner contends that it should not be held responsible where the evidence establishes that groundwater seepage from off the permit area originated in spoil areas created by Luzerne and was carried into sedimentation pond 004 by a diversion ditch which petitioner constructed at the request of OSMRE and thus became commingled only because of that action. Petitioner argues that to hold otherwise would be unjust and contrary to the law (Petitioner's Brief at 17).

The pertinent part of the regulation which petitioner is charged with violating, 30 CFR 717.17(a)(3), requires that discharges from areas disturbed by underground operation and by surface operation and reclamation operations conducted thereon comply with regulatory effluent limitations.[8] The Department commented concerning essentially the same language in 30 CFR 715.17(a) with respect to surface coal mining and reclamation operations, as follows: "[T]he regulations require application of the effluent limitations only to discharges from the disturbed area and not to discharges from areas the permittee has not disturbed through mining and reclamation. * * * Effluent limitations do not apply to discharges from undisturbed areas." 42 FR 62651 (Dec. 13, 1977).

[8] The quality of discharges from disturbed areas is measured at "the point at which drainage from the disturbed area leaves the last sedimentation pond through which it is passed." *Island Creek Coal Co.*, 3 IBSMA 383, 399, 88 I.D. 1122, 1130 (1981).

[5] In accordance with the regulations, a permittee is responsible for all discharges from its disturbed areas and must ensure that those discharges meet the effluent limitations, irrespective of the source of the discharges. *Cravat Coal Co.*, 2 IBSMA 249, 255, 87 I.D. 416, 419 (1982). However, a permittee is not accountable for discharges from areas which are not disturbed by it in the course of its operations. *Darmac Coal Co.*, 74 IBLA 100 (1983). Nevertheless, it has been held generally that where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed, the discharge from the sedimentation pond must meet the effluent limitations. *Jeffco Sales & Mining Co.*, 4 IBSMA at 148, 89 I.D. at 472.

The evidence in this case shows a commingling of waters in the sedimentation pond; however, petitioner's position is that the commingling took place only as a result of OSMRE's insistence that the drainage from the seepage be diverted to the sedimentation pond and that, but for that commingling, the discharge from the sedimentation pond would have met the effluent limitations.

In *Jeffco*, the Board held that one seeking to show the "inapplicability of the effluent limitations in 30 CFR 715.17(a) to discharges from its sedimentation pond" is in essence claiming an exemption from coverage by the regulations and must affirmatively demonstrate its entitlement thereto, citing *Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). 4 IBSMA at 150, 89 I.D. at 473.[9] Judge McGuire held that petitioner's own evidence, in essence, precluded a ruling in its favor because that evidence showed commingling of water from seep areas with water from disturbed areas. His conclusion was that commingling results in a finding of violation. Such a conclusion is, we believe, too restrictive.

In *Consolidation Coal Co.*, 4 IBSMA at 244, 89 I.D. at 641, the permittee was charged with an effluent violation concerning seepage from the base of a refuse pile. The permittee alleged that OSMRE had failed to show that the seepage included any surface drainage from an area disturbed by the permittee. The Board held that the evidence presented by OSMRE, showing that at least part of the drainage from the base of the refuse pile had percolated through the refuse pile from the top surface which had been disturbed by the permittee, established a violation, and that the permittee failed to rebut that evidence.[10] The Board stated, however, that if drainage was proven to be solely from an area not disturbed in the course of the permittee's operations, there

[9] We note that in *Jeffco* IBSMA found that OSMRE had presented a prima facie case of an effluent violation and that Jeffco "failed to carry its burden of persuasion." 4 IBSMA at 152, 89 I.D. at 474. In *Consolidation*, IBSMA held that OSMRE made a prima facie showing regarding an effluent violation and that Consolidation "did not rebut this evidence." 4 IBSMA at 244, 89 I.D. at 641. In each of those cases the proceeding was a review proceeding in which the regulations provide that the person seeking review shall have the ultimate burden of proof as to the fact of violation. 43 CFR 4.1171. IBSMA's holding in *Jeffco* that an applicant for review claiming that the effluent limitations of 30 CFR 715.17(a) are not applicable to discharges from its sedimentation pond bears the burden of proving the facts to support the claim of inapplicability is consistent with 43 CFR 4.1171. Although the present case involves a civil penalty proceeding, in which OSMRE bears, in accordance with 43 CFR 4.1155, the ultimate burden of persuasion as to the fact of violation, petitioner must still demonstrably show entitlement to an exception from responsibility.

[10] *Consolidation* was overruled in part not pertinent to the present discussion in *Alpine Construction Corp.* v. *OSMRE*, 101 IBLA 128, 95 I.D. 16 (1988).

would be no liability for the drainage. *Id.* at 244 n.10, 89 I.D. at 641 n.10.

We conclude, in accordance with the thrust of the *Consolidation Coal* case, that a person charged with a violation of the effluent limitations may escape liability for such a violation which is based on the discharge from a sedimentation pond where it can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations. We will review petitioner's evidence to determine if it made the necessary showing.

In order to support its position, petitioner hired an experienced consulting firm to define the origin of acid seepage at the minesite in question. The results of that study provide convincing evidence that the spoil areas have groundwater which has a low pH and a high manganese content, exceeding acceptable limits, while the refuse disposal material generally does not (*see* Tr. 193-95; Acid Seepage Study at 39-40). Petitioner's consultant concluded that the source of the low pH, high manganese content discharge from the sedimentation pond was acid seepage from the spoil material immediately above the pond (Tr. 195), and that but for such seepage, he would not expect the discharge to violate the effluent limitations (Tr. 196). The location of seepage from the spoil areas is shown on petitioner's exhibit 2.

On petitioner's exhibit 2, Bearden identified two seep areas as having been diverted into the sedimentation pond (Tr. 171-72). Those were sample point 60 and an area near sample point 58 (*see* Petitioner's Exh. 2). Petitioner claims that these areas are the sole cause of the low pH and high manganese content of the sample from the sedimentation pond discharge. However, Volkmar's testimony that the effluent violations were due to "acid seepage out of the spoil material immediately above the * * * pond" (Tr. 195), was never directly linked by petitioner to the two seepage areas identified by Bearden. While Volkmar's testimony was clearly general enough to have encompassed those two areas, it also could have included sample points 53-55 and 58-61, all of which were identified as acid seepage areas and could be considered "immediately above the pond" (*see* Petitioner's Exh. 2).

Moreover, while sample point 53 represents an acid seep area from spoil material, petitioner's exhibit 2 shows the location of that seep area within a disturbed area, *i.e.*, the refuse hollow fill area. In addition, sample point 54 may also be located in that same area. There is no evidence that seepage from sample points 53 and 54 would not have entered the sedimentation pond. Also, while refuse material generally exhibited a minimal acid production rate in weathering tests, two refuse samples produced significant amounts of acid. Acid Seepage Study at 33-34.

We conclude that petitioner has failed to establish that but for diversion of acid seepage from the two areas identified on petitioner's

exhibit 2 into the sedimentation pond, discharges from that sedimentation pond would have met the regulatory effluent limitations. Therefore, we affirm as modified Judge McGuire's decision upholding the violation in NOV No. 82-1-36-3.

We now consider the question of the appropriate civil penalty for NOV No. 82-1-36-3. In assessing a civil penalty, OSMRE assigned a total of 34 points, allocated as follows: probability of occurrence - 13 points; extent of potential or actual damage - 9 points; and negligence - 12 points (Respondent's Exh. 41, at 4). In his September 1986 decision, Judge McGuire affirmed OSMRE's civil penalty assessment of $1,400.

In its brief, petitioner does not dispute the assignment of points for probability of occurrence, extent of potential or actual damage or negligence. Rather, petitioner contends that it is entitled to points for good faith because it took "extraordinary measures" to abate the violation upon issuance of the NOV, as follows:

> Initially, National Mines increased the amount of soda ash treatment by relocating the treatment dispenser [down to the inlet of the pond]. (Tr. 204). Such effort began *immediately* upon receipt of the Notice of Violation. (Tr. 209). When this effort proved unsuccessful, National Mines determined that the only feasible alternative was to pipe the sedimentation pond discharge to its main treatment plant. (Tr. 204). This required engineering, approval by the Pennsylvania Department of Environmental Resources, and construction. (Pet. Exhibit 7). The construction involved approximately 2,000 feet of pipe and cost over $14,000. (Tr. 204-209; Pet. Exhibit 8). [Italics in original.]

(Petitioner's Brief at 18-19).

Bearden testified that all of the work done in order to pipe the sedimentation pond discharge to petitioner's main treatment plant was completed September 12, 1983, over 1 year after the initial time set for abatement in the modified NOV (Tr. 209). Even assuming that construction of the pipe constituted extraordinary measures, petitioner is not entitled to any points for good faith where petitioner admits that abatement was not achieved "before the time set for abatement," as required by 30 CFR 723.13(b)(4)(ii)(A).

In the alternative, petitioner contends that use of the point system and conversion table should be waived and the civil penalty reduced or eliminated in the interest of equity and fairness. The Board, as well as an Administrative Law Judge, has the authority to waive use of the point system and conversion table. 43 CFR 4.1157(b)(1) and 4.1270(f). However, waiver is permitted only where it would "further abatement of violations of the Act."[11] 43 CFR 4.1157(b)(1). We find no

[11] The preamble to the proposed rulemaking which became 43 CFR 4.1157(b)(1) indicates that the regulation was intended to accord the same authority to the Administrative Law Judge as was available to the Director, OSMRE, to waive use of the point system and conversion table. 43 FR 15442-43 (Apr. 13, 1978). As expressed in 30 CFR 723.16(a), the Director may waive use of the point system and conversion table where "taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust." Even utilizing that standard, we are not persuaded that the civil penalty is "demonstrably unjust." Petitioner had adequate opportunity to monitor discharges from sedimentation pond 004 and ensure that effluent limitations were met prior to issuance of the NOV. If it believed that acid seepage diverted to the pond at OSMRE's direction would cause or was causing discharges from its sedimentation pond to violate effluent limitations, it should have objected to OSMRE. The record contains no evidence of objection by petitioner.

justification for waiver of the use of the point system and conversion table in this case. Accordingly, the Board is required by 43 CFR 4.1270(f) to use the civil penalty formula set forth in 30 CFR 723.13 and 723.14. Given the points assigned, this translates to a civil penalty of $1,400 under 30 CFR 723.14. We affirm Judge McGuire's September 1986 decision to the extent that he assessed a civil penalty of $1,400 for NOV No. 82-1-36-3.

In summary, we affirm that part of Judge McGuire's decision upholding the violation in NOV No. 86-1-36-2 and affirm the imposition of a civil penalty for that violation, but we modify Judge McGuire's decision as to his imposition of a civil penalty of $2,200, and we assess a civil penalty of $900. We affirm as modified Judge McGuire's decision to the extent it upheld the violation in NOV No. 82-1-36-3, and we affirm the imposition of the $1,400 penalty assessed therefor. OSMRE is directed to refund to petitioner, in accordance with 30 CFR 723.20(c), the difference between its prepayment for the proposed civil penalties in this case ($3,600) and the amount assessed in this decision ($2,300).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and affirmed as modified in part.

BRUCE R. HARRIS
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Administrative Judge
Alternate Member

APPEAL OF TROY AIR, INC.

IBCA 2370-A, IBCA 2371-A Decided: *September 28, 1988*

Contract No. 81-0344, Office of Aircraft Services.

Sustained in part.

1. Contracts: Construction and Operation: Duty to Inquire

A contractor's claim under an Office of Aircraft Services contract for actual flight time during relocation of two aircraft from their reporting base to their releasing bases is denied, where the Board finds the contract provisions in issue to be patently ambiguous requiring the contractor to seek clarification from the Government before resolving the ambiguity in its own favor.

2. Contracts: Construction and Operation: Conflicting Clauses-- Contracts: Construction and Operation: Construction Against Drafter

In a case involving an Office of Aircraft Services Contract containing conflicting clauses which the contractor construes as providing for payment at contract rates for the

availability of two aircraft during the period of relocation flights from a reporting base to releasing bases, the Board finds the contractor's interpretation of the ambiguous provisions to be reasonable and that under the *contra proferentem* rule such provisions will be construed against the Government.

3. Contracts: Construction and Operation: Changes and Extras

A contracting officer's direction to a contractor to provide its pilots with a minimum of 1 hour of flight training instruction is found to constitute a constructive change where the Board finds that the contract provisions relied upon by the contracting officer in issuing the directive do not support the Government's position that the directed instruction was to be given at the contractor's expense.

APPEARANCES: Clark Reed Nichols, Attorney at Law, Perkins Coie, Anchorage, Alaska, for Appellant; Bruce E. Schultheis, Department Counsel, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Troy Air, Inc. (Troy, contractor, appellant), has timely appealed the decision of the contracting officer (CO) denying its claim for relocation of aircraft in the amount of $10,690.01 and its claim for an equitable adjustment under the Changes Clause in the amount of $2,422.50 for supplemental services ordered by the CO (Appeal File (AF), Tab 2.07).

Claim for Relocation of Aircraft (IBCA 2370-A) - $10,690.01

Background

On April 11, 1986, the Office of Aircraft Services (OAS) awarded contract No. 81-0344 to Troy in the estimated amount of $826,320. The contract called for the rental to the Government of three aeroplanes which were to be operated and maintained by the contractor for the benefit of the Bureau of Land Management, Alaska Fire Service. The aeroplanes were to be used as "smokejumpers," aircraft used for low level flights, aerial delivery of personnel and cargo by parachute, and transportation of personnel, equipment, and supplies, all in furtherance of the Government's mission of fighting fires in various places in Alaska, Canada, and the 48 coterminous United States. The contract vested the Government with the authority to determine whether the pilots proposed by the contractor met the requirement of the contract and provided for the issuance of an OAS Pilot Qualification Card to pilots who were determined to be qualified.

Included in the contract were a number of pay items including those for availability (when the aircraft were idle but ready to perform), actual flight hours, overnight subsistence allowance for the pilots, fuel and airport costs. Two of the aircraft had the same reporting base (Fairbanks) but different releasing bases (Boise, Idaho, for one and Redding, California, for the other).

The dispute concerns amounts claimed separately for actual flight time and for availability of aircraft during relocation for Item 1

(Report: 4/22 Fairbanks, AK; Release: 8/19 Boise, ID) and for Item 3 (Report 5/19 Fairbanks, AK; Release: 9/15 Redding CA). See Item Description (AF, Contract, Tab 1.03, at 5, 9).[1]

The contract includes a great number of provisions, among which are the following:

F4. *EXCLUSIVE USE PERIOD*

F4.01 *General.* Services shall be performed throughout the entire period stipulated in the Schedule of Items, including extensions.

F5. *AVAILABILITY PERIOD*

F5.01-01 *Hourly Availability.* Service shall be available eight hours per day throughout the Exclusive Use Period * * *.

F6. *Flight*

F6.02-01 Flight required for reporting or removal of aircraft, personnel and support equipment to and from the report and release bases specified in the Schedule of Items will not be measured for payment.

F13. *RELOCATION*

F13.02 *Period of Performance.* Relocation shall be accomplished within two calendar days.

F13.03 *Measurement and Payment.* Relocation shall be incidental to other work required under the contract and will not be measured or paid separately. * * *.

Except for excusable delays as provided under the Default Clause of Section I, service will be listed as unavailable in accordance with Section F. throughout any delay in completing the relocation.[2]

(AF, Contract, Tab 1.03 at 34-35, 38, 42).

Appellant's claim for relocation of the aircraft involved in the dispute is in the amount of $10,690.01, computed as follows:

Contract Item 1: Relocation from Fairbanks to Boise, Idaho (N-900TH)

Date		Flight Hours	Amount @ $200 per Flt. Hr.
07/31/86	Fairbanks to Anchorage	1:15	$ 250.00
08/04/86	Anchorage to Boise	8:53	1,776.67
	Two Days Availability		3,360.00
			$ 5,386.67

[1] For both items the period from report date to release date is 120 days. This figure multiplied by 8 (an 8-hour day) results in the 960 hours shown as Hourly Availability for Item 1a and the 960 hours shown as Hourly Availability for Item 3a. The total contract price for these items is obtained by multiplying the 960-hour figure by the appropriate unit price (*i.e.*, that bid by Troy for Item 1a or for Item 3a, adjusted for any quantity discount offered by Troy). See AF, Contract, Tab 1.03 at 5, 9, and 11.

[2] The contract also includes a provision applicable to subitem b. (Extended Availability) and subitem c (Additional Flight Crews) as part of Items 1, 2, and 3. Captioned "B3. Estimated Quantities," the provision reads as follows:

"Final quantities to be required under subitem[s] b. and c. are unknown and have been estimated for bid evaluation purposes only. The quantities will vary according to weather and the unscheduled needs of the Government. Estimated quantities do not represent an order or future order, expressed or implied, of the final quantities to be required under the contract."

(AF, Contract, Tab 1.03 at 11).

Contract Item 3: Relocation from Fairbanks to Redding, California (N-800TH)

Date		Flight Hours	Amount @ $200 per Flt. Hr.
07/22/86	Fairbanks to Anchorage	1:26	$ 286.67
07/23/86	Anchorage to Redmond	7:33	1,510.00
07/24/86	Redmond to Redding	1:32	306.67
	Two Days Availability		3,200.00
			$ 5,303.34

AMOUNT CLAIMED FOR RELOCATION OF AIRCRAFT (ITEMS 1 & 3) $10,690.01

(Appellant's Brief at 4-5).

Contention of the Parties

According to appellant, it is entitled to be paid the entire amount claimed for relocation of the two aircraft in question because the flights from the reporting base to the releasing bases were made at the direction of the Government during a period when the Government had exclusive use of the aircraft. The contract language "[r]elocation * * * will not be measured or paid separately" (F13.03, *supra*) is viewed as preventing the contractor from claiming rates different from those set forth in the contract for availability and flight hours. After asserting that Troy's interpretation of subsections F13.02 and F13.03, *supra*, is reasonable and literal and that there is no ambiguity, appellant goes on to state that to the extent the language is ambiguous, the contractor's interpretation controls (citing several cases applying the contra proferentem rule) (Appellant Brief at 3-7).

The Government's position is stated in its answer where it is contended (i) that the interpretation placed by Troy upon F13.03, *supra*, would leave subsection F13 without meaning; (ii) that provisions susceptible to two or more reasonable interpretations are considered to be ambiguous; (iii) that when ambiguities are patent or obvious, contractors are charged with an affirmative duty to make inquiry seeking clarification before such a provision will be construed against the Government as the drafter; and (iv) that failure to inquire places the risk of an incorrect interpretation on the contractor. Thereafter, citing cases [3] the Government requests the Board to deny the claim.

[3] Among the cases cited is *Beacon Construction Co. of Massachusetts* v. *United States*, 161 Ct. Cl. 1, 7 (1963), from which the following is quoted:

"We do not mean to rule that, under such contract provisions, the contractor must at his peril remove any possible ambiguity prior to bidding; what we do hold is that, when he is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representatives if he intends to bridge the crevasse in his own favor. Having failed to take that route, plaintiff is now barred from recovering on this demand (footnote omitted)."

September 28, 1988

Discussion and Decision

[1] For recovery on its relocation of aircraft claim, the appellant argues that its interpretation of the contract terms is both literal and reasonable but that assuming *arguendo* that the provisions of the contract respecting relocation of aircraft are ambiguous, it is entitled to have the ambiguity resolved in its favor under the rule *contra proferentem*. In defending against the claim made, the Government relies upon the affirmative duty of a contractor to make inquiry seeking clarification before a patent ambiguity will be construed against the Government as the drafter.

In *Newsom* v. *United States*, 230 Ct. Cl. 301 (1982), the Court of Claims noted that the doctrine of patent ambiguity is an exception to the general rule of *contra proferentem* which requires a contract to be construed against the party who wrote it, after which the Court stated:

> The analytical framework for cases like the instant one was set out authoritatively in *Mountain Home Contractors* v. *United States*. It mandated a two-step analysis. First, the court must ask whether the ambiguity was patent. This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum: Is it *so* glaring as to raise a duty to inquire? Only if the court decides that the ambiguity was not patent does it reach the question whether a plaintiff's interpretation was reasonable. The existence of a patent ambiguity *in itself* raises the duty of inquiry, regardless of the reasonableness *vel non* of the contractor's interpretation. It is crucial to bear in mind this analytical framework. The court may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist. [italics in original; footnotes omitted.]

(230 Ct. Cl. at 304).

Claim for Actual Flight Hours (Item 1 and Item 3) - $4,130.01

Apropos the claim for actual flight hours involved in relocation of the two aircraft in question, the appellant undertakes to analyze the provisions of subsection F6.02-01 ("Flight required for reporting or removal of aircraft, personnel and support equipment to and from the report and release bases specified in the Schedule of Items will not be measured for payment") and those of F13 (Relocation) including F13.03, "*Measurement and Payment*" ("Relocation shall be incidental to other work required under the contract and will not be measured or paid separately").

After noting that it is making no claim for flight to position the aircraft for the commencement of the contract at Fairbanks (reporting base) or for the removal of the aircraft from Boise/Redding (releasing bases), appellant states that it is entitled to payment for flights from the reporting base to the releasing bases made at the direction of the Government during the term of the exclusive use rental period. Read literally the provisions of F6.02-01 does not support the construction which appellant wishes to place upon it since the language "(f)light required * * * to and from the report and release bases * * * will not

be measured for payment" is sufficiently encompassing to cover flights to the releasing bases from the reporting base. While subsection F13.03 pertaining to relocation merely states that "[r]elocation * * * will not be measured or paid separately," subsection F6.02-01 (concerned exclusively with flight) states categorically that flights involved in relocation "will not be measured for payment."

The Board finds that if at the time of bidding Troy construed the provisions of F6.02-01 and F13.03--insofar as they relate to actual flight hours during relocation--in the manner now alleged, then such provisions were patently ambiguous requiring the contractor to seek clarification from the Government before construing the ambiguous provisions in the contractor's favor (*Beacon Construction Co. of Massachusetts, supra*, note 3). Since no such clarification was sought, appellant's claim for actual flight hours during relocation in the amount of $4,130.01 is denied.

Claim for Hourly Availability (Item 1 and Item 3) - $6,560

[2] Turning now to the claim for availability of the two aircraft during relocation, the Board notes (i) that subsection F13.02 provides that "[r]elocation shall be accomplished within two calendar days"; (ii) that included in subsection F13.03 is a paragraph stating that service will only be listed as unavailable if there is any delay in completing the relocation; (iii) that in that case at hand there was no delay in completing the relocation since it was accomplished within the 2 days allowed in subsection F13.02; (iv) that appellant interpreted the language of subsection F13.03 ("Relocation shall be incidental to other work required under the contract and will not be measured or paid separately") as only preventing the contractor from claiming rates different from those set forth in the contract for services rendered during relocation; (v) the Government has not undertaken to identify the "other work required under the contract" to which "relocation shall be incidental to"; nor has it offered any explanation as to why if at the time the invitation-for-bids was issued it interpreted the contract then in the manner it does now, it failed to adjust the contract price for Item 1a (Hourly Availability) and for Item 3a (Hourly Availability) to reduce the amount of payment due under each item by the 2 days (16 hours) allowed for relocation in subsection F13.02.[4]

With this the state of the record, the Board finds that the contract was ambiguous in regard to reimbursement to the contractor at contract rates for availability of aircraft during relocation; that the ambiguity was not patent; that insofar as the question of the amount to be paid for availability of aircraft during relocation, Troy reasonably construed F13.02 and F13.03 to mean that the contractor could not

[4] Note 1, *supra*. The contract prices shown for Item 1a (Hourly Availability) and Item 3a (Hourly Availability) are not estimates as is considered to be clear from the absence of any reference to either of such items in the "Estimated Quantities" provision contained in the contract (note 2, *supra*).

claim for such services at other than the contract rates; and that under the *contra proferentem* rule, appellant is entitled to be paid at the contract rates for the availability of two aircraft for the 2 days involved in relocation. So finding, appellant's claim for hourly availability of aircraft during relocation is granted in the amount claimed of $6,560.

Claim for Government-Directed Travel and Aircraft Flight Time to Provide Pilot Training (IBCA 2371-A) - $2,422.50

This claim is for Government-Directed travel and aircraft flight time to provide a minimum of 1 hour flight training instruction to all contract pilots.

As presented in the claim letter of September 22, 1986 (AF, Tab 3.12), the instant claim is in the amount of $2,422.50, computed as follows:

Instructor Pilot (travel and per diem)	$1,242.50
Aircraft Flight Time and Availability at Contract Rates	1,180.00
Total	$2,422.50

To a considerable extent appellant relies for recovery upon the fact that on August 14, 1986, the CO had directed that the flight training instruction here in issue take place and in connection therewith had represented that such instruction would be "at Government expense" (AF, Tab 3.04). In regard to all of the pilots to whom the directed flight training instruction pertains, Troy also avers (i) that it had previously complied with subsection E2 "Inspection of Personnel"; (ii) that the contractor's pilots had already demonstrated that they met all contract requirements; and (iii) that OAS had issued each of them OAS Pilot Qualification Cards in accordance with contract subsection E2.04 (Appellant's Brief at 8).

The Government has filed no brief and for the Answer it has filed a General Denial.

[3] The record shows that on August 14, 1986, the CO directed Troy to proceed with a minimum of 1 hour flight training for its pilots "at Government Expense" (AF, Tab 3.04). It appears, however, that in a conference on the following day related to such instruction, Troy was told that service would be interrupted throughout the training flight in accordance with subsections F5.06-02 and F6.02-03 and that neither availability nor flight would be measured for payment during those periods (AF, Tab 3.06). In any event it is clear that the flight training instruction involved in the claim was not conducted until August 17 and August 19, 1986 (Appellant's Brief, Exh. 7, 8), *i.e.*, subsequent to the time appellant appears to have been notified of the change in the Government's position.

We need not determine what effect, if any, should be given the fact that initially the Government had said that the directed flight training instruction would be "at Government expense." This is because the authorities cited by the CO and apparently relied upon by him in denying the claim are not supportive of that position. Both of the provisions cited (subsections F5.06-02 and F6.02-03) reference section E of the contract provisions as their authority. Section E, however, relates entirely to situations where the contractor is made responsible for all costs incurred for reinspection of personnel or equipment that did not comply with contract specifications upon initial inspection and for the costs involved in the inspection of substitute personnel or equipment (AF, Contract, Section E at 32-33).

In this case the Board finds that none of the costs for which claim is being made involve reinspection of personnel that did not comply with the contract specifications upon the initial inspection; nor do any of such costs involve substitution of personnel. The Board further finds that no other provision contained in the contract indicates that the contractor is required to provide flight training instruction at its expense for pilots whom the Government had found "met all the contract requirements," to whom OAS Pilot Qualification Cards have been issued, and for whom no replacement pilots had been requested. So finding, the Board concludes that the action of the CO in directing the flight training instruction here in issue constituted a constructive change under the contract for which the contractor is entitled to an equitable adjustment. As the claim reflects the use of contract rates for flight time and for availability and as the amount claimed for travel and per diem is supported by an itemized statement, the Board finds that the equitable adjustment to which the contractor is entitled is in the amount claimed of $2,422.50.

Summary

The appeal in IBCA 2370-A is granted in the sum of $6,560 and is otherwise denied.

The appeal in IBCA 2371-A is granted in the sum of $2,422.50.

The two appeals are granted in the aggregate sum of $8,982.50, together with interest thereon computed in accordance with the Contract Disputes Act of 1978 from the date the Government received the contractor's claim letter of September 22, 1986 (AF, Tab 2.05).

WILLIAM S. MCGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1989 O - 240-940 (1)

January 14, 1988

ISSUES REGARDING LATE PAYMENT INTEREST & CIVIL PENALTIES RELATED TO OFFSHORE OIL & GAS LEASES GOVERNED BY § 8(g) OF THE OUTER CONTINENTAL SHELF LANDS ACT *

M-36956 *January 14, 1988*

Appropriations--Outer Continental Shelf Lands Act: Generally

Civil penalties and late payment interest assessed against Outer Continental Shelf lessees are not "bonuses, rents . . . royalties, [or] other revenues (derived from any bidding system . . .)," within the meaning of 43 U.S.C. § 1337(g)(2). Therefore, they may not be shared with coastal states and must be deposited in miscellaneous receipts in the Treasury.

Mineral Leasing Act: Royalties--Outer Continental Shelf Lands Act: Generally

For royalty revenues from leases subject to 43 U.S.C. § 1337(g), the provisions of sec. 1337(g)(2) and (4), on investing and disbursing funds to coastal states supersede the provisions of 30 U.S.C. § 1721(b).

Accounts: Payment--Outer Continental Shelf Lands Act: Generally

Under 43 U.S.C. § 1337(g)(2), the Department is not required to invest a state's share of revenues. It may instead disburse them to the state as soon as they have been transferred from the Treasury's general suspense account to the special account created by sec. 1337(g)(2).

Appropriations--Outer Continental Shelf Lands Act: Generally

Under 43 U.S.C. § 1337(g)(2), the Department has no authority to pay interest to a coastal state on revenues held in the suspense account pending resolution of errors and disputes.

To: Secretary

From: Solicitor

Subject: Issues Regarding Late Payment Interest & Civil Penalties Related to Offshore Oil & Gas Leases Governed by § 8(g) of the Outer Continental Shelf Lands Act

By letter to you of June 24, 1987, Senator J. Bennett Johnston, Chairman of the Senate Committee on Energy and Natural Resources, raised three issues regarding interest and civil penalties related to offshore oil and gas leases governed by section 8(g) of the Outer Continental Shelf Lands Act of 1953 (OCSLA), *as amended*, 43 U.S.C. § 1337(g). That provision pertains to leasing of Outer Continental Shelf lands within 3 miles of the seaward boundary of a coastal state. [1] You have referred these questions to our office for analysis.

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* Not in chronological order.

[1] The "seaward boundary" of a coastal state is defined generally as a line 3 geographical miles distant from the state's coast (except for the Gulf coast of Florida and Texas, for which it is a line 3 leagues distant from the coast). 43 U.S.C. § 1312; *United States v. Louisiana*, 364 U.S. 504 (1960). Thus, the "8(g) zone" as used herein means the "belt" extending 3 miles beyond the first 3 miles (or leagues) from the coast.

SUMMARY

Senator Johnston has raised two issues regarding the proper disposition of monies collected from activities on leases in the 8(g) zone. Specifically, Senator Johnston has asked whether the Federal Government is authorized to share with the coastal states civil penalties paid in connection with any violation of OCSLA, and whether it may share interest paid to the Government for late payment of royalties (hereinafter "payor late payment interest") in the same manner as royalties. In addition, Senator Johnston has raised a third issue, namely, whether the Federal Government is obligated to pay interest to coastal states for untimely disbursement of their share of revenues from 8(g) leases. For the reasons explained below, we have concluded that there is insufficient authority for the United States to share either civil penalties or payor late payment interest with the coastal states. In response to the third issue, we have concluded that the United States must pay the states interest on 8(g) revenues only when interest has accrued under section 8(g)(4) from the investment of those revenues in certain securities.

BACKGROUND

For several years, the Department of the Interior and several coastal states disputed the disposition of revenues derived from leases within the 8(g) zone. After the OCSLA was amended in 1978 (Pub. L. 95-372, 92 Stat. 644) and until April 7, 1986, section 8(g)(4) provided that the Secretary was to deposit in a separate Treasury account "all bonuses, royalties, and other revenues attributable to oil and gas pools underlying both the Outer Continental Shelf and submerged lands subject to the jurisdiction of any coastal State . . ." pending either an agreement or judicial decision on how the revenues should be divided.

In 1986, section 8(g) was amended extensively by Title VIII of Pub. L. 99-272, 100 Stat. 148 (April 7, 1986). That title provided for the disposition of funds placed in escrow under the old section 8(g)(4). [2] It further provided a new scheme for the disposition of 8(g) revenues. The new section 8(g)(2), enacted in the 1986 amendment, 43 U.S.C. § 1337(g)(2), now provides:

> Notwithstanding any other provision of this subchapter, the Secretary shall deposit *into a separate account in the Treasury* of the United States *all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section*, excluding Federal income and windfall profits taxes, and derived from any

[2] To resolve the existing conflicts and provide a permanent formula for revenue disposition, the monies which had been deposited to the escrow account derived from any lease of Federal lands wholly or partially within 3 miles of the seaward boundary of a coastal state before Oct. 1, 1985, were distributed to the States of Louisiana, Texas, California, Alabama, Alaska, Mississippi, and Florida, pursuant to a formula prescribed in sec. 8004(b)(1)(A) of the statute. *See* 43 U.S.C. § 1337 note. Amounts derived between Oct. 1, 1985, and Apr. 15, 1986, were to be distributed according to a percentage formula prescribed in the new sec. 8(g)(2) discussed below. *See* sec. 8004(a)(1). The Act also provided, in sec. 8004(b)(1)(B), for annual distribution of a specified percentage of identified exact sums from revenues derived from Outer Continental Shelf leases generally. This provision is not relevant to the issues here. Acceptance by the respective states of these payments was deemed to satisfy all claims of each state against the United States under the earlier provisions of sec. 8(g). *See* sec. 8004(b)(2), 43 U.S.C. § 1337 note.

lease issued after September 18, 1978 of any tract which lies wholly . . . within three nautical miles of the seaward boundary of any coastal State, or . . . in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, *not later than the last business day of the month following the month in which those revenues are deposited in the Treasury*, the Secretary shall transmit to such coastal State 27 percent of those revenues, *together with all accrued interest* thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States. [Italics added.]

The accrued interest referred to in section 8(g)(2) is interest earned from investment of these revenues as provided for elsewhere in the amended section 8(g). Specifically, the new section 8(g)(4), 43 U.S.C. § 1337(g)(4), now provides the authority for the Federal Government to invest the revenues deposited in the special account:

The deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury in securities backed by the full faith and credit of the United States having maturities suitable to the needs of the account and yielding the highest reasonably available interest rates as determined by the Secretary of the Treasury.

Thus, under the amended section 8(g), the Secretary is required to deposit into a separate account in the Treasury all lease revenues as described in section 8(g)(2). Monies deposited there are to be invested, and 27 percent of the deposited sum and accrued interest are to be paid to the coastal state by the last business day of the month following in which those revenues are "deposited in the Treasury."

ANALYSIS

I. Authority to Share Civil Penalties

The first issue raised is whether the United States has authority to share with coastal states civil penalties paid by 8(g) lessees. Offshore lessees may incur civil penalty liability under two statutes. Section 24(b) of the OCSLA, 43 U.S.C. § 1350(b), provides for civil penalties of up to $10,000 per day for failure to comply with any provision of that statute or any regulation, order, or lease issued thereunder, after notice and a reasonable opportunity to correct the violation. In addition, the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1701 *et seq.*, adds extensive civil penalty authority. The civil penalty provisions of FOGRMA section 109, 30 U.S.C. § 1719, apply to leases subject to section 8(g). [3]

[3] Sec. 109(a) and (b) provide for general civil penalties for failure or refusal to comply with any requirements of FOGRMA or the mineral leasing laws, any rules or regulations issued thereunder, or the terms of any lease, with penalties of up to $5,000 per violation per day after certain specified notice requirements and allowed periods for corrective action. Sec. 109(c) provides for penalties of up to $10,000 per violation per day for knowing or willful failure

Continued

There is no specific provision in either FOGRMA or the OCSLA for the United States to share with coastal states civil penalties collected from 8(g) lessees. The issue, then, is whether civil penalties constitute "bonuses, rents, . . . royalties, [or] other revenues (derived from any bidding system authorized under [section 8(a)(1)])," within the meaning of the amended section 8(g)(2). Civil penalties plainly are not bonuses paid to obtain a lease or rents or royalties required by the terms of the lease. Therefore, they may be shared only if they are "other revenues" derived from a bidding system authorized under section 8(a)(1) of the OCSLA.

This Office previously has addressed a similar issue under the OCSLA. In Solicitor's Opinion, M-36942, 88 I.D. 1090 (1981), the Solicitor considered whether the Department could refund an overpaid civil penalty imposed under section 24 of the OCSLA. The Department's authority to issue refunds under the OCSLA was found in section 10 which permits refunds of overpayments made "in connection with any lease." 43 U.S.C. § 1339(a). The Solicitor concluded that civil penalties were not paid in connection with any lease:

> Civil penalties may be imposed against lessees, right-of-way holders, holders of exploration permits, and even persons with no permits at all, such as diving contractors. The Department's civil penalty authority is independent of the oil and gas lease.

88 I.D. at 1094. This reasoning is equally applicable here to penalties arising under both the OCSLA and FOGRMA. Revenues which are paid "in connection with any lease," as that phrase is used in section 10, include bonuses, rents, royalties, minimum royalties, net profit share payments, and so forth. *Id.* at 1095. These payments are not independent of, and indeed result from, an interest in the lease, *i.e.*, they are derived from bidding systems under section 8(a)(1). Because civil penalties are not received "in connection with" any lease in this sense, they necessarily cannot be "other revenues" derived from a bidding system.

When Congress has intended that civil penalties be shared with the states, it has established a specific mechanism. FOGRMA contains such a mechanism, but expressly excludes Outer Continental Shelf leases from its operation. Specifically, under FOGRMA section 206, 30 U.S.C. § 1736, one half of any civil penalties collected as a result of certain state audit and investigation activity is to be paid to the state. In addition, any civil penalty collected in a state suit under section 204, 30 U.S.C. § 1734, is retained by the state for expenditure as it sees fit. However, under FOGRMA section 201, 30 U.S.C. § 1731, the provisions of FOGRMA title II, which include sections 204 and 206, "shall apply only with respect to oil and gas leases on Federal lands or Indian lands. Nothing in this title shall be construed to apply to any lease on

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to pay royalty, permit lawful inspection or audit, etc. Sec. 109(d) provides for penalties of up to $25,000 per violation per day for knowing or willful submission of false or misleading reports or information, removal or diversion of oil or gas from a lease without authority, or purchase or acceptance of stolen oil or gas.

the Outer Continental Shelf." Therefore, the provisions for retaining or sharing in FOGRMA civil penalties do not apply to civil penalties assessed with respect to Outer Continental Shelf leases, including those subject to section 8(g).

Under Article I, § 9 of the Constitution, no payment may be made out of the Treasury except in consequence of an appropriation made by law. *See* Solicitor's Opinion, M-36942, *supra* at 1092. The new section 8(g)(2) is a permanent (or continuing), indefinite appropriation. It contains both a direction to pay and a designation of what funds are to be paid or used to make the payment. Under 31 U.S.C. § 1301(d), a statute "may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . ." *See also* the former 31 U.S.C. § 627. An appropriation cannot be inferred or made by implication. 50 Comp. Gen. 863 (1971). These considerations lead to a more strict construction of appropriations statutes. Sol. Op., M-36242, *supra* at 1092. For this reason, additional categories or sources of funds should not be read into a continuing indefinite appropriation by inference. Monies received by the Government must be despoited to miscellaneous receipts in the Treasury in the absence of other statutory direction. *See* 31 U.S.C. § 3302(b) and former 31 U.S.C. § 484; 22 Comp. Dec. 379, 381 (1916); 5 Comp. Gen. 289 (1925); 47 Comp. Gen. 70 (1967); 52 Comp. Gen. 125 (1972); 56 Comp. Gen. 275 (1977); and *Principles of Federal Appropriations Law* at 5-64 to 5-72.

Therefore, in view of the absence of a specific statutory directive, the Department must deposit receipts from civil penalties to the credit of miscellaneous receipts. *See also* 23 Comp. Dec. 353 (1916); 39 Comp. Gen. 647, 649 (1960); 47 Comp. Gen. 674 (1968); and *Principles of Federal Appropriations Law* at 5-75 to 5-76. In short, there is no authority under existing law to pay any civil penalty receipts with respect to section 8(g) leases to a state.

II. *Authority to Share Payor Late Payment Interest*

The second issue raised is whether the United States has authority to share with the coastal states late payment interest paid by 8(g) lessees. As with civil penalties, there is no specific provision dealing with sharing these revenues. Therefore, the issue is essentially the same as it was for civil penalties: whether late payment interest paid by lessees and other royalty payors is part of "royalties" or of "other revenues" within the meaning of section 8(g)(2). Our analysis of this issue is informed by how Congress dealt with this matter in FOGRMA, which contains express provisions for sharing late payment interest with the states. Consequently, we examine that statute first.

A. Authority to Share Late Payment Interest Under FOGRMA

For onshore oil and gas leases on public domain lands, section 35 of the Mineral Lands Leasing Act (MLLA), 30 U.S.C. § 191, requires that of all royalties, rents, bonuses, and proceeds of sale, 50 percent must be paid to the state in which the lease is located (except for Alaska, which receives 90 percent), 40 percent to the reclamation fund (except for Alaska), and 10 percent to miscellaneous receipts. [4] FOGRMA section 111(g) *amended* 30 U.S.C. § 191 specifically to include interest charges collected under FOGRMA within the term "royalties." Thus, late payment interest is part of the revenues distributed to the state according to the prescribed formula. That amendment, however, by its terms applies only to distributions under 30 U.S.C. § 191, which govern revenues received under the MLLA. [5] Neither FOGRMA nor any subsequent statute contains any provision similar to section 111(g) with respect to other mineral leasing laws, such as the OCSLA or the Mineral Leasing Act for Acquired Lands. And, except for Indian leases in section 111(c),[6] FOGRMA does not otherwise provide for sharing of payor late payment interest.

The relevance of FOGRMA to our interpretation of section 8(g)(2) is that in considering FOGRMA, Congress rejected language which would have resulted in coastal states sharing in late payment interest from 8(g) leases. The bill which became FOGRMA, H.R. 5121, as originally passed by the House of Representatives, would have shared payor late payment interest as part of any royalties distributed to other recipients. Section 116 of H.R. 5121 (which became section 111 of FOGRMA), as passed on September 29, 1982, provided:

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[4] Under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351 *et seq.*, royalties from onshore leases on acquired lands are distributed to the same funds or accounts as other revenues from those lands pursuant to other legislation applicable to the lands involved. *See* 30 U.S.C. § 355.

[5] Additionally, that amendment applies only to late payment interest collected under FOGRMA, as opposed to interest collected under regulations issued prior to FOGRMA. For offshore leases, interest charges resulting from late payment, underpayment, or nonpayment of royalty by lessees and other royalty payors were first assessed by regulation beginning in late 1979. On Oct. 16, 1979, the Department promulgated the former 30 CFR 250.49 (44 FR 61,892), which became effective on Dec. 13, 1979. MMS revised this regulation on May 25, 1982 (47 FR 22,528) to change the interest rate charged for late payments to the Treasury current value of funds rate. The regulation was redesignated as 30 CFR 218.150 on Aug. 5, 1983 (48 FR 35,641).

For onshore and Indian leases, regulations requiring assessment of late payment interest from payors were first promulgated approximately 1 year after those for the Outer Continental Shelf. On Dec. 23, 1980, the Department promulgated the former 30 CFR 221.80 (45 FR 84,764), effective Feb. 1, 1981, as part of the oil and gas operating regulations. These operating regulations applied to both Federal public domain and acquired land leases and leases on Indian lands. MMS revised this regulation on May 25, 1982, simultaneously with the offshore regulation, to change the interest rate (47 FR 22,527), effective June 1, 1982. On Aug. 5, 1983, simultaneously with the redesignation of the offshore regulation, the former 30 CFR 221.80 was redesignated as 30 CFR 218.102 (48 FR 35,641).

The requirement to charge interest on payor late payments became statutory with the enactment of FOGRMA on Jan. 12, 1983. FOGRMA sec. 111(a), 30 U.S.C. § 1721(a), required the Secretary to charge interest on late payments or underpayments at the rate applicable under sec. 6621 of the Internal Revenue Code (26 U.S.C. § 6621). The FOGRMA requirement was reflected in amendments to the regulations included in the initial FOGRMA rulemaking on Sept. 21, 1984 (49 FR 37,347), and the required interest rate is now found in 30 CFR 218.54.

[6] The regulation governing Indian leases specifically provided, even before FOGRMA, that "late payment charges assessed with respect to any Indian lease, permit, or contract shall be collected and paid to the Indian or tribe to which the amount overdue is owed." The Secretary could not have promulgated a similar regulation to share payor late payment interest with states. On Indian leases, the Secretary administers the interest of the Indian tribe or allottee. Indian lessors are entitled to lease revenues by virtue of ownership interest. The states, in contrast, do not have a property interest in Federal leases and receive a share of lease revenues only by virtue of statute. The requirement to pay late payment interest from indian tribal or allotted leases to the tribe or allottee became statutory upon FOGRMA's enactment. *See* sec. 111(c), 30 U.S.C. § 1721(c). The amendments to the regulations also moved the relevant provision to a new 30 CFR 218.55(a).

(d) for purposes of applying provisions of law relating to the distribution of royalty payments, *any interest charges under this section* or under § 103 [which became § 104 of FOGRMA] with respect to late royalty payments or underpayments of royalty *shall be included in, and deemed a part of such royalty payments.*

128 Cong. Rec. H 7893; H.R. Rep. No. 97-859, 97th Cong., 2d Sess. 8 (1982) (italics added). In turn, the House Report stated that "[s]uch interest penalties are deemed part of royalty payments." *Id.* at 36, *reprinted at* 1982 U.S. Code Cong. & Ad. News 4290.

Had this provision been enacted, it would have required distribution of all payor late payment interest to the same recipients and in the same proportions as the principal royalty amounts. However, the Senate amendment to S 2305 in the nature of a substitute, which was similar to H.R. 5121 and which passed the Senate on December 6, 1982, did not contain the same provision as the House bill. Instead, it provided narrower sharing authority. Specifically, section 111(c) required that all interest charges collected because of late payment or underpayment of royalties owing to an Indian tribe or allottee be paid to the tribe or allottee, and section 111(g) amended the distribution scheme of 30 U.S.C. § 191 to include interest charges collected. 128 Cong. Rec. S 13935. These provisions, which have been explained above, were enacted in the final statute. The section-by-section summary analysis printed simultaneously in the Congressional Record stated:

Sec. 111(a)-(d). Provides that late payments for royalties shall be charged interest at the IRS rate. Such interest shall be paid in the appropriate share to State [sic] and Indian tribes.

* * * * * * *

(f-g). Technical.

128 Cong. Rec. S 13939-13940. There is no other discussion in the legislative history, and no reference to why the new language was substituted for the House language.

Because Congress chose to amend the word "royalty" in the MLLA to assure that states would share in late payment interest, and because it chose not to apply that amendment to revenues under other statutes, we must be particularly careful in determining Congress' intent in using the phrase "royalties, and other revenues" in section 8(g)(2)

B. Authority to Share Late Payment Interest Under Section 8(g)(2)

In addition to the caution suggested by our review of FOGRMA, traditional rules on interpreting laws appropriating public funds require that we construe section 8(g)(2) strictly. As discussed previously with respect to sharing civil penalties, a statute may be construed to make an appropriation only if it specifically so states. 31 U.S.C. § 1301(d). Funds which the Government received must be deposited to

miscellaneous receipts absent other statutory direction. 31 U.S.C. § 3302(b) and former 31 U.S.C. § 484.

Our review reveals insufficient evidence that Congress intended to share late payment interest under section 8(g)(2). The term "other revenues" in section 8(g)(2) refers to revenues "derived" from any of the bidding systems set forth in section 8(a)(1). Historically, the Department has not used bidding systems, which are reflected in the terms of the leases issued, to impose late payment interest. Instead, as explained in note 5 above, the Department has imposed the duty to pay late payment interest at prescribed rates through regulations and, subsequently, under FOGRMA, a separate statute. 30 U.S.C. § 1721(a). Consequently, we cannot say that late payment interest is a kind of revenue which OCSLA contemplates as "derived" from a bidding system.

Not sharing late payment interest with the coastal states is consistent with the limited right to royalty revenues Congress has provided them. The United States is the sole lessor for onshore public domain and acquired lands and on the OCS. The revenue distribution provisions of the MLLA and the new OCSLA section 8(g)(2) (and 30 U.S.C. § 355 for acquired lands) do not create a beneficial or equitable interest in the lease on the part of the state. Therefore, the state's right to royalty revenue derives solely from statutory command. The state does not hold a royalty interest and is not entitled to any payment until after the Department actually receives payment. Whether a royalty payment is late with respect to the state depends on whether the Department disburses the state's share within the required time after the Federal Government receives it. Hence, the time value for late royalty payments to the lessor, the United States, belongs only to the United States and should not be shared with the state absent affirmative statutory command.

Although there are some arguments in favor of sharing late payment interest, we find them unpersuasive. For example, the previously quoted Congressional Record excerpt accompanying the final FOGRMA legislation stated in general terms that interest would "be paid in the appropriate share" to states, and referred to the amendment to 30 U.S.C. § 191 as "technical." This arguably could be read to infer that Congress intended no change between the House bill and the enacted language of FOGRMA. However, the amendment failed to deal with other statutes which allocate Federal mineral lease revenues. Not only was the Mineral Leasing Act for Acquired Lands not included, but the enacted language also did not cover the statutes providing for sharing with a state royalties from leasing of the National Petroleum Reserve in Alaska (42 U.S.C. § 6508), certain lands in the south half of the Red River, Oklahoma (*see* 42 Stat. 1448, 44 Stat. 740, 62 Stat. 576, and 65 Stat. 248), and certain state-selected lands (43 U.S.C. § 852(a)(4)). It is therefore difficult to view the enacted FOGRMA

provision as having the same comprehensive intent and effect as the House bill. FOGRMA demonstrates that Congress knows how to provide for distribution of late payment interest to the states if it desires to do so, and it has not done so here.

It might also be observed that before the enactment of the April 1986 amendments to section 8(g), the former section 8(g)(4) provided that "*all* bonuses, royalties, and *other revenues* attributable to oil and gas pools" underlying both state submerged lands and the Outer Continental Shelf were to be deposited into a Treasury account to await disposition. Because the language "all . . . other revenues" is broad and inclusive in form, it may be argued that "other revenues" in this context included late payment interest. The "other revenues" wording was retained in the April 1986 amendments. From this it could be argued that late payment interest must already be included within the continuing indefinite appropriation of the new section 8(g)(2). What this argument overlooks is that under the former section 8(g), the "other revenues" were those "attributable" to common pools; now they are those "derived" from bidding systems. While it may be plausible to "attribute" late payment interest to the production from the common pool on which royalty is owed, it is a different matter, as explained above, to say that the interest is derived from the bidding system underlying the provisions of the lease.

It might also be observed that section 10 of the OCSLA, 43 U.S.C. § 1339, requires the Secretary to repay (subject to the procedures of that section) a payment "*in connection with* any lease" in excess of the amount lawfully required to be paid. Late payment interest payments are made "in connection with" a lease; and if the Secretary determined that a lessee had paid late payment interest which was not owing, such excess interest payment would be refunded under this provision. MMS has refunded late payment interest from Outer Continental Shelf leases on previous occasions. It may be argued that it is difficult to distinguish payments made "in connection with" a lease from "all . . . other revenues" derived from an authorized bidding system, and that payor late payment interest therefore should be regarded as "other revenues." The problem with this argument is, again, that section 10 is not limited to revenues derived from a bidding system, even though such revenues comprise the bulk of those paid "in connection with" a lease.

For these reasons, and because Congress did not expressly include late payment interest in those revenues to be shared from 8(g) leases, we conclude that such interest may not be shared with the coastal states in the same manner as royalties under current law.

III. Interest Owed By the United States to the States on Untimely Disbursement of Royalty Revenues from Leases Subject to Section 8(g)

The third issue raised is whether the United States has authority to pay interest to the states under section 8(g) or under FOGRMA section 111(b), when it is untimely in disbursing section 8(g) revenues, and if so, when the disbursement becomes untimely.

FOGRMA sec. 104(a) (amending the MLLA, 30 U.S.C. § 191) and section 111(b), 30 U.S.C. § 1721, create two avenues for interest liability on the part of the United States to a recipient state under FOGRMA for untimely disbursement of a state's share of royalty revenues under any statute providing for such payments. [7]

Because the term "royalty," as defined in FOGRMA section 3(14), 30 U.S.C. § 1702(14), includes payments from leases on Outer Continental Shelf lands, the FOGRMA time deadlines and the suspense account interest provisions would have applied to section 8(g) disbursements to the coastal states under FOGRMA section 111(b) after the April 1986 amendments if Congress had enacted the 27-percent sharing provision with no reference to the time of disbursement.

However, the amended sections 8(g)(2) and (4) contain express payment time requirements applicable to section 8(g) revenues. Section 8(g)(2) requires the Secretary to "deposit into a separate account in the Treasury . . . all bonuses, rents, and royalties, and other revenues" from the 8(g) leases and then to transmit 27 percent thereof to the appropriate coastal state "not later than the last busines day of the month following the month in which those revenues are deposited in the Treasury," with the balance going to miscellaneous receipts. Section 8(g)(4) then requires that "[t]he deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury . . ." Therefore, the amended section 8(g) sets out a scheme for disbursement of revenues to a state which is separate from that set out in FOGRMA by prescribing the time deadline for

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[7] FOGRMA sec. 104(a) *amended* 30 U.S.C. § 191 by deleting the former semi-annual payment deadlines (as soon as possible after Mar. 30 and Sept. 30) and adding a new one:

Payments to States under this section with respect to any money received by the United States shall be made not later than the last business day of the month in which such monies are warranted by the United States Treasury to the Secretary as having been received, except for any portion of such monies which is under challenge and placed in a suspense account pending resolution of a dispute . . . Moneys placed in a suspense account which are determined to be payable to a state shall be made not later than the last business day of the month in which such dispute is resolved. Any such amount placed in a suspense account pending resolution shall bear interest until the dispute is resolved.

FOGRMA sec. 111(b), 30 U.S.C. § 1721(b), then provides:

Any payment made by the Secretary to a State under section 35 of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 191) and any other payment made by the Secretary to a State from any oil or gas royalty received by the Secretary which is not paid on the date required under section 35 [30 U.S.C. 191] shall include an interest charge computed at the rate applicable under section 6621 of the Internal Revenue Code of 1954.

Therefore, one way in which the United States may incur an interest liability for untimely disbursement is failure to pay within 10 days after the Treasury "warrant." The other is the holding of certain funds in suspense "pending resolution," which "shall bear interest" in favor of the state from the time it otherwise would have been paid until the date of payment, which is required to be not later than the last business day of the month in which the "dispute is resolved." MMS has incurred all of the liability for late payment interest which it has paid to states under the suspense account provisions, which consistently have been interpreted to apply to payments retained in suspense because of payor reporting errors which prevent proper disbursements, etc. The meaning and application of these provisions is set forth more fully in an Opinion of the Solicitor addressed to the MMS Director dated Feb. 10, 1986.

disbursement of the state's share and also providing for investment of the funds deposited in the special Treasury account.

These provisions therefore control over those in FOGRMA which by virtue of section 111(b), 30 U.S.C. § 1721(b), are otherwise applicable to all disbursements to states from any royalty revenues from Federally issued mineral leases. Consequently, the coastal states will not receive FOGRMA late payment interest in the same manner as states in which onshore leases are located.

The second question is when disbursements under the amended section 8(g) provisions result in liability for interest on the part of the United States. The statutory language is susceptible of two possible interpretations. One is that the requirement to disburse to the state "not later than the last business day of the month following the month in which those revenues are deposited in the Treasury" refers back to the time of initial payment and receipt of 8(g) revenues. The other is that the quoted phrase refers to the deposit of those revenues into the Treasury account which may be invested. Determining which interpretation is correct requires a brief review of what actually happens to royalty revenues when MMS receives them.

MMS has advised that because royalty payments are due on the last business day of the month following the month of production (*see, e.g.*, 30 CFR 218.50(a) and relevant lease terms), most royalty payments are received in the last 2 days of the month. Upon receipt of any revenues, including payments from 8(g) leases, MMS must and does promptly deposit them to the Treasury through the Federal Reserve. (Payments made through electronic funds transfer are deposited directly with a copy of the advice to MMS.) Payments from 8(g) leases are received together with large numbers and amounts of other payments from other sources and cannot be identified, checked, correlated with royalty reports, and posted to the correct accounts for investment or disbursement at the moment they are received. Consequently, the funds must first be deposited to general suspense. When a royalty report corresponding to that line are transferred from general suspense to the special account which may be invested and from which disbursement of the state's share is made. Processing of the royalty reports requires between 3 and 3-½ weeks following receipt of the payments and reports. (The process summarized here is explained in greater detail in the February 10, 1986, Solicitor's Opinion referred to above.)

If the requirement of section 8(g)(2) to disburse the state's share of 8(g) lease revenues by the last business day of the month following the month in which those revenues are "deposited in the Treasury" is interpreted to refer to initial receipt of payment and deposit to general suspense, the requirement of section 8(g)(4) to deposit the funds in a

separate account and to invest them in the prescribed securities is rendered virtually meaningless. The funds cannot be deposited into a separate account for investment until the royalty reports have been processed and the funds indentified and cleared, which does not occur until very close to the end of the month following the month of receipt. If the funds must be disbursed by the end of the same month, there is not sufficient time to invest them as part of the separate special account such that the monies would earn any significant interest. In addition, the Treasury would incur the associated administrative costs to obtain only a marginal return.

The only way to give real meaning to section 8(g)(4)'s investment requirement is to interpret the term "deposited in the Treasury" as referring to the deposit of the funds into the separate account after identification and processing. Under that reading, disbursement is required not later than the last business day of the month following the month in which the revenues are transferred from general suspense to the special account. The funds could then be invested for between 4 and 5 weeks before MMS must disburse the state's share of revenues and interest.

The MMS brought the interpretive question to the attention of the Congress before the amendments were enacted through an informal inquiry. The final enactment language did not change the language of the bill. However, the conference explanation included in the *Congressional Record* confirmed that the latter reading of the statute was correct. It also clarified that the Department was not required to hold funds and invest them for the subsequent month following deposit, but could disburse the state's share of the funds as soon as they were segregated and deposited to the separate account. The conference explanation stated:

> Section 8(g)(2) as amended by this title requires that the State's share of the 8(g) revenues together with accrued interest shall be transmitted "not later than the last business day of the month following the month in which these revenues are deposited in the Treasury." The Conferees fully expect that the Department will comply with this prescribed deadline. *However, under this language the Department may expedite distribution of the State's share to the State by omitting the step of investing these escrowed revenues in interest-bearing securities, which may have a maturity of 30 days or more, and by paying the State its share as soon as the 8(g) revenues can be identified among non-8(g) royalty payments by a lessee.*
>
> Under the current reporting system in place, the OCS lessee aggregates payments to the Federal Government of 8(g) and non-8(g) revenues, so some period of time is required for the Department to identify the 8(g) revenues. Thus, even where the Department does invest the State's share of 8(g) revenues, the period during which interest accrues to the State will not commence until the 8(g) revenues can be segregated by the Department and actually invested. It is anticipated that the Department can meet the requirements of section 8(g)(2) as amended without substantial revision of the current OCS reporting system, reporting forms, or Treasury accounts.

131 Cong. Rec. H 13218 (December 19, 1985) [italics added]. Even in the absence of this specific legislative history, the term "deposited in the Treasury" would still be interpreted to refer to deposit of the funds

into the separate account in view of the well-established principle of statutory construction that statutory provisions are not to be construed as meaningless or superfluous if such constructions can be avoided. *E.g., Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Thus, MMS may disburse at any time before the end of the month following the month of deposit of the funds into the special account; if the funds are held long enough to be invested, then the interest earned of course must be shared with the state pursuant to the section 8(g)(2) formula.

The Department has no authority to pay interest to the states except as specified in the statute. *E.g., United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), *reh. denied*, 447 U.S. 930 (1980). Because the amended section 8(g) contains no provision for interest to be paid to the coastal states on funds held in suspense pending resolution of errors and disputes, the United States cannot pay interest on such funds when disbursed, in contrast to situations covered by the FOGRMA provision.

CONCLUSION

The Department is not authorized to share civil penalties or late payment interest with coastal states under section 8(g) of the OCSLA. The Department may pay to the states their share of 8(g) revenues promptly after identifying them and depositing them in the special Treasury account. If it does this, the Department has neither authority to pay interest nor any obligation to invest the funds. It may, however, keep the 8(g) revenues in that account until the last business day of the month following the month of deposit into the special account; if it does so, the earnings from investment of the funds in certain Treasury securities are to be shared with the states. Section 8(g) contains no other provision creating an interest liability on the part of the Federal Government.

RALPH W. TARR
Solicitor

APPEAL OF HARDRIVES, INC.

IBCA-2375 Decided: *October 14, 1988*

Contract No. 6-CC-30-04090, Bureau of Reclamation.

Appellant's motion for sanctions denied.

Rules of Practice: Appeals: Discovery--Rules of Practice: Appeals: Evidence--Rules of Practice: Appeals: Motions

No sanctions were imposed on the Government for its failure to comply with a discovery order where its failure was not shown to be willful or to have caused appellant substantial prejudice. Noted by the Board was the fact that throughout much of the period of time within which the Government was to respond to the discovery order, appellant had been either unwilling or unable to comply with requests of Government auditors for cost information pertaining to appellant's multiple claims and that scheduling the various appeals for hearing was dependent upon the requested information being furnished not only in regard to discovery but also with respect to the Government audit.

APPEARANCES: Rolf R. von Oppenfeld, James R. Morrow, Attorneys at Law, Fennemore Craig, P.C., Phoenix, Arizona, for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Appellant has filed a motion calling for the imposition of sanctions against the Bureau of Reclamation (Bureau/Government) for its failure to comply with our Order dated July 5, 1988 (the Order) by which the Bureau was directed to produce the documents requested and to answer the interrogatories propounded by appellant within the 45-day period specified therein.

In support of its motion, appellant asserts that despite repeated inquiries the Government has offered no reason for its failure to cooperate in voluntary discovery and that during a meeting on August 24, 1988, the Department Counsel failed to give any indication as to when a response to the discovery requests would be made. Appellant also asserts that no rationale for the Bureau's noncompliance with the Order has been offered and that the Bureau has failed to file a statement with the Board setting forth the reason or reasons for its failure to respond within the time allowed by the Order.

After characterizing the Bureau's actions as "blatant stalling tactics" and after referring to the Bureau's consistent efforts to thwart proper discovery, appellant states that it is important for the Board to take some responsibility for curbing this persistent abuse and delay designed to defeat the valid claims of smaller adversaries by tactics of attrition. Thereafter, appellant asks that "the Board sanction the Bureau by (a) directing the Bureau to give *complete* answers to the discovery requests immediately or face waiver of all defenses and (b) barring the Bureau from presenting any evidence concerning the claim other than on cross-examination." (Italics in original.)

In the Government's Response to Motion for Sanctions, the Bureau states (i) that the instant appeal is one of nine claims on this contract which has reached the appeal stage; (ii) that contrary to the apparent belief of Hardrives, the Arizona Project Office, Bureau of Reclamation (which has administrative responsibility for the contract including the claims), does not have inexhaustible resources, either in personnel or in time; (iii) that that office administers the entire Central Arizona

Project system which involves many construction contracts in excess of $20,000,000; (iv) that the Bureau has made a good faith effort to meet the heavy demands placed on it by the Hardrives claims, involving the preparation of contracting officer's decisions, appeal files, answers to complaints and answers to the extensive interrogatories propounded in IBCA-2319, as well as accommodating counsel in the request for production of documents and with respect to Freedom of Information Act Requests related to these claims; and (v) that the actions of the Bureau and of the Department Counsel have not involved "blatant stalling tactics."

Although acknowledging the delay by the Bureau in responding to the 155 pages of interrogatories submitted by appellant, the Department Counsel notes that during the period involved in the delay appellant has been proceeding with discovery work by examining the contract records at the Bureau and at the A-E, Franzoy-Corey, as well as at the affected irrigation district, Hohokam Irrigation and Drainage District.

The Government response concludes by asserting that there has not been abuse or delay designed to defeat the possible valid claims of Hardrives by tactics of attrition but that rather it has been a case of a good faith effort on the part of the Bureau to accommodate Hardrives on many fronts which has led to the delay in the Bureau's response to the requested discovery. Immediately thereafter, the Department Counsel states: "I promise the Board and counsel that it [discovery] will be completed no later than Friday, October 21, 1988" (Government's Response to Motion for Sanctions at 3).

Discussion and Decision

Very recently in the course of reversing a decision of the Claims Court in a case where sanctions had been imposed against the Government, the Court of Appeals for the Federal Circuit noted that there is a strong policy favoring a trial on the merits, after which the Court stated:

> The harsh remedy of de facto dismissal is appropriate where the failure to comply with a pretrial discovery order is due to "willfulness, bad faith, or * * * fault" on the part of a litigant. *Societe Internationale*, 357 U.S. at 212; *see also National Hockey League*, 427 U.S. at 643 (dismissal under Rule 37 justified where there was "flagrant bad faith" and counsel displayed "callous disregard" of their responsibilities); *Mancon*, 210 Ct. Cl. at 696 (sanctions not warranted where there was no evidence of willfulness).

(*Ingalls Shipbuilding, Inc.* v. *United States*, No. 88-1203 (Sept. 29, 1988), slip. op. at 8).

Although the authority has been used sparingly, the Boards of Contract Appeals have sometimes imposed sanctions where their orders have been flouted or ignored. *See*, for example, *Ralph Construction, Inc.*, ASBCA No. 35633 (Mar. 22, 1988), 88-2 BCA par. 20,731. For sanctions to be imposed, however, something more is

required than mere noncompliance. *M.T.F. Industries, Inc.*, IBCA-977-11-72 (July 17, 1973), 73-2 BCA par. 10,145. But evidence in support of a claim was found to be properly excluded where an appellant never complied with the condition imposed by the Board (answering interrogatories) over a protracted period of time, resulting in the denial of the claim to which the excluded evidence pertained. *Evergreen Engineering, Inc.*, IBCA-994-5-73 (Oct. 29, 1974), 81 I.D. 615, 74-2 BCA par. 10,905 (decision on motion to dismiss); 85 I.D. 107, 110, 78-2 BCA par. 13,226 at 64,679 (decision on merits).

In responding to appellant's motion for sanctions, the Department Counsel states that the Board should be aware of Hardrives' unwillingness or inability to accommodate the Government auditors as indicated by an attached memorandum dated August 3, 1988. The memorandum reports the attempts made to audit Hardrives' own claims [1] and those of two of its subcontractors (MRT Construction and Valley Ditch Lining) [2] during the period from April 27 to August 3, 1988. Thereafter, the Department Counsel notes that opposing counsel has taken steps designed to assure future cooperation by Hardrives and it two subcontractors which it is hoped will enable the auditing process to move to a rapid conclusion.

While sanctions were found to be warranted and were imposed in *Evergreen, supra*, the Board stated that it undertook "such a drastic measure with extreme reluctance." 81 I.D. at 618, 74-2 BCA at par. 51,890). Here appellant has requested that the Board impose sanctions against the Government for its failure to comply with the Order dated July 5, 1988, pertaining to discovery. It has proceeded, however, in a perfunctory manner. Although correctly citing rule 4.100(g) as the Board's authority for imposing sanctions, appellant's motion contains no citation to case authority and is not accompanied by a copy of a letter dated August 29, 1988, which the motion states is "attached as Exhibit A."

The Government acknowledges that it failed to comply with the terms of our discovery order of July 5, 1988. It relates such failure to personnel and time limitations, however, and to the fact that much time has been devoted to the processing of other appeals of appellant under the instant contract including the preparation of extensive

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[1] According to the memorandum the initial site review of the claims began on Apr. 27, 1988, with a return visit being made on June 8, 1988. On both visits the company officers stated that the claims were ready for review and promised full cooperation. After noting that the auditors' various requests for information usually received inordinately slow, and often incomplete responses, the regional audit manager states:

"In fact, most information requests were never responded to, even though the June visit covered nearly 3 weeks. These information requests remain unanswered to this date. When we departed the contractor's office on June 23, 1988, we submitted a written information request and stated that we would return to Hardrives when the request is answered in full * * *." (Memorandum of Aug. 3, 1988, to Contracting Officer from Regional Audit Manager at 1).

[2] The Government auditors were unsuccessful in even commencing the audit of the subcontractors' claims. While the attorney who represents both subcontractors attributes their failure to make the records available for audit to insufficient prior notice, the regional audit manager states:

"[T]he attorney's position on insufficient audit notice contradicted statements made by the Contractor. Hardrives' vice-president had previously informed us that both subcontractors were given ample notice of the audit long before our direct notification of subcontractor audits. Actually, little notice should be necessary, since all applicable supporting documentation for claimed costs should be readily available from company accounting records." (Memorandum of Aug. 3, 1988, to Contracting Officer from Regional Audit Manager at 2).

answers to the interrogatories propounded in IBCA-2319. Responding to the serious charges made by appellant's counsel, the Department Counsel denies that there has been any abuse or delay designed to defeat any valid claims of Hardrives by tactics of attrition and commits himself to complete the Government's response to the requested discovery by no later than Friday, October 21, 1988.

While the Board does not lightly countenance a party's failure to comply with any of its orders and particularly where, as here, the party against whom the sanctions are sought failed to offer any explanation to either the Board or to the appellant until a motion for sanctions was filled, it does not consider that resort to the harsh remedy of sanctions is warranted in the present circumstances.

The Board finds that appellant has not shown that the Government's failure to comply with the Order dated July 5, 1988, was due to willfulness or bad faith or that it was otherwise culpable. So finding, the Board further finds that appellant is not entitled to the remedy it seeks. Accordingly, appellant's motion for sanctions against the Government in the above-captioned proceedings is denied. The denial of the motion for sanctions is without prejudice to the motion being renewed at a later date [3] if the circumstances then obtaining so warrant.

WILLIAM F. MCGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

GORDON B. COPPLE, ESTATE OF JANET COPPLE, ESTATE OF GUST E. SVENSSON, JR.

105 IBLA 90 Decided: *October 20, 1988*

Appeal from the decision of the Arizona State Office, Bureau of Land Management, declaring the Betty Lee mining claim, A MC 72979, and the Frisco No. 20 mining claim, A MC 90517, abandoned and void.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976:

[3] Since the scheduling of the hearing requested by appellant is dependent upon the completion not only of requested discovery but also of the requested audits (it is our practice to have the hearing cover not only entitlement but also quantum), any renewal of the motion for sanctions should be accompanied by a status report as to any audits in progress or completed including a statement as to whether there are any records pertaining to the claims which the auditors have requested that have not been furnished, and, if so, the reason or reasons for the refusal to so furnish.

Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calender year, *i.e.*, on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void.

2. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made.

3. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

Under 43 CFR 3833.2-4, a mining claimant is excused from filing evidence of annual assessment work or a notice of intention to hold his claim only if a proper application for a mineral patent is filed and the final certificate has been issued. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements.

4. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

APPEARANCES: Stephen P. Shadle, Esq., Yuma, Arizona, for claimants.

OPINION BY ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF LAND APPEALS

By decision dated April 1, 1986, the Arizona State Office, Bureau of Land Management (BLM), declared the Betty Lee mining claim, A MC 72979, and the Frisco No. 20 mining claim, A MC 90517, abandoned and void for failure to file an affidavit of assessment work or notice of intention to hold the claims for the 1984-1985 assessment year on or before December 30, 1985. The owners of the claims (claimants) have appealed this decision. [1]

These two claims were part of a group of claims held by claimants that were included in an aerial gunnery and bombing range

[1] The BLM decision listed the Estate of Janet Copple and Gust E. Svensson, Jr., as the owners of the claims. A notice of intention to hold the claims dated Apr. 15, 1986, identified the owners as Gordon B. Copple and the heirs of Gust E. Svensson, Fred Cooper, and Ed Cooper.

established on November 6, 1942, that is now associated with Luke Air Force Base, Arizona. The area in which the claims are located was withdrawn from all forms of entry and reserved for continued use as a gunnery and bombing range pursuant to the Act of August 24, 1962, P.L. 87-597, 76 Stat. 399 (1962). Since November 1943, claimants have essentially been barred from access to the claims because of military activities. The claims, with others similarly situated, are the subject of a condemnation action brought by the United States, and by order dated March 29, 1977, claimants were required to deliver possession of the claims to the United States. *United States* v. *1,739.13 Acres of Land*, Civ. No. 77-242 (D. Ariz. Mar. 29, 1977). [2] The United States has paid an annual rent to claimants since 1977.

[1] Under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the mining claim prior to December 31 of each year; *i.e.*, on or after January 1, and on or before December 30. Failure to file within the prescribed period results in the claim being deemed abandoned and void. *United States* v. *Locke*, 471 U.S. 84 (1985).

Claimants do not allege that notices of intention to hold for the 1984-1985 assessment year were filed for the Betty Lee and Frisco No. 20 mining claims. [3] Instead, they argue that the pendency of the contest and condemnation proceedings relieved them of the filing obligation for two distinct reasons: (1) these proceedings provided BLM with actual and constructive notice of their intention to hold the claims, and (2) they had no obligation to file because the United States Government held the possessory interest in the claims by virtue of the 1977 court order and thus assumed the obligation to maintain the claims.

[2] Claimants' second assertion provides no basis for reversal of BLM's decision. In *Comstock Tunnel & Drainage Co.*, 87 IBLA 132, 134 (1985), we observed:

> In section 314 of FLPMA, Congress assigned the owner of the claim the responsibility for making the required filings; the owner must bear the consequence of filings not timely

[2] The Betty Lee claim was also the subject of a previous mining claim contest initiated on Sept. 30, 1980, by BLM at the request of the Corps of Engineers, Department of the Army. Although other mining claims were found invalid as a result of that contest, the contest against the Betty Lee claim was dismissed. *United States* v. *Copple*, 81 IBLA 109 (1984). As noted in *United States* v. *Taylor*, 19 IBLA 9, 25, 82 I.D. 68, 74 (1975), a dismissal of a mining claim contest does not constitute a finding that a claim is valid unless the contest proceeding results from a patent application. Such was not the case in the earlier proceeding against the Betty Lee claim.

[3] Claimants argue both that they were given conflicting advice about whether or not notices of intention to hold were required because of the pending condemnation proceeding and that they had good reason to believe such notices had been filed because notices were filed with the local county recorder's office and there was confusion over what documents had been filed with BLM in April 1985 because of a change in counsel representing claimants. Claimants further state they expected the condemnation proceeding to be tried in late 1985, and the outcome of that proceeding would have determined whether notices of intention to hold were required. Although the record clearly shows that claimants had time to file the notices on or before Dec. 30, 1985, and that there were questions about whether the notices were required and whether they had, in fact, been filed, claimants do not allege that notices were actually filed.

made. *Cf. United States* v. *Boyle*, [469 U.S. 241], 105 S. Ct. 687 (1985) (penalty properly imposed on taxpayer whose attorney filed a late return on taxpayer's behalf).

The filing obligation thus clearly rests with the mining claim owner, regardless of the status of any other property interests in the land at issue.

[3] Claimants' equitable argument that BLM had both actual and constructive notice of their intention to hold these claims by virtue of the contest and condemnation proceedings is not cognizable by the Board under the statute and regulations. Congress provided no relevant exceptions to the filing requirement in 43 U.S.C. § 1744 (1982). The regulations in 43 CFR 3833.2-4 excuse a mining claimant from filing evidence of annual assessment work or a notice of intention to hold the claim only if a proper application for a mineral patent was filed and the final certificate issued. In *United States* v. *Ballas*, 87 IBLA 88 (1985), the Board dismissed as moot an appeal involving a contest against certain mining claims because the claims had become abandoned and void as a result of the claimant's failure to file the required instruments during the pendency of the contest proceedings. [4] In *Robert C. LeFaivre*, 95 IBLA 26 (1986), we noted that the submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982). [5]

Under the clear provisions of 43 U.S.C. § 1744(c) (1982), the automatic consequence of failure to file the required instruments is a finding that the claim has been abandoned and is null and void. *See United States* v. *Locke, supra*. As the Supreme Court made clear in the *Locke* decision, it is the failure to file the required notice that results in the abandonment of the claim; neither the mining claimant's subjective intent nor even the Government's general awareness of such intent is sufficient to avoid the effect of the statute.

[4] Finally, claimants contend that their failure to file was a result of excusable neglect by the contestees or their agents which should not result in the loss of the claims, and that BLM breached an affirmative duty to them because it failed to mail a reminder notice to the address furnished in prior years, but instead mailed the notice to an address of one of the deceased owners whose name was not listed on the 1984 notice. Contrary to claimants' assertion, BLM has no affirmative obligation to send a reminder notice. Although noting in *Locke, supra*

[4] Once the claim has been declared invalid, however, there is no requirement to file an affidavit of assessment work or a notice of intention to hold the claim unless that decision has been suspended during subsequent proceedings. *See J. L. Block*, 98 IBLA 209 (1987).

[5] Claimants observe that the Government sought to introduce into evidence information concerning the loss of these claims in the court proceeding to determine just compensation for the Government's past use of the claims, but the Judge refused to admit this evidence. It is not clear why this ruling should affect our disposition of this appeal. The loss of the claims under 43 U.S.C. § 1744 (1982), does not occur until after the filing deadline expires without the required filing having been made. In this case, that date is Dec. 30, 1985, long after the initiation of occupancy by the Government for which claimants claim a right to compensation. Claimants cite nothing in the Judge's ruling that purports to suspend the statutory filing requirement or the loss which results from their failure to file. Nor may we lightly infer any such intent by the court.

at 109 n.18, that BLM had chosen "[i]n the exercise of its administrative discretion," to send reminder notices, the Court in no way suggested that such notices were required by the statute or that once BLM sent such notices, a right to receive them in the future was created. The following observation from *Locke, supra* at 108, is equally pertinent to claimants' contentions:

> In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. * * * [E]very claimant in appellees' position already has filed once before the annual filing obligations come due. That these claimants already have made one filing under the Act indicates that they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands.

Thus, the loss resulting from claimants' failure to make the required filings cannot be attributed to the United States.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

KATHRYN A. LYNN
Administrative Judge
Alternate Member

I concur:

WILL A. IRWIN
Administrative Judge

UNITED STATES *v.* NEW YORK MINES, INC.

105 IBLA 171 Decided: *October 31, 1988*

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring the New York No. 2 and New York No. 3 lode mining claims null and void. ORMC 470, ORMC 471.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality 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. Although the profitability at the time of the contest hearing of a mining claim located for a precious metal (gold) need not be proven, evidence of the projected costs and anticipated revenues of mining the claim is properly

considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital.

2. Mining Claims: Discovery: Geologic Inference

While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure has been developed which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man may be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. Projection of inferred reserves on the basis of the quantity of ore removed in past mining operations on the vein will not support a discovery where there is evidence of a substantial change in the character of the mineral deposit in the vein from the area previously mined to the deposit remaining.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

It has been recognized that the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of developing a paying mine. Thus, the existence of reserves on adjacent mining properties controlled by the claimant is relevant to the question of whether there is a reasonable prospect of developing a paying mine.

APPEARANCES: Warde H. Erwin, Esq., Portland, Oregon, for appellant; Robert M. Simmons, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

New York Mines, Inc., has appealed a decision dated June 14, 1985, by Administrative Law Judge E. Kendall Clarke declaring the New York Nos. 2 and 3 lode mining claims null and void. [1] The claims were located on lands within the Wallowa-Whitman and Umatilla National Forests in the Granite Mining District, Grant County, Oregon.

On September 27, 1978, appellant filed mineral patent applications for the claims at issue. On June 14, 1983, the Bureau of Land Management (BLM) issued contest complaints charging that no discovery of valuable minerals had been made within the limits of the claims. Appellant timely filed an answer and a hearing was held before Judge Clarke, June 11-14, 1984, in Portland, Oregon. [2]

Daniel G. Avery, a Forest Service mining engineer, examined the claims on April 6, 1981, and thereafter prepared several reports of mineral examination. In his initial report, dated February 17, 1982, Avery noted the existence of three veins on the claims: the Alaska vein; the New York No. 1 vein; and the New York No. 2 vein. Most of

[1] The mining claims are situated in secs. 22 and 27, T. 8 S., R. 35½ E., Willamette Meridian, Grant County, Oregon. Two other claims initially cited in the contest complaint, the New York Nos. 1 and 4, were excluded from the contest proceeding (1 Tr. 3-5).

[2] References to the multivolume hearing transcript in this case identify the volume of transcript followed by the page number.

the development and prior mining has been on the New York No. 1 vein, which is described as a strong fracture varying in width from 2 to over 10 feet, composed of gouge, felsite dike, and breccia fragments. He noted that the original production from the vein was from the oxide zone extending to a depth of about 100 feet below the surface, and that work was stopped when lower-grade sulfide ore was encountered (Exh. B at 7). He noted that the present owners had driven a decline to intersect the New York No. 1 vein approximately 100 feet below the old workings, and had exposed approximately 520 feet of the New York No. 1 vein in the lower level. This exposure was almost entirely within the New York No. 2 and New York No. 3 claims with the bulk of the mineralization in the New York No. 2 claim. He concluded that very few of the New York claims samples showed ore-grade material. He found, however, that on the New York No. 3 claim there was a small block of mineralized material (approximately 800 tons) in the New York No. 1 vein, which, although too small to be mined by itself, "could be mined in conjunction with other ore at this or a nearby mine." He concluded that the New York No. 3 had a valid discovery and met the requirements for patent (Exh. B at 9-10).

In a memorandum dated August 2, 1982, to the Forest Supervisor, the Baker District Ranger refused to concur with Avery's conclusion that a valid discovery existed on the New York No. 3. His critique of Avery's analysis stated in part as follows:

> The examination reflects an added cost per ton for custom milling of ore removed. This figure is more realistic than the speculative cost per ton by using shared milling facilities. At this time there are no "going", operations within the New York[']s vicinity that would conceivably enter into such a venture. A total net loss using these added milling costs would be $191,008.

(Exh. F).

In a letter dated November 17, 1982, to the Forest Service, the Acting Chief, Branch of Lands and Minerals, Oregon State Office, BLM, expressed similar doubts concerning Avery's initial report. He noted first that, according to Avery's report, mining costs were developed by extrapolating costs from an operation processing 1,000 tons per day to the 800 tons of mineral in place in the New York No. 3. He felt that an extrapolation of that magnitude should be justified by an independent calculation of mining and milling costs. Secondly, BLM objected to Avery's conclusion that the ore might be mined and milled in conjunction with other properties because, as a general rule, "each claim should stand on its own" (Exh. C; *see* I Tr. 172-74). Confronted with these objections, Avery reevaluated his data and on April 5, 1983, issued a second report of mineral examination (Exh. D; I Tr. 17).

In his second report, Avery analyzed anticipated smelting as well as mining and milling costs. Based on his reconsideration, he concluded that the "lengths of vein identified by the claimants do not come close

to profitability" (Exh. D at 11; I Tr. 155-56). In explaining the basis for his reevaluation, Avery stated that his initial report was based on a 35-foot strike length along the vein exposed in appellant's drift which contained the high-grade samples from which he estimated an 800-ton deposit of mineralized material, which he identified as ore. His second report, on the other hand, analyzed the entire 169-foot strike length of the New York vein exposed in the drift and identified by appellant as ore grade in its patent application (I Tr. 116-17, 155).

Avery prepared a third supplemental report (Exh. H) on June 8, 1984, prior to the hearing. In this third supplement he further analyzed mining, milling, and smelting costs and the cost of transportation from the mine to a smelter. Avery calculated a "break even value" by comparing the sum of the mining, milling, and smelter costs to the value of the net-recovered gold. [3] Using the various sample points and assay values presented by appellant, Avery analyzed the value per ton of material in place, based upon assay values, anticipated mining width, and the value of gold in place at various gold prices prevailing between 1979 and 1984. The report reaches the following conclusion regarding discovery:

> Utilizing the $50 per ton mining cost and $40 per ton milling cost, both of which I feel are justified, [4] none of the samples in the decline drift would be considered ore grade (see mined grade value calculations). Even the $30 per ton mining cost and $15 per ton milling cost produce a break even value well above the average value of the 169 feet of drift claimed to be ore by Bowes. [5] It is also in excess of all but six samples at the 1979 to 1983 gold price, and all but four samples at the May, 1984 price. I therefore conclude that a discovery of a valuable mineral deposit has not been made on either the New York No. 2 or 3 lode claim on the basis of the material exposed in the decline drifts.
>
> Only four surface samples have been submitted on cuts beyond the limits of the old underground workings. No information has been given as to the total width of the structure in these areas, so for this analysis I have diluted the values to a 5 foot mining width. Two of the samples are ore grade at this width, but are not representative of material to be found underground, in the lower grade sulfide zone. The erratic distribution of values demonstrated in the decline drift could logically be expected to continue under these surface samples. I therefore conclude that a discovery of a valuable mineral deposit has not been made on the New York No. 2 claim on the basis of surface sampling. [Footnote omitted.]

(Exh. H at 5). Avery concluded, based on his research and analyses, that there was no discovery of a valuable mineral deposit on either of the New York Nos. 2 or 3 mining claims (I Tr. 70; IV Tr. 445).

The first witness for the contestee was William A. Bowes, a professional geologist who had undertaken a program of acquisition of mineral properties in the western United States for a group of investors. In the course of this activity he had acquired (by lease or purchase) a number of properties in Oregon's Granite mining district. Among the claim groups acquired were the New York, Cougar-Independence, Ajax, and Magnolia groups, which are contiguous to one

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[3] Net gold recovery was calculated as 82.026 percent by using a 90-percent mill recovery rate and a smelter payment based upon 93 percent of the contained gold and 98 percent of the London gold price (Exh. D at 9-10).

[4] Avery contacted mine managers, exploration experts, and others knowledgeable in the field to obtain his data (I Tr. 47-60).

[5] W. A. Bowes, Inc., is the operator for the claimants of the New York lode mining claims.

another, and other noncontiguous groups. He had also located additional claims around the various properties. He explained his interest in the Granite mining district, which was based upon favorable host rock and a history of past production. He further explained that he acquired the New York and adjacent groups because they covered what he considered to be important mineral bearing structures which could be mined as a logical mining unit. He also described certain of the work conducted to date, consisting primarily of drifting on the Cougar and New York claims and heap leach testing. He noted that, while the oxide ores appeared to be amenable to heap leaching, the results of heap leaching of the primary ores was less than satisfactory.

Steve Aaker, a senior geologist with W. A. Bowes, Inc., testified at some length concerning his interpretation of the mineral reports prepared by Avery. He characterized Avery's figures as being "fairly consistent and in the ball park with what we [claimants] say" (III Tr. 224, 226). Aaker testified that the difference between his projections and those of Avery, which were based upon the same samples, is the amount of dilution encountered in mining the vein (II Tr. 150). He stated ore reserves were difficult to quantify but there could be approximately 70,000 tons of "possible" reserves on the New York Mine (III Tr. 189). When developing mining and processing cost estimates Aaker relied mostly on the experience of Kenneth B. Henderson and Leslie C. Richards (III Tr. 229-35).

Kenneth B. Henderson, a civil engineer with experience in coal and hard rock mine management, testified that the New York vein could be stoped with a 2-½-foot mining width (III Tr. 256, 259-90). He testified that using this mining method and stope width, he anticipated mining costs of about $40 per ton (III Tr. 258), and mining and milling costs would be approximately $55 per ton, which he considered a "reasonable amount for a reasonable and prudent person" (III Tr. 269).

Leslie C. Richards, a geologist, engineer, and consultant for W. A. Bowes, Inc., testified that a prudent man would consider a number of things when deciding to mine the New York claims, such as size of the vein, whether the vein held gold, the fact that some gold has been produced, and the fact that there are adjacent mining properties (III Tr. 333). Alluding to the prudent man standard, he stated that the New York No. 1 vein was of minable width encompassing an ore shoot "that constitutes approximately 40 per cent of the strike length." He continued: "So – and if you – consider what this – this block or exposed zone runs in value and what you estimate it would cost to mine it and what it would cost to mill it, it – it would show a profit. So it fits that category [prudent man standard]" (IV Tr. 355).

Richards described the New York No. 1 vein as being in excess of 2,500 feet long, having an area where "surface samples indicate ore grade that could be mined and milled profitably." He recommended

that development work be continued on the New York No. 1 and other veins in the New York group which are only "part of the picture" with general mines and milling operations taking into account a number of sources of ore, not just the New York No. 1 (IV Tr. 356-57). He indicated that further drifting on the New York No. 1 vein might be justified in the New York No. 2 claim (IV Tr. 359). He could give no definitive data on mining and milling costs and stated that both claims had negligible proven reserves (IV Tr. 361-62, 365-66). Richards could not recommend constructing a mill based on the reserves in the New York Nos. 2 and 3 claims (IV Tr. 374).

Mining geologist William A. Bowes testified that before continuing development on the New York No. 3 claim he would need further information, "positive data," and the promise of greater mineralization at another level (IV Tr. 385). He stated also that conditions "have to be right" before an investment could be made to construct a mill (IV Tr. 393).

In his decision reached after the hearing, the Administrative Law Judge found the Forest Service mineral examiner had testified that a reasonably prudent man would not invest his time and money with a reasonable prospect of success in developing a paying mine because of the lack of evidence of the extent of the reserves and because the material mined would inevitably be diluted by low-grade deposits present in much of the vein material which would preclude recovery of mining and milling costs. Hence, the Administrative Law Judge concluded the Government had presented a prima facie case that the claims were invalid.

In reviewing the case presented by appellant's witnesses, Judge Clarke acknowledged their contention that effective mining widths could be reduced to as little as 2-½ feet thus reducing dilution of ore values, but noted the testimony that proven and probable reserves on the claims are very limited. The Administrative Law Judge acknowledged the testimony to the effect that it is reasonable to expect that, based on the history of mining in the area on this and similar veins, other ore shoots will be discovered at other locations in the vein structure, but found compelling the testimony that a prudent operator would not attempt to operate the mines or to construct the mill which is essential to the operation of these claims based on the proven or probable reserves. Hence, Judge Clarke found appellant had failed to rebut the prima facie case and establish the existence of a discovery.

Appellant raises several contentions in the statement of reasons for appeal. First, it is argued that the Administrative Law Judge erred in holding that a discovery must be established as of the date of the hearing as opposed to the date of the claim or the patent application. Hence, appellant asserts the revised opinion of Forest Service mineral examiner Avery regarding validity is irrelevant. Further, appellant contends the Administrative Law Judge erred in denying contestee's motion to dismiss the contest for failure to establish a prima facie case on the ground that proof of immediate profitability (marketability) is

not required under the mining law to establish a discovery of a claim located for precious metals such as gold. It is contended that evidence of marketability is required only for claims located for nonprecious minerals of common occurrence. Appellant contends the correct standard is that a prudent man would under the circumstances expend his time and money in the expectation of "developing" a paying mine. Appellant argues that this same error in the legal standard for discovery caused the Administrative Law Judge to reach an erroneous conclusion regarding the existence of a discovery on the claims. Additionally, appellant contends there was an improper emphasis on the claims at issue in determining the existence of a discovery and that the development of adjacent claims by the contestee was improperly discounted.

Two of the contentions raised by appellant involve well-settled legal precedent in mining contest adjudication and may be disposed of as a threshold matter. In the absence of evidence of prior payment of the purchase price by the claimant and issuance of a receipt therefor, [6] the validity of a claim must be established as of the time of the hearing. *See e.g.,, United States* v. *Pool*, 74 IBLA 37 (1983). In any event, contrary to appellant's assertion, the revised opinion of Forest Service mineral examiner Avery as to the existence of a discovery on the claims would not be irrelevant. Although the previous opinion may serve to impeach the later opinion, the revised opinion is not irrelevant if sufficient basis is given for the revision.

[1] The basic standard of discovery under the mining laws was set forth by the Department long ago:

> [W]here 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.

Castle v. *Womble*, 19 L.D. 455, 457 (1894); followed, *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). This standard has been supplemented by the "marketability test" requiring a showing that the mineral deposit can be extracted, removed, and marketed at a profit. *United States* v. *Coleman*, 390 U.S. 599 (1968). Although the Court of Appeals for the Ninth Circuit (Oregon is located within the Ninth Circuit) has held that a mining claimant need not show the profitability of a mining claim located for a precious metal (gold) at the time of the hearing and, hence, a showing that the gold can presently be extracted, removed,

[6] In *United States* v. *Whittaker (On Reconsideration)*, 102 IBLA 162 (1988), the Board recognized that where a mineral patent application has been filed and claimant has paid the full purchase price for a claim, a subsequent inquiry regarding discovery is proper focused on the issue of whether or not a discovery was established at the date of entry, *i.e.*, the date of issuance of the final certificate. We find no evidence in the record before us that payment has been made and a final certificate issued. Further, we find that such an occurrence would make no material difference to the result of this contest proceeding. The Government's prima facie case reflected a range of gold values over the timeframe from 1979 to 1984 and the reasonable prudent man determination is not tied to a particular price of gold within the range.

and marketed at a profit is not required, it has held that evidence of the costs and profits of mining the claim should be considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital. *Lara* v. *Secretary of the Interior*, 820 F.2d 1535, 1541 (9th Cir. 1987). Accordingly, we find the Administrative Law Judge did not err when he took into consideration the reasonably anticipated costs of mining and processing the gold and the projected return when determining whether a prudent man would be justified in the further expenditure of his labor and means.

It is well established that when the Government contests the validity of a mining claim on the basis of lack of discovery, it bears the burden of presenting sufficient evidence to establish a prima facie case. However, once a prima facie case is presented, the claimant must present evidence sufficient to overcome the Government's case by a preponderance of the evidence on those issues raised. *United States* v. *Springer*, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States* v. *Whittaker*, 95 IBLA 271 (1987).

The essence of the issue on appeal in this case is twofold. The first question involves the existence of mineral in place of sufficient quantity and quality to justify a prudent man's investment of his time and money. This determination can be made by examining the samples of the vein material taken by appellant, the nature of the vein, and the history of workings on the same vein and similar veins in nearby mines. The second issue is whether the reserves on adjacent mining properties owned or controlled by appellant which, together with the subject claims might be operated as a single mining unit, are sufficient to warrant a prudent man in expending his labor and capital with a reasonable prospect of developing a paying mine.

The record supports the finding of the Administrative Law Judge that a prima facie case of lack of discovery of a valuable mineral deposit was established. Avery, the Forest Service mining engineer, found the average mined grade values to be below the break even value for the 169 feet of drift claimed by Bowes to contain ore grade even using the $30 per ton mining cost and the $15 per ton milling cost estimates made by appellant (Exh. H). [7] Avery's report also concluded that oxide zone samples were not representative of "material to be found underground, in the lower grade sulfide zones" (Exh. H at 5). Hence, he testified that in his opinion there was no discovery on either claim (I Tr. 70). Accordingly, we must affirm the Administrative Law Judge's holding that the Forest Service made a prima facie case of lack of discovery of a valuable mineral deposit. Thus, the issue before the Board is whether contestee's evidence is sufficient to rebut the prima facie case of no discovery.

[7] Appellant's expert, Henderson, conceded that combined mining and milling costs would total $55 per ton (III Tr. 269; Exh. 73).

Contestee's witnesses took issue with the dilution assumed by Avery in his calculations. Appellant's witness Aaker testified that mining the vein by open-stope method in a width as narrow as 2-½ feet is feasible (III Tr. 278). Appellant's witness Henderson concurred in this judgment (III Tr. 256). In his testimony Aaker limited his analysis to the higher grade mineralization found in approximately 40 feet of strike length of the New York No. 1 vein exposed in the Bowes' drift, rather than either the full length of the exposed vein or the full width of the vein, when calculating ore-grade (III Tr. 205-06, 224-25). Richards testified that it would not be necessary to take the full width of the vein or mine the entire strike length of the vein structure. Rather he proposed selective mining of the ore-grade shoots with an allowance for overbreak (III Tr. 326-27). Proper sampling and assaying was cited as the key to mining ore grade and restricting dilution (III Tr. 328). [8] Of importance to our decision is the apparent inconsistency between the testimony regarding the anticipated cost of mining and later testimony regarding selective mining. The anticipated mining costs were based on open-stope mining with an occasional stull to support the ribs. We find the evidence regarding the incompetency of the vein material to be convincing. Clearly, any attempt to mine less than the full width in a shear zone will result in either a marked increase in mining costs, or dilution. The upper oxide stopes indicated that the wall rock was competent and would stand with little support. However, the assay map submitted at the hearing describes the vein in the area where the selective mining would occur as being a "complex fault zone of clay gouge." Thus, while we might be willing to accept appellant's estimates of the mining cost based upon removal of the full vein width, we cannot accept the proposition that the cost of mining less than the full vein width would be the same.

Even if it is assumed that it would be feasible to limit mining operations to the high-grade portion of the vein with mine widths as narrow as 2-½ feet the issue remains whether the exposed mineralization is of sufficient quantity and grade to justify a reasonably prudent man in further investment with a reasonable prospect of success in developing a paying mine. Richards stated in his testimony that the values in the ore shoot in the New York No. 1 vein exposed in the Bowes drift exceed his estimate of the costs of mining

[8] The Forest Service mining engineer, Avery, disputed the feasibility of limiting mining to a narrow and selective width of the vein structure. Based upon his analysis of the samples taken from the vein structure, Avery concluded that mineral values are distributed throughout the entire width of the structure and that higher grade portions of the vein could not be selectively mined (I Tr. 68; IV Tr. 435). Avery noted:

"New York Mines do not allow for any dilution in their analysis of ore grade. They selectively took ore grade samples from their sample locations. They are not consistently on one wall or another. There are various parts within the structure and in some cases even included a waste in between values which apparently wasn't considered and they assumed that they could mine that ore grade material without taking any lower grade along with it." (I Tr. 64).

Additionally, Avery contended that the vein was in an incompetent shear zone, causing him to conclude that the effective mine width would have to be the width of the vein (I Tr. 159, IV Tr. 437).

and milling the ore (IV Tr. 355). [9] Richards indicated that surface samples along the vein in the New York No. 2 indicate ore grade that could be mined and milled profitably (IV Tr. 356). However, Avery concluded that the surface samples were not representative of material to be found underground in the lower-grade sulfide zone (IV Tr. 442; Exh. H at 5, quoted *supra*). [10] This is supported by the discussion of the New York Mine in G. S. Koch, Jr., *Lode Mines of the Central Part of the Granite Mining District, Grant County, Oregon* (State of Oregon, Department of Geology and Mineral Industries, 1959) (Exh. 28):

> Near the face of the lowest adit the vein changes from oxide ore to sulfide ore, containing the minerals quartz, arsenopyrite, chalcopyrite, and gold. Grove [J. Grove, The New York Mine, Granite, Oregon (Washington Univ. (Seattle) 1940) (unpublished thesis)] states that the New York and Cougar veins are alike. From Grove's report and map (Figure 24) it is clear that the New York No. 1 vein has not been completely explored below the surface outcrop and that almost all exploration was confined to the oxide zone.

Id. at 36-37. Indeed, Bowes acknowledged in his testimony that the samples taken on the upper levels were in an oxide zone, but that primary sulfide mineral was encountered in the headings he drove in the Cougar Mine and in the Bowes drift on the New York No. 1 vein (II Tr. 105). [11]

Appellant's expert Aaker described in his testimony how ore reserves were projected by contestee on the basis of historical workings and production:

> [W]e quantified the available working and the percentage of ore that occurred through those workings as evidenced by historical stope production, and the results are that at Cougar we find that to be 39 per cent of the available area that has been opened up by drifting and so forth turned out to be ore grade material.

(III Tr. 187). Bowes confirmed that the reserve estimate was based on the mineralized zones previously mined (IV Tr. 397). For the New York Mine, the historical data indicated that 54 percent of the available vein area had been mined (III Tr. 187). Aaker explained that this technique was used to estimate the "shooting occurrences" along the vein so that "we can come up with possible ore reserves based on this type percentage of the vein as ore" (III Tr. 188).

On this basis, Bowes estimated "potential" reserves on the New York claims as approximately 150,000 tons (IV Tr. 399-400). Appellant's witness Richards, on the other hand, was much more conservative in his tonnage estimates. Richards testified that in the New York No. 3 claim there were negligible proven reserves, in the range of 2,000 tons

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[9] Although Richards referred to the high-grade shoot as comprising approximately 40 percent of the exposed strike length of the New York No. 1 vein exposed in the Bowes drift (IV Tr. 355), Avery described the high-grade shoot exposed by appellant as constituting about 40 feet or 7.7 percent of the 520-foot exposure in the Bowes drift (Exh. D at 8; IV Tr. 441). This latter description is consistent with the 40-foot high-grade shoot identified in the testimony of appellant's experts Richards (III Tr. 177, 205-06) and Aaker (II Tr. 158).

[10] A number of these samples were taken from points on the vein directly above old stopes. Those samples shed light on what was there before mining but are of hardly any value when trying to estimate the amount of mineral in place.

[11] Although the oxidized ore samples from the upper levels were amenable to separation of the gold through the heap leaching process, this technique was not successful with the unoxidized ore (II Tr. 105). This latter type of ore required "regular milling–flotation type operations" (II Tr. 108).

of probable reserves, and probably under 10,000 tons of possible reserves (IV Tr. 365-66). He testified that proven reserves in the New York No. 2 claim were negligible, probable reserves in the range of 4 to 5 thousand tons, and possible reserves in the range of 15 to 20 thousand tons (IV Tr. 366). Bowes acknowledged that proven reserves are negligible (IV Tr. 428).

[2] While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure has been developed which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man may be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. *United States* v. *Feezor*, 74 IBLA 56, 79, 90 I.D. 262, 274-75 (1983).

We find no fault in appellant's projection of the strike length of the New York No. 1 vein. However, we find a fundamental flaw in the projections made by appellant when estimating the potential quantity and quality of the mineralization in the New York Nos. 2 and 3 claims based upon the size of the stopes and reported mined grade of the ore from the stopes. A careful examination of the description of the New York, Cougar, Independence, Ajax, and Magnolia mines set out in Exhibit 28, leaves little doubt that prior mining activity on these claims was from the oxide zone. The author notes that, for the Independence Mine, there is a strong suggestion "that this increase in value is to be attributed to the downward enrichment, following weathering and erosion of the superficial portion of the vein" (Exh. 28 at 34-35). The same report notes that the production in the above-mentioned mines was almost entirely oxide ore. What has been described is almost a classic textbook example of supergene enrichment. [12] In the face of such strong evidence that the past production came from a zone of supergene enrichment, it would not be prudent to project the size or grade of the ores previously mined to the underlying mineral deposit, when the exposures in that deposit show it to be composed of primary mineralization. By increasing the grade of the mineral in place the process of supergene enrichment also increases the amount of mineral which can be mined and processed at a profit. The evidence suggests that the supergene enrichment ore deposits have been mined out years ago. After acknowledging the fact that negligible proven reserves existed in the New York Nos. 2 and 3 claims, appellant's witnesses, Aaker and Bowes, sought to project the occurrence of further ore shoots such as the 40-foot deposit found in the Bowes drift based on the percentage of ore-grade material previously mined from the New York No. 1 vein. However they gave no basis for projecting a similar percentage of ore-grade material in

[12] *See* Hugh E. McKinstry, *Mining Geology* (Prentice-Hall, Inc., 1959) at 392-93.

the sulfide zones, based on prior mining activity. Indeed, in discussing the projected occurrence of ore shoots, Aaker recognized the distinction in his testimony: "[I]n the New York, *in the historical data*, again *not with the Bowes level decline*, it turned out to be 54 per cent of the available area" (III Tr. 187 (italics added)).

When considering the quantity of mineral necessary to establish a discovery of a valuable mineral deposit, the Board has recognized that a reasonable estimate of inferred reserves may be considered when there is strong geologic evidence to support the inference. *United States* v. *Feezor, supra* at 85, 90 I.D. at 278. However, when the record reveals that the character of the vein deposit changes from oxidized ore to sulfide ore, strongly indicating supergene enrichment, the facts will not support a downward projection of the ore-grade oxide deposits to sulfide deposits lying below the water table. Therefore we are unable to conclude from the record that the evidence supports the application of geologic inference to project reserves which would justify a reasonably prudent man in further expenditure of his labor and capital with a reasonable prospect of success in developing a paying mine.

One of the arguments raised by contestee in this appeal is that the decision of the Administrative Law Judge improperly focused solely on the claims being contested. As previously noted, Bowes testified that appellant controlled 32 mining claims in the vicinity of the New York Mine (II Tr. 89). Leslie Richards testified it would be necessary to unitize several previously independent properties in order to establish sufficient reserves to make milling economic (IV Tr. 356-57). Bowes based his conclusion that a reasonably prudent man would be justified in further expenditure of his labor and capital with a reasonable prospect of success in developing a paying mine on the existence of an entire group of properties controlled by appellant including the Cougar, Independence, Ajax, Magnolia, and New York claims and the LaBelleview and Ben Harrison claims (which are not contiguous) which would feed into a single mill (IV Tr. 389-92). Bowes stated that a minimum of four stopes in the Cougar, four in the Independence, and four in the New York Mine would be necessary for the envisioned operation (IV Tr. 392). Bowes projected potential reserves on the Cougar-Ajax extension of 700,000 tons, on the LaBelleview Mine as 300,000 tons, on the Independence-Magnolia claims as 300,000 tons, and on the Ben Harrison claims as 130,000 tons (IV Tr. 401-02).

[3] It has been recognized that the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of developing a paying mine. *United States* v. *Foresyth*, 100 IBLA 185, 94 I.D. 453 (1987). Thus, the existence of reserves on adjacent mining properties controlled by claimant is relevant to the question of whether

there is a reasonable prospect of developing a paying mine. However, the only testimony submitted by appellant was to the "projected" reserves based on previous mining in the oxidized zone of the various veins. The same formula was used by appellant to calculate projected reserves (ore shoots) on the adjacent claims as was used for the New York No. 1 vein, *i.e.*, calculating the percentage of the vein material previously mined along the strike length of a vein, and projecting the reserves at depth based upon the percentage of the total vein mined in the upper levels (III Tr. 187; IV Tr. 401). As noted above, use of this approach to project inferred ore reserves is simply not demonstrated on the record in this case to be reliable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

R. W. MULLEN
Administrative Judge

ATLANTIC RICHFIELD CO.

105 IBLA 218 Decided: *November 2, 1988*

Appeal from a decision of the Montana State Office, Bureau of Land Management, upholding a Miles City District Office decision assessing compensatory royalty for oil and gas drained from lease M-60749.

Set aside and remanded.

1. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. When BLM has established that a leased Federal tract is being drained by a well operated by a common lessee, it need not prove as a part of its cause of action that a protective well would be economic. In such cases the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

2. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Compensatory royalties commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case

BLM need not assume the initial burden of showing that the common lessee knew or that a reasonably prudent operator should have known that drainage was occurring. The common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to notice of drainage.

3. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

If the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas, there would be no breach of a lessee's duty to prevent drainage. However, if a lessee can make a reasonable profit by drilling the well, he should drill. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the offset well were not drilled.

***Gulf Oil Exploration & Production Co.*, 94 IBLA 364 (1986), modified.**

APPEARANCES: Gregory J. Nibert, Esq., Roswell, New Mexico, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Atlantic Richfield Co. has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated October 28, 1986, upholding a decision of the Miles City District Manager assessing compensatory royalty for oil and gas determined to have been drained from lease M-60749. This Federal lease is located within the N½ of sec. 5, T. 31 N., R. 59 E., Montana Principal Meridian, Sheridan County, Montana, [1] and appellant is the lessee. Appellant is also the lessee of the adjacent private lands on which the offending well, the Hoffelt #2, is located. [2]

In his decision of September 26, 1986, the Miles City District Manager found that the Hoffelt #2 well was draining Federal lease M-60749 by a drainage factor of 4.4 percent. Citing lease provisions and applicable regulations, the District Manager assessed appellant for compensatory royalty effective the date of first production from the Hoffelt #2 well and continuing until the date of last production, or the effective date of the relinquishment of affected portion(s) of lease M-60749, or the date on which production commences from a protective well. The record reveals that the Hoffelt #2 well was completed by appellant on January 2, 1985, and it reported production that same month. The record also reveals that production from the relevant (Gunton) formation has been shut off since July 1, 1986, and no protective well has been drilled by appellant.

In affirming the District Manager's decision, the Montana State Office held that an economic well could be drilled on lease M-60749.

[1] Lease M-60749 was issued effective Sept. 1, 1984. Lands described therein are lots 1, 2, 3, 4, S½ NE¼, SE¼ NW¼ sec. 5, T. 31 N., R. 59 E., Montana Principal Meridian.

[2] This well is located in SE¼ SW¼ sec. 32, T. 32 N., R. 59 E., Montana Principal Meridian.

This conclusion was based upon a finding that recoverable reserves totalled 312,000 barrels of oil.

The lease terms referred to by the District Manager are found in section 4 of appellant's lease: "Lessee shall drill and produce wells necessary to protect leased lands from drainage or pay compensatory royalty for drainage in amount determined by lessor." The applicable regulations, 43 CFR 3100.2-2 and 43 CFR 3162.2(a), state in part, respectively:

> Where lands in any leases are being drained of their oil or gas content by wells either on a Federal lease issued at a lower rate of royalty or on non-Federal lands, the lessee shall both drill and produce all wells necessary to protect the leased lands from drainage. In lieu of drilling necessary wells, the lessee may, with the consent of the authorized officer, pay compensatory royalty in the amount determined in accordance with 30 CFR 221.21.
>
> (a) The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage. The authorized officer may assess compensatory royalty under which the lessee will pay a sum determined as adequate to compensate the lessor for lessee's failure to drill and produce wells required to protect the lessor from loss through drainage by wells on adjacent lands.

Appellant observes that despite the regulations' clear direction to drill or pay, this obligation only arises after a determination that drainage is substantial and that a prudent operator would drill an offset well.

In support of its position that a lessee's duty to drill arises only if substantial drainage is occurring, inter alia, appellant cites 5 Williams and Meyers, *Oil and Gas Law* § 822 (1986), *Gerson* v. *Anderson-Pritchard Production Corp.*, 149 F.2d 444 (10th Cir. 1945), and *Cone* v. *Amoco Production Co.*, 87 N.M. 294, 532 P.2d 590 (1975). Appellant acknowledges that the term "substantial drainage" has not been quantified in the case law, but quotes with approval the view stated by Williams and Meyers that substantial drainage should remain as an element of the cause of action for breach of the protection covenant: "Where damages are measured by the amount of oil or gas drained away, the pecuniary award will be modest if not purely nominal. There is no reason to incur the expense of litigation to compensate modest losses, when such losses are established by evidence that cannot be exact." *Id.* at § 822.1 (footnote omitted).

Appellant contends that 4.4 percent of the Hoffelt #2 production can only be considered a modest loss which does not justify drilling a protective well or payment of compensatory royalty.

Appellant further argues that BLM cannot recover damages without proving that a protective offset well can produce in paying quantities sufficient to yield a reasonable profit after paying all drilling, operating, and administrative costs. Appellant alleges that BLM's proof in this respect is flawed because BLM has assumed an unrealistic production decline rate for a protective well. According to appellant, this error caused BLM to overestimate reserves recoverable by an

offset well and to arrive at a conclusion that an economic offset well could be drilled. Appellant insists that an economic protective well cannot be drilled on lease M-60749 and submits data in support of its contention.

Finally, appellant takes exception with the District Manager's assessment of compensatory royalties for the period commencing with *first production* from the Hoffelt #2 well. Such a decision, appellant states, is contrary to *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982). In *Ptasynski* this Board held that "[t]he obligation to protect a leasehold from drainage arises not upon completion of the draining well, but only after the passage of a reasonable time subsequent to notification by the lessor that an adjoining well is draining the leasehold." 63 IBLA at 256, 89 I.D. at 217. Having cited *Ptasynski* with approval, appellant argues that compensatory royalties should not commence until the lapse of a reasonable time, but in no event less than 6 months, after the date of first production from the offending well.

In response, BLM defends its decisions, noting that, even if substantial drainage is an element of its proof, this term has not been quantified and is otherwise ill-defined. No BLM manager has the authority to waive royalties, however insubstantial, without good legal reason, BLM observes. Moreover, if substantial drainage were a requirement, BLM states, its loss of $9,003 in royalties during the period through May 1987 is substantial.

BLM also maintains that it used an accurate production decline rate when estimating reserves for the protective well. Appellant's contention that a steeper decline rate is appropriate is misguided, BLM states, because there has been no physical deterioration of the reservoir. BLM further observes that a model protective well should be based on a minimum of 207,276 barrels of oil. In BLM's view, such reserves can support the drilling and operation of a paying protective well. Whether a paying protective well exists, BLM states, depends upon the sufficiency of reserves recoverable by the protective well and not, as stated in *Gulf Oil Exploration & Production Co.*, 94 IBLA 364, 368 (1986), on the reserves under the Federal lease that are drained by the offending well.

Finally, BLM states that compensatory royalties are properly calculated from the date of first production of the Hoffelt #2 well because appellant, as operator of that well, knew of the potential for drainage at the time it completed the well. As a common lessee, appellant benefitted immediately from this well, BLM states, and had immediate knowledge of the drainage.

In *Nola Grace Ptasynski, supra*, this Board refrained from deciding whether substantial drainage was a part of the cause of action for breach of the protection covenant or merely a restatement of the prudent operator standard. 63 IBLA at 250, 89 I.D. at 214. In the present case, it is not disputed that the Hoffelt #2 well has produced 77,055 barrels of oil and 44,966 MCF gas, of which 4.4 percent may be

regarded as drainage from lease M-60749. Had the United States received royalty on these drained resources, it would have received $9,003 in royalties, according to BLM's calculations. [3] BLM has not used the term "substantial drainage" in its decision. If appellant maintains that substantial drainage is part of BLM's cause of action and that BLM has failed to demonstrate this fact, it is incumbent upon appellant to define this term in order that we might determine whether appellant's contentions are correct. As one seeking reversal of BLM's decision, appellant bears the burden of showing error in that decision by a preponderance of the evidence. *Bender* v. *Clark*, 744 F.2d. 1424 (10th Cir. 1984). By offering only an unsupported conclusion, appellant has failed to meet this burden.

[1] In the decision on appeal, the Montana State Office specifically found an economic protective well could be drilled on lease M-60749. This finding reflects BLM's application of the prudent operator rule in a common lessee context. This rule was previously applied to a common lessee in *Gulf Oil Exploration & Production Co., supra*, when this Board remanded a decision of the New Mexico State Office for application of the rule. In *Ptasynski*, the prudent operator rule was described as a limitation on a lessee's implied obligation to protect against drainage. Quoting from *Olsen* v. *Sinclair Oil & Gas Co.*, 212 F. Supp. 332, 333 (D. Wyo. 1963), the Board set forth the rule in these terms:

> Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill offset wells unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well.

63 IBLA at 247, 89 I.D. at 212.

Upon review of our *Gulf* decision, we find certain refinements of that opinion to be in order. When BLM seeks to recover compensatory royalties from a common lessee, it must establish that a leased Federal tract is being drained by a well operated by the common lessee. However, BLM need not prove as a part of its cause of action that a protective well would be economic, *i.e.*, profitable. Both the burden of going forward and the ultimate burden of persuasion on this issue must rest with the common lessee. These burdens are placed on the common lessee because of the possibility of unfair dealing and because the common lessee possesses the evidence necessary to prove that an economic well cannot be drilled. *See* 5 Williams and Meyers, *Oil and Gas Law* § 824.2 (1986), and *Elliott* v. *Pure Oil Co.*, 10 Ill.2d 146, 139 N.E.2d 295 (1956). If the common lessee satisfies this burden of going forward on the issue of profitability, BLM must produce evidence on this issue or suffer an adverse ruling.

[3] Production from the Gunton formation has been shut off since July 1, 1986. Had production continued, BLM estimates, $24,332 could ultimately be derived in Federal royalty income.

[2] Appellant's argument focusing on when compensatory royalties begin to accrue has been the subject of recent case law. In *CSX Oil & Gas Corp.*, 104 IBLA 188, 95 I.D. 148 (1988), the Board cited *Ptasynski* with approval for the proposition that compensatory royalties commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. *CSX* clarified *Ptasynski*, however, by further explaining that if, in the absence of notice from BLM, BLM can prove that the lessee knew or that a reasonably prudent operator should have known drainage was occurring, the notice requirement was satisfied. 104 IBLA at 196, 95 I.D. at 152-3.

Neither *CSX* nor *Ptasynski* involved a common lessee, and hence these cases do not guide us in every aspect of the present appeal. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such context, we find no reason for requiring BLM to assume the initial burden of going forward with evidence that the common lessee knew or that a reasonably prudent operator should have known that drainage was occurring. *See Elliott* v. *Pure Oil Co., supra.* The common lessee shall be presumed to have knowledge of the drainage upon first production from its offending well. However, this presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to notice of drainage.

[3] Having determined that the prudent operator rule does apply in the case of a common lessee, we turn to the test to be applied in such cases. The loss incurred by the lessor is an economic loss and, therefore, economics must govern the duty to drill. If the cost of drilling and operating the offset well is greater than the value of oil and/or gas recovered by such well, there would be no breach of the duty to protect against drainage. When entering into an oil and gas lease, the parties contemplate that a well will be drilled by or on behalf of the lessee if the lessee can recover his costs and make a reasonable profit on his investment. If this cannot be done, the prevention of drainage by drilling an offset well is uneconomic, and need not be attempted. [4]

Normally the application of the prudent operator rule to the duty to drill a well arises in two cases. The first is the case of the lessee's duty to develop the leasehold. The second case, such as that now before us, involves the duty to prevent drainage. As noted by Williams and Meyers, the application of the rule should be the same in both cases. If a lessee can make a profit by drilling the well, he should drill. *See* 5 Williams and Meyers, *Oil and Gas Law* § 815 (1986). Therefore, the test is applied looking to the reasonably anticipatable recovery from the *offset* well, and not the amount of oil and/or gas which would be

[4] It also stands to reason that when an offset well is drilled and proves to be uneconomic because the cost of operating the well is greater than the return from the well, the operator need not continue production from the well in order to avoid paying compensatory royalties. A determination that the well is uneconomic should be based upon production (or anticipated production in the case of the decision to drill) and not the loss of revenue to the lessor occasioned by drainage from an adjacent well. The "profitability" determination is therefore subject to constant review, as would be the case for a well drilled for any other purpose.

lost if the offset well is not drilled. The statements to the contrary in *Gulf Oil Exploration & Production, supra* at pages 368 and 370, are incorrect. However, recovery must be reasonably anticipatable, and the mere possibility of being able to recover additional product from other strata should be given very little weight.

A strict application of the duty to prevent drainage would require the lessee to commence drilling an offset well at the same time an offending well is being drilled. If he did not, the lessee would be required to pay compensatory royalties during the period the offset well is being drilled, *i.e.*, commencing with first production from the offending well. Such anticipatory drilling is contrary to sound business judgment, and would prove wasteful in many cases. If the "offending" well is a dry hole, there would be no need to drill an offset well. As set forth in *Ptasynski*, the obligation to pay compensatory royalties commences only when a lessee fails to offset an offending well within a reasonable time after notice of drainage. Because the decision of the Montana State Office assessed royalties from the date of first production from the Hoffelt #2 well, that decision must be set aside. Compensatory royalties would begin to accrue only upon the expiration of a reasonable period of time after notice of drainage. [5] *See Bruce Anderson*, 80 IBLA 286 (1984), and *Nola Grace Ptasynski, supra*. As noted above, in the case of a common lessee, notice is presumed at the time of first production from the offending well.

BLM's decision is also flawed in its application of the prudent operator rule. The record reveals that BLM based its conclusion that a prudent operator would drill an offset well on the anticipated recoverable reserves as of January 1, 1985. [6] BLM should have used the anticipated recoverable reserves remaining at the conclusion of the reasonable period allowed for drilling the offset well. The recoverable reserves used by BLM when making its prudent operator determination will have been partially depleted during the interim, and the use of the higher figure casts doubt on this determination. The drilling costs used for the determination should also be the costs on the date a prudent operator would have commenced drilling and not the costs on the date of first production from the offending well.

The record further reveals that appellant and BLM are not in agreement regarding reserves in lease M-60749 which could be recovered by an offset well. The anticipated annual decline rate for the offset well will be a key factor in this determination. By setting aside

[5] The time it would take to complete a well is dependent upon a number of factors such as the depth of the well, the ability to obtain necessary permits, and the availability of equipment. For example, if an environmental impact statement were required prior to the issuance of a permit to drill a deep well, to commence compensatory royalties 6 months after completion of the offending well might be very unreasonable. Thus, the determination of what is a reasonable time must be made on a case-by-case basis.

[6] *See* Memorandum to Drainage File, dated June 17, 1986, and Reserve Analysis Report, dated Sept. 16, 1986, each by Jamie E. Connell, BLM petroleum engineer, at tabs F and K respectively.

the decision we are affording appellant and BLM an opportunity to resolve their differences on this issue.

The parties appear to be in agreement that 4.4 percent of the total production from the Hoffelt #2 well comes from the tract of land subject to lease M-60749. *See* Statement of Reasons, December 29, 1986, at pages 7 and 13. We believe that, as a starting point, BLM should determine what was a reasonable time from the date of completion of the offending well for completion of an offset well. After that determination is made, BLM should determine the amount deemed owing as compensatory royalties. [7] If appellant is of the opinion that a prudent operator would not drill an offset well because such well would not be economically feasible, it should then submit evidence in support of that contention as well as any other evidence it believes will have a bearing on the date of notice, the prudent operator determination, or the amount of the compensatory royalty. BLM should then make its final determination of whether compensatory royalties are due based upon its information and the evidence submitted by appellant. The decision should clearly set forth the methods and assumptions used as well as an explanation of its rejection of any of the evidence submitted by appellant. That determination will be appealable to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is set aside and remanded.

R. W. MULLEN
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Administrative Judge

HIRAM WEBB *ET AL.*

105 IBLA 290 Decided: *November 8, 1988*

Appeal from a decision of the Arizona State Office, Bureau of Land Management, partially rejecting an Affidavit of Labor Performed and Improvements Made for assessment year 1984-1985. A MC 86948, A MC 86949, A MC 86952 - A MC 86958, A MC 86960, A MC 86962, and A MC 86963.

Affirmed in part; reversed in part.

[7] The amount of the compensatory royalty should be based upon the amount of drainage that could be prevented, not the anticipated recovery from the offset well. The effect of factors limiting a lessee's ability to recover product being drained by the offending well (*e.g.*, well-spacing requirements or geography) should also be considered. *See* 5 Williams and Meyers, *Oil and Gas Law* § 825.2 (1986).

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Possessory Right

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), apply to claims which rely on the provisions of 30 U.S.C. § 38 (1982), to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Possessory Right

The provisions of 30 U.S.C. § 38 (1982), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving recording and posting. Where, however, placer rights are asserted under this statute, such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to lode locations.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for Hiram Webb; David M. Donovan, Esq., Phoenix, Arizona, for Bruce Balls and Everett Warner; Fritz L. Graham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This case involves a group of mining claims situated near Phoenix, Arizona, collectively known as the Turkey Track Granite Quarries. On December 20, 1985, Bruce Balls filed an Affidavit of Labor Performed and Improvements Made (affidavit) for assessment year 1984-85 with BLM for the 16 mining claims which comprise the Turkey Track Granite Quarries. This filing was made pursuant to the provisions of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982). On February 10, 1986, the Arizona State Office, Bureau of Land Management (BLM), issued a decision rejecting the affidavit as to the following 12 claims within the Turkey Tract Granite Quarries:

Name of claim	Serial number
Leo #1 Lode	A MC 86952
Leo #2 Lode	A MC 86953
Leo #3 Lode	A MC 86954
Leo #4 Lode	A MC 86955
Alta Vista #1 Lode	A MC 86956
Alta Vista #2 Lode	A MC 86957
Turkey Track #1 Placer	A MC 86958
Turkey Track #3 Lode	A MC 86960
Turkey Track #5 Lode	A MC 86948
Turkey Track #6 Lode	A MC 86949

Name of claim	Serial number
Minnie Lode	A MC 86962
Victor Lode	A MC 86963

The BLM decision stated it would not accept filings for the 12 claims listed above[1] for the following reasons:

> [BLM] recordation records pertaining to the subject claims have been closed as the claims were voided by prior administrative actions. The Affidavit of Labor Performed and Improvements Made was informally returned on January 27, 1986 because the claims referenced herein had been closed out. The filing of the subject Affidavit as it pertains to the mining claims identified in this decision is hereby rejected.

(BLM Decision at 4). The BLM decision then pointed out "[f]ormal adjudicative action was taken through contest Nos. 10009, A 9700, AR 032789, AR 034090, and AR 10013, which led to the final disposition of these mining claims and the closure of the records" (BLM Decision at 3). Hiram Webb, Bruce Balls, and Everett Warner filed timely appeals from this decision.[2]

Before considering further BLM's rationale for rejecting the filing and the arguments against the decision asserted by appellants, we will first review the history of the claims at issue. These claims are all situated in secs. 21 and 22, T. 4 N., R. 3 E., Gila and Salt River Meridian in Maricopa County, Arizona.[3] Because the Turkey Track #1 lode and placer claims raise issues distinct from those presented by the other 11 claims, they will be discussed separately below.

Lode mining location notices were filed in the Maricopa County Recorder's Office by Webb on July 1, 1954, for the Minnie claim, on April 2, 1954, for the Victor claim, on August 12, 1954, for the Leo #1 through #4 claims, on October 7, 1954, for the Turkey Track #3 claim, and on April 25, 1955, for the Alta Vista #1 and #2 claims. These nine lode claims, together with the Turkey Track #1 lode claim (discussed separately below), were the subject of mineral contest AR 10013 in 1957. By decision dated December 23, 1957, the hearing examiner found the Turkey Track #1 lode and the Minnie and Victor

[1] The BLM decision states that for the remaining four claims in the Turkey Track Granite Quarries, the Turkey Track #2, #4, #7, and #8 lode claims, the affidavit had been accepted.

[2] To best understand appellants' respective ownership interests in the claims, a partial conveyance history of these claims is briefly set forth. According to counsel for Webb, in a sale agreement dated Nov. 13, 1978, Webb transferred the Turkey Track #1 and #3, Minnie, and Victor claims to Gerald L. Lomker and Patsy A. Lomker (now Patsy A. Brings). Counsel states that the terms of the sales agreement were not fully met and the "Lomkers are in default," and further reports that on "March 24, 1986 in the Superior court of Arizona in C-570017, the court granted the Lomkers Turkey Track #1 and forfeited her [sic] out of Turkey Track * * * #3 * * * and the Minnie and the Victor [claims]" (Webb SOR at 9). No further action in this State court proceeding has been reported by appellants to the Board. According to counsel for Balls and Warner, Balls and Warner have an interest in the claims subject to the Webb-Lomkers sales agreement "by virtue of a 'Mining Lease and Option' dated May 15, 1985. The conveyance purports to grant [to Balls and Warner] Mr. Webb's 'interest as seller' under [the sales agreement]" (Balls and Warner SOR at 5). In a notice attached to a memorandum, dated Feb. 11, 1988, to the Board from the BLM acting Deputy State Director, counsel for Balls and Warner have no interest in Turkey Track #1 and are not seeking to have the claims with respect to Turkey Track #1 adjudicated in this appeal." No appeal from the BLM decision presently under review was filed by the Lomkers.

[3] The land in question was segregated from mineral entry on Apr. 26, 1973, by the filing of Recreation and Public Purposes Act application A 6390 by the City of Phoenix.

lode claims null and void. The complaint was dismissed with respect to the other seven lode claims. No appeal was taken from the decision of the hearing examiner.

Recordation of amended notices of lode mining location for the four Leo, Turkey Track #3, and the two Alta Vista claims was made with the county recorder on February 14, 1961. In 1963, these seven claims were part of a patent application made by Webb. As a result of the patent application, BLM initiated another contest against these claims on May 17, 1965, under contest Nos. AR 032789 and AR 034090. The hearing examiner declared the lode mining claims null and void and rejected the mineral patent applications on March 29, 1967. This decision was ultimately affirmed by the Board in *United States* v. *Webb*, 1 IBLA 67 (1970). Webb did not seek judicial review of this decision when it became final in 1970.[4]

For the Turkey Track #5 and #6 claims, lode mining location notices were allegedly posted on the claims on October 4, 1958. However, these claims were not recorded with the county until August 27, 1976. Relying on a classification of the lands as suitable for purchase by the City of Phoenix, under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), BLM declared these lode claims null and void by decision dated October 5, 1976. This decision was affirmed by the Board in *H. B. Webb*, 34 IBLA 362 (1978). No appeal was taken from this final administrative decision.

We turn now to certain notices and documents that Webb filed with BLM on October 22, 1979, pursuant to the recordation provisions in section 314(b) of FLPMA. This section required the owner of a mining claim located before October 21, 1976, to file, on or before October 22, 1979, a copy of the claim's location notice with the proper office of BLM. Section 314(c) further provides that failure to comply with section 314(b) would "be deemed conclusively to constitute an abandonment of the mining claim." 43 U.S.C. § 1744(c) (1982). The constitutionality of these provisions was upheld in *United States* v. *Locke*, 471 U.S. 84 (1985).

On October 22, 1979, Hale C. Tognoni filed with BLM copies of the official record of all notices and amended notices of these lode mining claims that had been filed in the Maricopa County recorder's office. These filings were made in two separate groups. Thus, Tognoni filed

[4] In 1978, the Government brought an action against Webb seeking recovery of possession of the land within the claims found to be void in contest Nos. AR 032789 and AR 034090, and a judicial declaration that Webb was without right, title, or interest in the property. In 1979, after the Government filed a motion for summary judgment 12 months after the original pleadings, Webb sought leave of the court to amend his pleadings to allege valid placer claims and to request judicial review of the 1970 Board decision. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government. On appeal, the Ninth Circuit vacated the district court's ruling on the motion and remanded for further consideration of Webb's request to amend his pleadings. The court also held that there was no statute of limitations for judicial review of an administrative decision of the Board finding mining claims null and void. *United States* v. *Webb*, 655 F.2d 977 (9th Cir. 1981). Counsel for Webb reports that on remand, the district court "separated the placer mining rights out of the proceedings, left Webb in possession, but granted the BLM's new motion for summary judgment" on the lode claims found to be void in the Board decision (Webb SOR at 21).

documents for 10 claims consisting of the Turkey Track #5 through #8, the Leo #1 through #4, and the Alta Vista #1 and #2 lode, on behalf of a Ronald Linderman, "under a purchase contract from Hiram B. Webb."[5] These claims were assigned serial numbers A MC 86948 through A MC 86957. The second group consisted of six claims, the Turkey Track #1 and #2 placers, the Turkey Track #3 and #4, and the Minnie and the Victor lodes, which were filed on behalf of Gerald L. Lomker and Patsy A. Lomker (the Lomkers), "under a purchase contract from Hiram B. Webb."[6] These claims were assigned serial numbers A MC 86958 through A MC 86963.

In addition to filing the various location notices, for the Leo #1 through #4, Alta Vista #1 and #2, and Turkey Track #3 lode claims, Tognoni submitted copies of a "Notice of Intention to Hold Mining Claim through Work and Possession (Pedis Possessio) Title 30, Section 38, USCA" which had been filed with the county recorder's office on November 9, 1976. These documents were placed in the BLM records according to each claim's respective BLM claim file number. The effect of this filing is central to the issues in this appeal.

In its February 10, 1986, decision partly rejecting the 1985 affidavit of assessment work, BLM addressed the issue of the recordation filings submitted by Webb in October 1979. The decision stated that "[i]f it was the intent of the mining claimant to amend some of the prior void [lode] locations * * * and record them under the recordation statute," then *Jon Zimmers*, 90 IBLA 106 (1985), the Board precedent holding that amendments of void locations may not properly be considered amended locations would apply. BLM thus concluded that, because of the prior decisions invalidating the claims at issue, the filings made by Webb in 1979 to comply with section 314 of FLPMA were without legal effect.

On appeal, appellants claim that BLM, in rejecting the affidavit, completely failed to consider their entitlement to the claims through the statutory provisions of 30 U.S.C. § 38 (1982). This statute provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto * * *

Appellants assert placer rights under 30 U.S.C. § 38 (1982), and claim that there rights "remain valid existing mineral rights that have not been contested" in any of the decisions cited by BLM as dispositive of the mining claims' validity (Webb Statement of Reasons (SOR) at 2).

Appellants' argument that they are entitled to the claims in question under 30 U.S.C. § 38 (1982), is necessarily intertwined with BLM's

[5] We note that the Turkey Track #7 and #8 are not involved in the instant appeal.

[6] Neither the Turkey Track #2, which is a placer claim, nor the Turkey Track #4, which is a lode claim, is involved in this appeal. With respect to the Turkey Track #1, it is important to note that appellant had located two Turkey Track #1 claims, one as a lode and the other as a placer. The relevance of this point is discussed *infra* in our discussion of the Turkey Track #1 placer.

conclusion that appellants' recordation filings made with BLM on October 22, 1979, did not preserve appellants' asserted placer rights. As will be more fully explained below, the filings which appellants made are fatally flawed insofar as the preservation of any asserted placer rights flowing from the lode claims is concerned.

[1] Initially, we note that, section 314(b) and (c) of FLPMA provides in pertinent part:

> (b) The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to [October 12, 1976,] shall, within the three-year period following [October 21, 1976,] file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim * * * sufficient to locate the claimed lands on the ground.
>
> (c) The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner.

The Board has had occasion in the past to consider the applicability of these provisions to claims asserted under 30 U.S.C. § 38 (1982), beginning with its decision in *Philip Sayer*, 42 IBLA 296 (1979). The appellant in *Sayer* had filed copies of recorded, amended location certificates with BLM on July 21, 1977, which stated that the claims were originally located in 1908 and that the official records were "imperfect, incomplete or nonexistent." 42 IBLA at 298. The Alaska State Office, BLM, rejected the filings and declared the claims null and void because, among other reasons, copies of the original recorded location notices were not filed as required by the language of section 314(b) and the regulations then in effect.

On appeal, Sayer asserted that BLM's decision was improper since the regulations promulgated to implement section 314(b) of FLPMA did not specifically address the situation where a claimant intends to rely on 30 U.S.C. § 38 (1982). In reviewing appellant's allegations, the Board explained that where a claimant was attempting to record claims being held under 30 U.S.C. § 38 (1982), the problem becomes what must be shown to meet the FLPMA recordation requirements. In reversing BLM, the Board found:

> Because there is a gap in the recording statute and the regulations currently concerning proof that a claim is being held under this provision of the mining laws, BLM should liberally consider attempts by claimants to record evidence of such claims. We agree with appellant that it was premature for BLM to take the action it did in rejecting the notices filed by claimant where BLM had been informed claimant was relying on 30 U.S.C. § 38 (1976).

Id. at 301.

In light of this regulatory hiatus, the Board then addressed the issue of what was necessary to meet the recordation requirements:

> [T]he purpose of the recording provisions in FLPMA is essentially to give notice to BLM of the existence of mining claims on Federal lands so that this information may be considered in the land use planning and management of those lands. To serve this

purpose then, *there is some essential information that would be necessary where a claimant cannot show proof that a notice of location was recorded.* This would include the following: (1) the name under which the claim is presently identified and all other names by which it may have been known to the extent possible; (2) the name and address of the present claimants: (3) an adequate description of the claim; (4) type of claim; (5) information concerning the time of the state's statute limitations and a statement by the claimant as to how long the claim had been held and worked, giving, if possible, the date (or least the year) of the origin of the claim; and (6) any other information the claimant would have showing the chain of title to him and bearing upon the possession and occupancy of the claim for mining purposes. Other information which BLM deems essential to meet its purposes may also be required. The above information would set the minimal requirements to be satisfied. * * *. [Italics supplied, footnote omitted.]

Id. at 302-03. As noted in *Sayer*, recording with BLM under section 314(b) was necessary to establish an official Federal record of *all* extant mining claims. The types of information outlined by the Board in that case ensured that any filing made for a claim held under section 38 met the statutory intent of the recording provisions, namely, identification of the mining claims. Thus, to ensure that the statutory requirement has been met, all filings made to record claims asserted under section 38 by appellants with BLM must be judged by the "minimal requirements" set forth in *Sayer*.

The necessity that some filing be made within the statutory deadline was reemphasized in *United States* v. *Haskins*, 59 IBLA 1, 88 I.D. 925 (1981), *aff'd, Haskins* v. *Clark*, No. CV-82-2112-CBM (D.C. Cal. Oct. 30, 1984). In that decision, which dealt with a fact situation similar in certain respects to the instant case, we expressly noted that "[t]he recordation provisions of FLPMA required the recordation of all claims located prior to Oct. 21, 1976, *no matter how located*, on or before Oct. 22, 1979, or the claims would be deemed conclusively to be abandoned and void." *Id.* at 105, 88 I.D. at 978 (italics supplied).

In another Board decision, *Paul Vaillant* 90 IBLA 249 (1986), BLM declared six unpatented lode mining claims null and void ab initio because the claims had been located in 1978 after the lands therein had been withdrawn from mineral entry on February 27, 1975. Appellants, while acknowledging that the withdrawal negated four of their claims, asserted that the remaining two lode claims found invalid by BLM were 1978 amendments of an earlier placer claim located in 1970. Rejecting this argument, the Board initially pointed out that "[a] miner cannot amend a placer location by filing a lode location. The two claims are located for altogether different reasons." *Id.* at 253, *citing R. Gail Tibbets*, 43 IBLA 210, 86 I.D. 538 (1979). *Accord Cole* v. *Ralph*, 252 U.S. 286 (1920); *United States* v. *Haskins, supra*. Thus, the 1978 locations were treated as relocations or new locations. As a result, the Board concluded the "appellants' lode locations made in 1978 were invalid because they were located upon land previously withdrawn from location under the mining law." *Id.* at 253. As to the placer mining claim located in 1970, the Board explained that it was abandoned in 1979 "since appellants failed to comply with FLPMA

mining claim recordation requirements on or before October 22, 1979." *Id.* at 253.

The appellants in *Vaillant*, however, sought to "avoid total invalidation of their claims by another possible theory." Thus, they alleged that they had worked their claims diligently since 1970, developing their discovery and determining the extent of the minerals claimed. The Board noted that "their arguments indicate they may be asserting what amounts to a claim of right under provision of 30 U.S.C. § 38 (1982)," but this argument was also rejected. Relying on the holding in the Supreme Court decision *United States* v. *Locke, supra*, that "Congress intended in § 314(c) to extinguish those claims for which timely filings were not made," the Board reasoned:

> This analysis applies equally to the claims held in this case by appellants. The *Locke* claims also were being actively prosecuted up until the time they were declared invalid, and were in fact the basis for a going business. While section 314 had not repealed the provisions of 30 U.S.C. § 38, it is now clear that in order to have a valid claim under 30 U.S.C. § 38, a claimant must also have complied fully with section 314 of FLPMA. In this case, *there was an abandonment of the placer claim as a matter of law when the appellants failed to make timely filings for their placer claim under the recording provisions of section 314 of FLPMA.* The void lode locations, made after the lands upon which the placer was first located were withdrawn, could not be considered to be valid as amendments of the placer claim * * *. As a consequence, the placer claim was extinquished. [Italics supplied.]

Id. at 254. Thus, the law is clear that all claims asserted under 30 U.S.C. § 39 (1982), were subject to the recordation reuqirements of FLPMA.

Finally, we wish to address appellants' contention that there was "no provision under FLPMA providing for recording rights claimed under 30 USCA 38 for the preservation or loss of 30 USCA 38 rights." It is true, as pointed out in *Philip Sayer, supra* at 300, that the regulations as *originally* promulgated to implement section 314 of FLPMA did not "specifically [address] the situation where a claimant intends to rely on 30 U.S.C. § 38." However, the definition of the term "copy of the official record" was amended to permit filing of "other evidence, acceptable to the proper BLM office, of such instrument of recordation." 43 CFR 3833.0-5(i) (1979); 44 FR 9722 (Feb. 14, 1979). In *Cleo May Fresh*, 50 IBLA 363, 365 (1980); when an appellant sought to invoke this definition to include the filing of a copy of a quitclaim deed as a copy of the "official record," the Board pointed out that the "provision of the regulations concerning the submission of 'other evidence' only applies when the notice of location is no longer obtainable *or when a claimant purports to hold a claim under 30 U.S.C. § 38.*" (Italics supplied.) *Accord Marvin E. Brown*, 52 IBLA 44 (1981). Thus, there is no basis for an assertion by appellants that there was no mechanism by which they could record a claim based on 30 U.S.C. § 38 (1982).

From the foregoing, it can be seen that any claim asserted under the provisions of 30 U.S.C. § 38 (1982), must have been recorded pursuant to section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1982), or it will be deemed conclusively to be abandoned and void. Appellants assert that they recorded their placer "rights" in 1979. Thus, counsel for appellant Webb asserts that Webb

> complied with the recordation requirements of FLPMA by filing either copies of the notices of intention to hold or previously recorded notices of mining locations and obtained a BLM serial number for each claim of right under 30 USCA 38 and Affidavits of Labor have been filed with the BLM for every year required by FLPMA.
>
> Webb filed notices of intention to hold for the Leo #1-4, Alta Vista #1 and 2, and the Turkey Track #3, declaring his intention to hold under 30 USCA 38. *The BLM assigned the intentions to hold the same BLM serial numbers as the lode claims.*
>
> Webb filed previously recorded lode notices of mining location of the Minnie, Victor and Turkey Track #5 and 6 lode mining claims, giving the BLM notice of its intention to hold the remaining placer rights. *The lode rights under these notices of mining location had been previously invalidated by Department (ALJ and IBLA) decisions, but the placer rights under 30 USCA 38 remain intact unless they fail for lack of discovery* under *Cole v. Ralph*, 252 U.S. 286. The recording of the notices of mining location with the BLM merely established "color of title" for the 30 USCA 38 rights held by Webb and notice to the BLM that Webb claimed 30 USCA placer mining rights. In fact, there is no provision under FLPMA providing for recording rights claimed under 30 USCA 38 or for the preservation or loss of 30 USCA 38 rights. [Italics supplied.]

(Reply Brief at 3-4).

A close examination of the foregoing discloses that appellants' arguments do not withstand analysis. Appellants refer variously to "each claim of right," "remaining placer rights," and "color of title," in relation to 30 U.S.C. § 38 (1982). As we shall show, the use of these terms displays a fundamental msiconception of the nature of that statute.

Not a single court decision, including both *United States* v. *Haskins*, 505 F.2d 246 (9th Cir. 1974), and *United States* v. *Webb*, 655 F.2d 977 (9th Cir. 1981), on which appellants purport to rely, has ever suggested that placer "rights" can flow from invalid lode locations. As the Supreme Court noted long ago in *Cole* v. *Ralph, supra* at 295, "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location." Moreover, to the extent that appellants are contending that placer "rights" can inure to a lode location through the auspices of 30 U.S.C. § 38 (1982), they are equally wrong.

What the Ninth Circuit Court of Appeals ruled in *United States* v. *Haskins, supra*, was *not* that a claimant could assert placer "rights" to a lode location by showing compliance with the provisions of 30 U.S.C. § 38 (1982), but rather that a claimant, upon such a showing, "may assert placer *locations* without proof of recording and posting." *Id.* at 251 (italics supplied). This is consistent with a long train of Supreme Court decisions which have noted that "the right to possession comes only from a valid *location*." *Belk* v. *Meagher*, 104 U.S. 279, 284 (1881) (italics supplied).

The Ninth Circuit decision in *United States* v. *Webb, supra*, which actually dealt with the claims involved herein, is clearly in accord with this analysis. Thus, the court noted:

> In 1979, after the Government filed a motion for summary judgment twelve months after the original pleadings, Webb sought leave to amend his pleadings to allege *valid placer claims* (as contrasted with lode claims) and to request judicial review of the 1970 administrative decision that his lode claims were null and void. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government. [Italics supplied.]

Id. at 979.

The Court of Appeals vacated the District Court's refusal to permit Webb to amend his pleadings because the absence of a finding by the District Court that either bad faith was involved or that prejudice would result prevented the Court of Appeals from determining whether the District Court's actions were an abuse of discretion under Fed. R. Civ. P. 15, which covers permissive amendment of pleadings. Thus, the Court of Appeals directed the District Court to reconsider its ruling that appellant could not amend his pleadings by alleging valid placer claims. By no means, however, did the court countenance appellant's assertion herein that placer rights could flow form the lode locations, themselves. Indeed, if such were the case, there would have been no need for Webb to attempt to amend his pleadings since he had originally asserted lawful possession of the property under the lode mining claims, and would have, perforce of appellants' present theory, been able to assert placer rights as an incidence of those lode mining claims.

The importance of this point is not merely theoretical. While the provisions of 30 U.S.C. § 38 (1982), do permit the assertion of a location without proof of posting or recording, appellant is still required to comply with all other substantive provisions of the mining laws, including recordation of the claim under FLPMA. Appellants' repeated reference to rights and color of title is simply a smokescreen designed to obscure the fact that appellants never recorded placer *locations* with BLM for these 11 claims.

For four of the claims at issue, the Minnie, Victor, and Turkey Track #5 and #6, the only documents submitted were copies of the lode location notices which had been filed with the Maricopa County Recorder's Office. As indicated above, this was clearly inadquate to record any placer *claims* asserted under 30 U.S.C. § 38 (1982). With respect to the remaining claims under discussion, appellant filed, in addition to the lode notices of location,[7] an additional document for each claim, captioned "Notice of Intention to Hold Mining Claims

[7] We note that for the Turkey Track #3, no copy of the lode location notice was submitted. Only a copy of the "Notice of Intention to Hold Mining Claims through Work and Possession (Pedis Possessio)" was filed for that claim.

through Work and Possession (Pedis Possessio) [8] Title 30, Section 38, USCA." Because of the arguments which appellants premise on the contents of this document, an example of the form, this one filed for the Leo #3, is reproduced below:

TO ALL WHOM IT MAY CONCERN:

This mining claim, which was named Leo #3, situate on lands belonging to the United States of America, and being a form of valuable mineral deposit, was entered upon by Rachelle Lora Landriault on the 12th day of August, 1954 for the purpose of working and producing Gold and other valuable minerals from the same through acquisition of the mineral rights of previous owners and through work and possession have acquired the right to patent, subject to the discovery of an economic mineral deposit, under Title 30, Sections 11, 23 & 35 thru 38, USCA.

Hiram B. Webb as the (purchaser, * * *) from Rachelle Lora Landriault, who relocated a previously existing mining claim on the same ground, hereby gives notice that he and said owners or locators and as locator himself have held and worked the Leo #3 for a period equal to the time prescribed by the statute of limitations for mining claims of the State of Arizona, where the same is situated.

The Leo #3 mining claim is located in the Winifred Mining District, County of Maricopa, State of Arizona approximately 2 miles East of Deer Valley Airport and is more particularly described as follows:

BEGINNING at the corner of sections 15, 16, 21 & 22, T4N, R3E, G&SRB&M, thence S 87° 45' E, 600 feet to corner No. 2, thence S 0° 45' E 1500 feet to corner No. 3, thence N 87° 45' W, 600 feet to corner No. 4, thence N 0° 45' W, 1500 feet to corner No. 1.

The original location notice of above said claim is recorded in Book 1413 Page 491 in the Maricopa County Recorder's Office.

[8] As pointed out by counsel for BLM, the doctrine of "pedis possessio," has no relevance to the application of 30 U.S.C. § 38 (1982). *Pedis possessio* applies only to prediscovery locations (*see generally Union Oil Co. of California* v. *Smith*, 249 U.S. 337 (1919); *United States* v. *Haskins*, 59 IBLA at 53 n.36, 88 I.D. 951 n.36). Therefore, any rights which were based solely on *pedis possessio* would have been terminated by the withdrawal of the land in 1973, since pedis possessio does not apply against the United States and only claims supported by a discovery of a valuable mineral deposit would have been protected from the effect of the withdrawal. *See Cameron* v. *United States*, 252 U.S. 450, 456 (1920).

All done under the provisions of Chapter 6 of Title XXXII of the revised statutes of the United States and Title 30, Sections 22, 23 & 35 thru 38, USCA .

Certain observations are in order. Appellants assert that the intent of this document was to record their placer "rights." As we discussed above, however, absent the assertion of a placer *claim* under 30 U.S.C. § 38 (1982), appellants had no placer rights to the land. Moreover, their contention that the entire purpose of this document was to assert placer rights is undermined by the fact that the document cites not only 30 U.S.C. § 35 (1982), which deals with location of placer mining claims, but also 30 U.S.C. § 23 (1982), which authorizes the location of lode mining claims. A perusal of the document makes it clear that, rather than attempting to assert a placer *claim* based on 30 U.S.C. § 38 (1982), the claimants were reasserting their mistaken view that placer *rights* could attach to a lode *claim* by virtue of 30 U.S.C. § 38 (1982).

Appellant Webb's belated attempt to suggest that BLM erroneously assigned these documents the same recordation numbers as the lode claims does not bear scrutiny. Viewing the record in the light most favorable to appellants, the claimants were attempting to record seven placer claims *in addition to* their seven lode claims.[9] Thus, under the filing which counsel for Webb made on behalf of Ronald Linderman, which listed the Turkey Track #5 through #8, the Leo #1 through #4 and the Alta Vista #1 and #2, appellant would have been recording 10 lode claims *and* eight placer claims, since "Notices" were submitted for all of these claims except the Turkey Track #5 and #6. Yet, appellant submitted only $50 in filing fees, sufficient funds (at the rate of $5 per claim, *see* 43 CFR 3833.1-2(d) (1979)) to record only 10 mining claims. Appellant's tender of $50 at the time he recorded theses claims is inconsistent with any present contention that he intended to record *both* lode and placer claims in 1979.

With respect to the second group of filings made on behalf of the Lomkers, six claims (Turkey Track #1 through #4, Minnie and Victor) were listed. Of these, two were actually located as placers (Turkey Track #1 and #2),[10] and of the remaining four claims, a "Notice of Intention to Hold * * * (Pedis Possessio)" was submitted only for the Turkey Track #3. This claim, however, presents an

[9] That the claimants intended to record their lode claims cannot be gainsaid. Thus, when counsel for appellant Webb argues that "BLM assigned the intentions to hold the same BLM serial numbers as the lode claims," he implicitly recognizes that claimants were intending to record the lode claims in 1979. Indeed, since Webb was, at that time, litigating the correctness of the Department's invalidation of the lode claims in Federal court, it was essential that he record them in order to maintain his challenge to the Department's determination of validity, since a failure to comply with sec. 314(a) and (b) would result in a conclusive finding of abandonment. *See United States* v. *Locke, supra*; *Andrew L. Freeze*, 50 IBLA 26, 87 I.D. 396 (1980).

[10] Actually, counsel submitted both a lode location notice and a placer location notice of the Turkey Track #1. This is a matter of some confusion since the Turkey Track #1 *lode* mining claim had been invalidated in contest AR 10013, which decision had never been appealed. In this appeal, appellants have essentially abandoned any arguments that the Turkey Track #1 *lode* claim has any validity. The Turkey Track #1 *placer* mining claim is discussed separately *infra*.

unusual problem. As discussed above at footnote 8, no location notice was submitted for this claim. In the papers accompanying the filing made on behalf of the Lomkers, there was a document, denominated as Exhibit A, which listed the six claims involved in the agreement between Webb and the Lomkers, together with the date of filing of each notice of location and also including various recording data. The entry adjacent to the Turkey Track #3 is as follows:

Date	Type notice	Recording book	Data page
10/7/54	Original—Placer	1443	72
2/14/61	Amended—Placer	3616	398
11/9/76	Notice of intent to hold . . work and possession.	11938	725

This document asserts that the Turkey Track #3 was originally located as a placer claim. This is not correct. Both the original and amended notice of location related to *lode* claims. *See United States* v. *Webb*, 1 IBLA at 74; Appellant Webb's SOR at 12. Moreover, since the Turkey Track #3 was part of the ongoing litigation leading to the decision in *United States* v. *Webb*, 655 F.2d 977 (9th Cir. 1981), it is clear that the claimant intended, consistent with the approach utilized for all of the other claims, to record the lode claim and assert placer rights as an incidence of that lode claim (*see* note 9, *supra*). Had the claimant intended to record both a lode and a placer claim for the area covered by the Turkey Track #3, a total of seven claims would have been involved in the Lomker filing.[11] The $30 filing fee submitted was sufficient to record only six claims. This lends further support to our conclusion that, in line with the consistent course of conduct of the claimants herein, placer rights deriving from holding and working under 30 U.S.C. § 38 (1982), were viewed as accruing to the lode locations and, therefore, only the lode claims were being recorded. But, as we have explained above, placer *rights* emanating from holding and working under 30 U.S.C. § 38 (1982), can only be asserted in the context of a placer *claim*.

We hold, therefore, that appellants' affidavits of labor were properly rejected as to the Turkey Track #3, #5, and #6, the Leo #1 through #4, the Alta Vista #1 and #2, the Minnie, and the Victor lode mining claims on the ground that those claims had been declared null and void. Further, these affidavits were correctly rejected in reference to appellants' assertion of placer *rights* appertaining to these lode locations as no such rights exist. Finally, these affidavits were also properly rejected insofar as any asserted placer *claims* based on the provisions of 30 U.S.C. § 38 (1982), are concerned, since such claims were not recorded as required by section 314(b) of FLPMA, 43 U.S.C.

[11] We are leaving aside for the present the problems associated with the Turkey Track #1 claim, wherein the claimant actually submitted both lode and placer location notices, *see* note 10, *supra*.

§ 1744(b) (1982), and must be conclusively deemed to be abandoned and void.

We turn now to consideration of the Turkey Track #1 placer and lode claims. The BLM decision noted that, for these claims, Webb filed with BLM on October 22, 1979, copies of the following documents:

Notice of Mining Location Placer, recorded September 1, 1954;
Notice of Mining Location Lode, recorded January 30, 1957;
Notice of Mining Location, Amended Placer Claim, recorded January 30, 1957;
Notice of Mining Location, Amended Placer Claim, recorded February 14, 1961.

As an initial matter, we note that while counsel for appellant filed both lode and placer notices of location for the Turkey Track #1, he accompanied the submission with only enough money (considering the other claims for which recordation was sought) to record one claim. BLM, clearly proceeding in the view that there was only one claim involved, assigned a single recordation number. The question arises, therefore, as to which claim was recorded since appellant by his actions clearly did not intend to record both. The nature of appellant's subsequent actions and the arguments presented both in this appeal and that of *Patsy A. Brings*, 98 IBLA 385 (1987), a decision which is examined in detail, *infra*, leads necessarily to the conclusion that counsel intended to preserve the placer mining claim and recorded the lode location (which had already been declared void in contest AR 10013) for informational purposes. Therefore, we will treat the Turkey Track #1 *placer* claim as duly recorded.

On appeal, Webb asserts that the default decision in contest No. 10009 should be set aside since the mining claim had not been abandoned, and Webb, as owner of the claim at the time the contest issued, did not receive notice of the contest or the result thereof until 1985. The record indicates that the contest complaint was served only upon Webb's predecessor-in-interest, Rachelle Lora Landriault, who had transferred the Turkey Track #1 placer claim to Webb by quitclaim deed on February 29, 1956.

In fact, the issue of whether the default judgment in contest No. 10009 was binding on Webb or his successors-in-interest was resolved in the Board decision *Patsy Brings, supra*. In *Brings*, the appellant, a successor-in-interest to Webb,[12] had filed a mining plan of operations with BLM for the Turkey Track #1 claim. BLM rejected the plan of operations on the grounds that the default judgment in contest No. 10009 had rendered the claim null and void. Appellant on appeal raised essentially the same argument Webb raises herein. After reviewing the circumstances surrounding the issuance of the contest complaint and the default judgment, the Board agreed that

> BLM should have served Webb with the complaint and that its failure to do so was fatally defective to contest No. 10009. The default judgment in that contest is, therefore,

[12] The ownership interest of Patsy Brings in the Turkey Track #1 placer claim is discussed in note 2, *supra*.

not binding on Webb or his successor-in-interest, and BLM's null and void determination in contest No. 10009 may not be utilized as a basis for rejecting the mining plan of operations * * *

98 IBLA at 390. Because, therefore, the issue concerning the validity of contest No. 10009 has been finally resolved, the reasoning and holding of the Board in *Brings* is controlling in this case. Just as BLM could not use contest No. 10009 as the basis for rejecting a plan of operations, it likewise cannot serve as the basis for rejecting the filing of the affidavit of assessment work performed. BLM's rejection of the affidavit must be reversed since as explained above, a properly filed affidavit was filed in order to preserve the validity of the claim.[13]

In light of our finding that the rejection of the affidavit as to the Turkey Track #1 placer claim was in error, we need not further consider the validity of this claim, since, nothing in the BLM decision appealed from put the substantive validity of the claim at issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as to the Turkey Track #1 placer claim and affirmed as to all other claims for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

DAVID L. HUGHES
Administrative Judge

[13] This result is mandated regardless of who presently holds the ownership interest in this claim. A timely filing of the affidavit must be on record in order to preserve the claim itself.

GPO : 1989 0 - 240-940 (2) : QL 3

APPEAL OF PHILOMATH TIMBER CO.

IBCA-2409 Decided: *December 12, 1988*

Contract No. OR090-TS84-22, Bureau of Land Management.

Government motion to dismiss denied.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Motions

A Government motion to dismiss an appeal for lack of jurisdiction over the claims asserted is denied where the Board finds on the basis of controlling precedents that under the Contract Disputes Act the Board has jurisdiction over an appeal from a default termination absent a monetary claim by the parties and that it is not precluded from exercising jurisdiction over such an appeal by the failure of the contracting officer to issue a requested final decision where the record shows that the contracting officer gave *de facto* consideration to the claims and in effect denied them.

APPEARANCES: Galen L. Bland, Attorney at Law, Portland, Oregon, for Appellant; Roger W. Nesbit, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal on the general ground that the Board is without authority to grant the equitable relief requested. In connection therewith it has also stated a number of specific grounds. The Government has renewed its motion to dismiss in which it has assigned an additional ground. The Government motions are accompanied by supporting briefs. Appellant opposes the Government motions to dismiss and has filed memorandums in support of its position. Appellant has also filed an amended complaint to which the Government has filed an amended answer.

Background

The instant contract calls for appellant to complete the cutting and removal of the timber covered thereby over a 3-year period with an expiration date of April 20, 1987. Approximately 6 months before the scheduled expiration date, a landslide occurred on Road 16-1-21 Improvement which blocked access to unit No. 4, the final unit to be harvested (Appeal File (AF) 31, 46). The landslide occurred in the vicinity of station 100+00. In a visit to the site on December 1, 1986, the Bureau of Land Management (BLM/Government) discovered that at station 98+00 a 20-foot-long section of the shoulder had slipped out taking almost half of the roadbed and making it impassable for anything bigger than a pick-up and that maybe risky (AF 37).

Upon a visit to the site on December 9, 1986, a BLM investigation team found that there were no indications of poor groundwater drainage or tension cracks in the logging road. The cause of the instability was attributed to the loss of support for the soil and rock uphill brought about by the excavation for the road improvement work the previous summer. The BLM investigators recommended that the slide material be left in place until excavation work for the entire site could begin. As for the nearby fill failure of the road, they recommended that the road be moved into the hill in order to attain proper subgrade width (AF 41).

By letter dated December 15, 1986, the contractor requested that the expiration date of the contract be extended by one full year[1] or to April 20, 1988, in order to enable the contractor to deal with most unforeseen problems in the repair and stabilization of the road (AF 40). The contracting officer (CO) considered that an extension of time until October 30, 1987, should be sufficient and so advised the contractor in a February 2, 1987, letter (AF 44). The 6-month time extension was not acceptable to the contractor who wrote on April 29, 1987, to say that because of unstable soils in the area of the slide both its road building contractor and its logging contractor were refusing to proceed with the work. The letter requested BLM to look for an alternate way to secure access to unit No. 4 or to rescind the contract (AF 46).

In a meeting at the site on May 15, 1987, BLM representatives proposed that the contractor only excavate the slide material and such other materials as was necessary to secure access to unit No. 4 and that in reference to the fill failures the contractor only excavate whatever yardage of material was necessary to attain proper road width (AF 48). In a letter of May 26, 1987, pertaining to the May 15 meeting, the contractor objected to the Government's proposal for dealing with the slide and stated that the contractor and its subcontractor "are not willing to risk injury or death for a band-aid fix" (AF 49). Modification No. 6, dated June 2, 1987, extended the time for cutting and removing the remaining timber to October 30, 1987. The modification states (i) that Road 16-1-21 was the only reasonable access to the timber in unit No. 4; (ii) that BLM's geologist and its engineering staff believe that the slide presents no extraordinary safety problems; (iii) that BLM was only requesting the contractor to remove that portion of the slide mass which was preventing the removal of timber from unit No. 4;[2] (iv) that with a diligent operator

[1] Sec. 9 (Extension of Time and Reappraisal) provides that an extension of time may be granted, not to exceed one year, upon the written request of the purchaser, if the purchaser shows that delay in cutting and removal (of timber) was due to causes beyond his control and without his fault or negligence. The section specifically provides, however, that "[m]arket fluctuations shall not be cause for consideration of contract extensions" (AF 1; the contract).

[2] Under Sec. 19 (Cost Adjustment for Physical Changes) the Government is responsible for any estimated costs above the amounts specified in the section provided the costs involved stem from a major physical change, caused by a single event, which is neither due to the negligence of the purchaser nor imputable to him. The section specifically refers to the "estimated cost of additional work" and in connection therewith states " '[s]uch costs shall include the cumulative estimated costs of repairing damage from slides, washouts, landslips, fire, etc. caused by said event' " (AF 1; the contract).

and proper equipment, it should take only 4 or 5 days to remove the amount of material indicated; and (v) that it was not in the best interest of BLM to cancel the contract (AF 50).

The contractor refused to sign Modification No. 6 and in a letter to the CO under date of July 15, 1987, set forth the reasons for its refusal. The letter requested that it be considered a claim for adjustment of the contract terms within the meaning of Section 37 of the contract.[3] Accompanying the letter was a report from Mr. Robert Strazer of Kelly Strazer Associates, Inc. (identified as experts on landslides). The letter calls attention to Mr. Strazer's assessment that the minimal clearing operation proposed by BLM poses a substantial hazard of future landslides and to his conclusion that in order to repair the site so that the risks are similar to those existing before the slide, a full regrading program was absolutely essential. Thereafter, the letter states that in the absence of reasonably safe road conditions, comparable to those existing before the slide, the contractor had no duty to proceed with the contract. The contractor requested that the letter be treated as a formal request for a decision pursuant to Section 37 of the contract and 41 U.S.C. § 605 (AF 54).

The CO's letter response of August 7, 1987, adhered to the positions BLM had maintained for several months with respect to the extent of clearing required to assure relatively safe access to unit No. 4 and in regard to the time extension needed to accomplish such work. The letter rejected the claim under Section 37 of the contract as premature on the ground that no work had been done on which to base such a claim. The contractor was given 5 days from the date of receipt of the letter to return Modification No. 6 duly signed or to pay the unpaid balance of $123,381.91, plus accrued interest (AF 57). The contractor failed to meet either one of these conditions and by the CO's letter of August 18, 1987, the contractor was declared to be in default (AF 61). In its letter of October 20, 1987, the contractor appealed to the Board citing the CO's letter of August 7, 1987, and requesting an oral hearing.

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[3] "Sec. 37, Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. § 601, *et seq.*). If a dispute arises relating to the contract, the Purchaser may submit a claim to the Contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1-314 (FPR 1-1.38).

(b) 'Claim' means:

(1) A written request submitted to the Contracting Officer;

(2) For payment of money, adjustment of contract terms, or other relief;

(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer's decision is demanded.

* * * * * * *

(f) The Purchaser shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action related to the contract, and comply with any decision of the Contracting Officer." (AF 1; the contract).

Contention of the Parties

The Government has moved to dismiss the instant appeal on the specific grounds (i) that in exercising its jurisdiction, the Board has the same authority and limitations of authority as the Claims Court has in providing relief to litigants asserting a contract claim in that forum (citing 41 U.S.C. § 607(d) and *United States* v. *King*, 395 U.S. 1 (1969); (ii) not even the decision to terminate made in the August 18, 1987, letter (AF 61) would be appealable to the Board until the CO decides to pursue the Government's contractual rights to money damages as a result of the failure to timely perform the contract (citing *Gunn-Williams* v. *United States*, 8 Cl. Ct. 531 (Cl. Ct. 1985); (iii) appellant has failed to certify its claim to a contract right which is in excess of $50,000 in value; (iv) the requested equitable remedy of extending the time for completion of the contract obligation is not available under the Contract Disputes Act; (v) the requested remedy is not possible to grant without reinstating a terminated contract, which is not within the authority of the Board to grant; (vi) the requested remedy is not possible to grant without cancelling the contract which was resold to Bohemia, Inc., on July 21, 1988, which is not within the authority of the Board to grant; and (vii) the August 7, 1987, letter from the CO upon which appellant bases its appeal is not a final decision upon a claim under the Contract Disputes Act (CDA).

Appellant's opposition to granting the Government's motion to dismiss is grounded principally upon its amended complaint to which (without filing any objection) the Government has filed an amended answer. Succinctly stated, appellant's position is that the Board has the power to rule that the Government materially breached the contract and to order its rescission, citing *Seneca Timber Co.*, AGBCA Nos. 83-228-1, 84-175-1 (Oct. 30, 1985), 86-1 BCA par. 18,518 or, alternatively, to reform the contract, citing *United States* v. *Hamilton Enterprises Inc.*, 711 F.2d 1038 (Fed. Cir. 1983). As to the question of whether a final decision has been rendered by the CO, appellant disputes the Government's position that only claims for money damages can be pursued before the Board. In this regard, appellant calls attention to the fact that in the final paragraph of its letter of July 15, 1987 (AF 54), the contractor expressly requested a formal decision under Section 37 of the contract which defines "claim" as a written request for "payment of money, adjustment of contract terms, or other relief."

The Government's objections to the Board's assumption of jurisdiction over the instant appeal are considered seriatim below.

As to item (i) (jurisdiction of boards of contract appeals (BCA's) being identical to that of the Claims Court), precisely the argument advanced by the Government in this case was made to the Armed Services Board of Contract Appeals (ASBCA) in the case of *McDonnell Douglas Corp.*, ASBCA No. 26747 (Feb. 28, 1983), 83-1 BCA par. 16,377. There the ASBCA stated:

We are unable to agree with the Government's position that the Board is subject to the same jurisdictional limitations as the Court of Claims (U.S. Claims Court).

* * * * * * *

In our opinion, therefore, the authority to grant equitable relief in the form of reformation and rescission and to award damages in "pure" breach of contract cases, pursuant to section 8(d) of the Act, supplements and is in addition to the authority the Board already possessed under the "Disputes" clause and the practice developed thereunder. Accord, Robert J. Di Domenico, GSBCA No. 5539, 80-1 BCA par. 14,412 at 71,040.

Finally, as pointed out by appellant, historically and traditionally the Board has assumed jurisdiction over issues involving disputes as to the interpretation of contract provisions and determination of the rights and obligations of the parties under the provisions of a contract even though the Court of Claims might have declined jurisdiction on the ground that declaratory judgment would be involved.

(83-1 BCA at 81,420-21).

The ASBCA decision in *McDonnell Douglas, supra*, was affirmed in part and rejected in part on other grounds in *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365 (Fed. Cir. 1985). The decision of the ASBCA in *McDonnell Douglas* continues to be cited as precedent for the proposition that the Board has jurisdiction to determine the rights and obligations of the parties under a contact even though no monetary relief is sought. *Systron Donner, Inertial Division,* ASBCA No. 31148 (July 21, 1987), 87-3 BCA par. 20,066; *General Electric Automated Systems Division,* ASBCA No. 36214 (Sept. 2, 1988).[4]

To the same effect are decisions of other BCA's. *See,* for example, Robert J. DiDomenico, GSBCA No. 5539 (Apr. 23, 1980), 80-1 BCA par. 14,412 at 71,040; *Smith's Inc. of Dothan*, VABCA No. 2198 (May 14, 1985), 85-2 BCA par. 18,133 at 91,016-18; and *Husky Oil NPR Operations, Inc.*, IBCA-1792 (Nov. 20, 1985), 92 I.D. 589, 597-98, 86-1 BCA par. 18,568 at 93,243-44. *But see Rough & Ready Timber Co.*, AGBCA Nos. 81-171-3 *et al.* (June 11, 1981), 81-2 BCA par. 15,173, at 75,098-99, and *Guy F. Atkinson Co.*, ENG BCA No. 4785 (Mar. 28, 1983), 83-1 BCA par. 16,406 at 81,593-94.

Concerning item (ii) (no jurisdiction in Board over a default termination unless the appeal from the default termination is accompanied by a monetary claim), it is noted that the rationale of the decision in *Gunn-Williams, supra* (simple default termination is not a Government claim),[5] was rejected by the Engineer Board in *Almeda Industries, Inc.*, ENG BCA No. 5148 (Oct. 23, 1986), 87-1 BCA par. 19,401 at 98,104-06, which held that a default termination is, in effect, a Government claim from which a contractor can take an

[4] In *Brener Building Maintenance Co.*, ASBCA No. 35726 (May 25, 1988), 88-2 BCA par. 20,786, the ASBCA deemed that the issuance of an advisory opinion in that case would be premature and inappropriate. It noted, however, that in *Arctic Corner, Inc.* v. *United States*, Nos. 87-1617, 87-1618, slip op. at 4 n.2, the Court of Appeals for the Federal Circuit had stated that while it was constitutionally prohibited from issuing advisory opinions, such a limitation did not apply to the Board which could render advisory opinions "under such circumstances it may deem appropriate" (88-2 BCA at 105,013).

[5] For a contrary holding by the Claims Court, see *Z.A.N. Co.* v. *United States*, 6 Cl. Ct. 298, 305-06 (1984) (default termination found to be a Government claim).

appeal. A later decision of the Claims Court in *Industrial Coatings, Inc.* v. *United States*, 11 Cl. Ct. 161, 162-64 (1986) (direct access suit concerning propriety of default termination is a request for declaratory relief over which Claims Court has no jurisdiction), was not accepted as persuasive authority by the Transportation Board in *Varo, Inc.*, DOT BCA No. 1695 (Nov. 13, 1986), 87-1 BCA par. 19,430.[6] There, in the course of denying a Government motion to dismiss, the Board found that an appeal from a termination for default unaccompanied by any monetary claim was not a request for declaratory judgment (87-1 BCA at 98,231-32).

Very recently in *Emily Malone d/b/a Precision Cabinet Co.* v. *United States*, 849 F.2d 1441 (1988), the Court of Appeals for the Federal Circuit in a case involving a decision of the ASBCA had occasion to consider the same type of jurisdictional question as had been raised in *Almeda Industries, supra*, and in *Varo, Inc., supra*. While refraining from expressing any opinion with respect to the jurisdiction of the Claims Court over a termination for default unaccompanied by any monetary claim,[7] the Court noted that the BCA's have historically accepted appeals from a CO's decision terminating a contract for default before either the Government or the contractor submitted a monetary claim related to the termination. Then the Court stated:

> There is nothing in the CDA or its legislative history to suggest that Congress intended to restrict this practice. In fact, Congress in the CDA actually expanded the BCAs' jurisdiction. Formerly, the BCAs only had jurisdiction to hear disputes concerning contract interpretation and could not decide breach of contract issues. The CDA, however, broadened the BCAs' jurisdiction to permit those tribunals to hear all disputes relating to a contract, including breach of contract issues. * * * Far from supporting the government's view that Congress intended to restrict the BCAs' prior exercise of jurisdiction, this evidence suggests that Congress countenanced an expansion of the BCAs' jurisdiction.
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> * * * * * * *
>
> For the stated reasons, we hold that the ASBCA had jurisdiction to consider the validity of Malone's default termination apart from any monetary claim by either Malone or the government relating to the termination. [Citations omitted.]

(849 F.2d at 1444-45).

In regard to item (iii) (need for certification of claim), appellant cites the case of *Introl Corp.*, ASBCA No. 27610 (Nov. 16, 1983), 84-1 BCA par. 17,000 in support of its position that there is no need for certification where the claim is seeking non-monetary relief. The rationale for not requiring certification in termination for default cases was articulated in *Almeda Industries, supra*, where the Engineer Board stated that since a default termination is treated as a Government

[6] After noting that sec. 14(i) of the CDA specifically amended the Tucker Act (28 U.S.C. § 1491), the statute providing the Claims Court with its jurisdiction, the Transportation Board stated that on its face the CDA gives the Court of Claims (Claims Court) jurisdiction, like that of the boards, over all disputes under the Act (87-1 BCA at 98,232).

[7] The Court made clear that it was only deciding the question of whether the CDA gives the BCA's jurisdiction over default termination absent a monetary claim by the parties and that it was not ruling upon the validity of the Claim Court precedents to which it had referred in its opinion (849 F.2d at 1444).

claim, the contractor need not certify its appeal therefrom (87-1 BCA at 98,105).

The Government's contentions identified above as item (iv) (no power in Board to grant time extensions), item (v) (no authority in Board to reinstate a terminated contract), and item (vi) (Board without authority to cancel contract let to Bohemia, Inc.) are closely related and will be considered together. Concerning item (iv), the Board notes that while generally the BCA's have authority to rule upon a request for a time extension apart from any monetary claim, they have no such authority where the contract has been terminated. This is because the BCA's do not have injunctive authority and, consequently, cannot order reinstatement of a terminated contract, even if it were to be found that the termination was improper, *EGA Products, Inc.*, PSBCA No. 1082 (Feb. 16, 1983), 83-1 BCA par. 16,303 at 81,009 (citing *Nathan Dal Santo*, PSBCA No. 1094 (Feb. 9, 1983), 83-1 BCA par. 16,292 and *Arcon/Pacific Contractors*, ASBCA No. 25057 (Sept. 18, 1980), 80-2 BCA para. 14,709). For the same reason (*i.e.*, absence of injunctive authority), the Board is without authority to order cancellation of the contract with Bohemia, Inc.

Remaining for consideration is item (vii) of the Government's contentions (CO's letter of Aug. 7, 1987, was not a CO's decision for purpose of the CDA). In a letter to the CO under date of July 15, 1987 (AF 54), the contractor specifically requested that its letter be treated as a formal request for a decision pursuant to Section 37 of the contract. That section defines "claim" as a written request submitted to the CO "[f]or payment of money, adjustment of contract terms, or other relief" (AF 1). In refusing to accede to the contractor's request for a decision on the claims presented, it appears that the CO proceeded on the assumption that non-monetary claims unaccompanied by a monetary claim were not claims which were cognizable under the CDA.

Prior to the enactment of the CDA, the BCA's often entertained appeals where no monetary claims were involved or would only be involved later dependent upon the outcome of some future event (*e.g.*, excess reprocurement costs). *See* the discussion of pre-CDA jurisdiction of BCAs in *Varo, Inc., supra*, 87-1 BCA at 98,227-28. As is reflected in cases cited in the text, *supra*, there is no unanimity among BCA's concerning their authority to issue declaratory judgments. Boards that have exercised (or are perceived to have exercised) declaratory judgment authority have proceeded somewhat gingerly, except in a relatively few well defined areas (*e.g.*, rights in data disputes). While the law on the question of the jurisdiction of BCA's in regard to declaratory judgments appears to be in a state of flux,[8] the decision of

[8] Noted in the text *supra* is the fact that the BCA's are apart on the question of whether boards have any declaratory judgment authority. BCA's which claim such authority differ as to the criteria to be applied in

Continued

the Federal Circuit in the case of *Emily Malone, supra,* has removed any doubt about the jurisdiction of BCA's to entertain appeals from terminations for default apart from any accompanying monetary claim and has thus confirmed our subject matter jurisdiction over the instant appeal. Thus, to rule in this case, there is no need for the Board to undertake to determine the scope of our declaratory judgment authority.

We turn now to examination of the specific question of whether the CO issued a decision from which an appeal could be taken to this Board. The notice of appeal is dated October 20, 1987. This is almost 2-½ months after the issuance of the CO's comprehensive letter of August 7, 1987 (AF 57), and approximately 2 months after the dispatch of the CO's three-sentence letter of August 18, 1987 (AF 61), in which the contractor was declared to be in default. The issues between the parties were clearly defined in the correspondence exchanged between them extending over a period of months which culminated in the detailed presentation of the contractor's claims in its letter of July 15, 1987, and the consideration and, in effect, denial of such claims in the CO's letter of August 7, 1987.

The August 18, 1987, letter declaring the contractor to be in default specifically relates the declaration of default to the contractor's failure to sign Modification No. 6 (AF 50). The proposed modification incorporated the Government's position as to what would be required to provide the contractor with a relatively safe access road to unit No. 4 so that the remaining timber could be harvested and the Government's position as to what would be an appropriate time extension for performing the necessary clearing and completing the contract work (cutting and removing the timber from unit No. 4). The record shows that since early June BLM had attempted to secure the contractor's signature on Modification No. 6 without success and in connection therewith had repeatedly threatened the contractor with default if it failed to sign and return the modification.

Since there already has been a *de facto* consideration of all of the claims involved in the appeal by the CO, no useful purpose would be served by dismissing the appeal and remanding the claims to the contracting officer for further consideration, *Southland Construction,* ASBCA No. 32677 (Mar. 17, 1987), 87-1 BCA par. 19,672 at 98,589; *Clark Enterprise,* ASBCA No. 24306 (June 20, 1980), 80-2 BCA par. 14,548 at 71,713; *Cincinnati Electronics Corp.,* ASBCA No. 23742 (Oct. 19, 1979), 79-2 BCA par. 14,145 at 69,612.[9]

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determining whether a particular action requires invoking the declaratory judgment authority. For example, on the question of whether entertaining an appeal from a default termination apart from any monetary claim requires the exercise of declaratory judgment authority, compare the decision in *Smith's, Inc. of Dothan,* 85-2 BCA at 91,017 (involves the exercise of declaratory judgment authority) with *Varo, Inc., supra,* 87-1 BCA at 98,231-32 (does not involve the exercise of declaratory judgment authority).

[9] The failure to refer to the CO's Aug. 18, 1987, letter in the Notice of Appeal of Oct. 20, 1987, may have been due to inadvertence. Whatever the reason for the failure, it is clear that the Board's jurisdiction is *de novo* (*Space Age Engineering Inc.,* ASBCA No. 26028 (Apr. 22, 1982), 82-1 BCA par. 15,766 at 78,032-033) and that a claimant's "failure to analyze with greater nicety the appropriate theory for its claim should not have the effect of a forfeiture of its rights." (*John A. Johnson Contracting Corp.* v. *United States,* 132 Ct. Cl. 645 at 656).

December 14, 1988

Decision

For the reasons stated and on the basis of the authorities cited, the Government's motion to dismiss the instant appeal is denied.

WILLIAM F. MCGRAW
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

RUSSELL C. LYNCH
Chief Administrative Judge

MARATHON OIL CO. *v.* MINERALS MANAGEMENT SERVICE

106 IBLA 104 Decided: *December 14, 1988*

Appeal from a decision of Administrative Law Judge Joseph E. McGuire affirming issuance by Minerals Management Service of a Notice of Noncompliance/Penalty Notice and the civil penalty assessment proposed for knowingly and willfully failing to comply with royalty payment orders.

Affirmed as modified.

1. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Assessment of a civil penalty pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 for knowingly or willfully failing to timely make a royalty payment as specified in an administrative order will be affirmed on appeal after a hearing where it is established that the party either knew or showed reckless disregard of whether its actions violated the order.

2. Alaska: Oil and Gas Leases--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third Party Interests--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

3. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Assessment of a civil penalty for knowingly and willfully failing to comply with a final royalty payment order pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 pending judicial review of the propriety of that order will be affirmed as not violating constitutional due process restrictions by impairing the right to judicial review where the lessee assessed has failed to avail itself of the opportunity to obtain a stay of the royalty payment order conditioned upon the tender of acceptable security for the obligation at issue.

4. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

The exercise of the Secretary's discretion to set the amount of a civil penalty assessed pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 after a hearing properly requires the exercise of reasoned discretion on a case-by-case basis. Factors properly considered in deciding the amount of the penalty include the good or bad faith of appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter such conduct and to uphold the authority of the Minerals Management Service.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for Marathon Oil Co.; Peter Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service; and William D. Temko, Esq., Los Angeles, California, for Cook Inlet Region, Inc., amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Marathon Oil Co. (Marathon) has brought this appeal from an April 23, 1986, decision of Administrative Law Judge Joseph E. McGuire, rendered after a hearing, upholding the issuance by the Minerals Management Service (MMS) of a Notice of Noncompliance/ Penalty Notice dated September 29, 1984. The decision also upheld the civil penalty assessment proposed therein in the amount of $70,000 per day for "knowingly or willfully" failing to pay royalty on certain oil and gas leases in accordance with the requirements of royalty payment orders issued by MMS. The assessment of the penalty was upheld for the period from July 13, 1984, through April 30, 1985, in the cumulative amount of $20,440,000.

The statutory authority pursuant to which the civil penalty was assessed is found at section 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719(c) (1982). Subsequent to receipt of the civil penalty notice, Marathon filed a timely request for a hearing in accordance with section 109(e) of FOGRMA. The hearing was held before Judge McGuire on June 3 and 5, 1985.

An understanding of the issues in this case is aided by a review of the somewhat complex factual background. The leases at issue in this controversy were issued by the United States Government for public lands in Alaska and are designated A-028055, A-028056, A-028103, A-028140, A-028142, and A-028143 (Joint Statement of Material Facts Not

In Controversy (hereinafter Joint Statement) at 1). From October 1955 to November 1958 Marathon acquired interests in the subject leases which would become part of the Kenai Field with the result that Marathon and Union Oil Co. of California (Union) each own a working interest of approximately 50 percent of Kenai Field production (*Id.* at 2). The decision of the Administrative Law Judge relates additional factual background:

In return for removing oil and/or gas from the leased lands covered by the subject leases, each of which was prepared on that format known as the fourth or fifth edition of BLM Standard Form No. 4-1158, Marathon agreed to pay MMS a 12-½ percent royalty on the production which Marathon removed or sold, according to the identically worded provision contained in all of the subject leases (Exh. 14): "Royalty on production. - To pay the lessor 12-½ percent royalty on the production removed or sold from the leased lands computed in accordance with the Oil and Gas Operating Regulations (30 CFR Pt. 221) [presently codified at 30 CFR Part 206, Subpart C]."

On the dates the subject leases were entered into the relevant section of the Oil and Gas Operating Regulations, [presently codified at] 30 CFR 206.103, contained these provisions for use in determining the value of production for the purpose of computing Marathon's royalty payments:

§206.103 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 Associate Director 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, 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 per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value. [Italics added.]

In mid-1959, with MMS' approval, the subject leases were unitized with other leases owned or held by Marathon and Union (Exh. 200). As part of that unit agreement, which covered only a portion of the Kenai Unit area, Marathon and Union agreed to share equally the costs of exploration, an endeavor which resulted in the discovery of gas later that year. The initial sales contract for Kenai Field gas was entered into by Marathon and Alaskan Pipeline Company (APL) on May 13, 1960 (Exh. 21 at 3) (APL I) and the sale of gas began in 1961, with deliveries to APL, then Marathon's only customer.

Since the supply of gas greatly exceeded demand, Marathon set about creating markets for its excess gas and it was joined in that undertaking by Phillips Petroleum Company (Phillips), which owned nearby gas reserves under leases Phillips had entered into with the State of Alaska involving submerged State lands located in the North Cook Inlet Field. One of those potential markets involved the sale of significant quantities of gas to Japanese utilities under a long term sales agreement. But the remoteness of that market militated against the gas being delivered in its natural, or gaseous, state through a pipeline. Instead, the gas had to be transposed from its wellhead configuration to liquid natural gas (LNG) by a process known as liquefaction and transported to Japan as a liquid in specially designed seagoing cryogenic tankers. Upon delivery in Japan the LNG was apparently regasified and utilized in its natural state (Tr. 139).

The gas liquefaction process does not alter the chemical properties of the wellhead gas nor does it result in a manufactured product. The process, simply stated, involves the dehydration of the gas at the lease and transporting the gas under pressure by pipeline

to a specially designed liquefaction plant, which in this case was located some 20 miles distant. At the plant, the gas is treated to remove carbon dioxide and traces of sulphur compounds; scrubbers remove liquid glycol, water, and heavy hydrocarbons; the methane content of the gas is increased to enhance its Btu rating and the gas is sent through a gas treater, dehydrated further, filtered, and cooled to a temperature of minus 260 degrees Fahrenheit. Following liquefaction the wellhead gas, in its transformed state, is then loaded onto the tankers for delivery. Through the hearing testimony of John A. Davis, Jr., the manager of Marathon's Natural Gas division, a position which also includes the overall supervision of the LNG operation at issue, it was shown that because of losses of gas product inherent in the liquefaction and tankering processes, some 1.23 units of gas are required to be produced at the wellhead in order to deliver 1 unit of LNG in Japan (Tr. 148). In replying to MMS' first request for admissions, Marathon, at page 2 of its response to those requests for admissions which were filed on March 18, 1985, further advised that it takes approximately 600 cubic feet of natural gas to produce one cubic foot of LNG.

On March 6, 1967, Marathon and Phillips entered into a LNG sales agreement (Exh. 20) with the Tokyo Electric Power Company, Inc. (Tokyo Electric), and Tokyo Gas Company Limited (Tokyo Gas) which provided for delivery by ship of very substantial amounts of LNG. Approximately 30 percent of the LNG delivered under that sales agreement was to have been furnished by Marathon from natural gas which it produced on the subject leases located in the Kenai Field Unit and 70 percent of the LNG was to have been supplied by Phillips from its leases with the State of Alaska covering wholly owned State submerged lands in the North Cook Inlet Field (Exh. 119 at 2). By the provisions of that contract, the term of which was June 1, 1969, to June 1, 1984, since extended to June 1, 1989, the LNG was to be delivered by tanker to the dock of Tokyo Gas' Negishi plant site in Yokohama, Japan, at the rate of 50 trillion 570 billion Btu's annually. The hearing testimony of John A. Davis, Jr., also established that for purposes of measuring quantities of gas 1 million Btu's (MMBtu's) is the equivalent of approximately 1,000 cubic feet (Mcf) of that product since the regasified product contains 1,010 Btu's per 1 cubic foot, or 1,010,000 Btu's for each 1,000 cubic feet (Mcf) (Tr. 139, 145). Accordingly, the annual delivery rate of LNG to Japan under the sales contract, expressed in 1,000 cubic foot units, converts to approximately 50 billion 570 million thousand cubic feet, or 50 billion, 70 million Mcf, less those product losses discussed earlier.

The price of the LNG so delivered in Japan in November 1969 was $0.52 per MMBtu's, or approximately $0.52 per Mcf. The price term of the sales agreement was amended on 11 occasions between June 1, 1969, and January 1, 1980, and those and other price term amendments resulted in the range of the price of the delivered LNG having been between $0.52/MMBtu's/Mcf at the outset of the deliveries in November 1969 to its highest price of $6.50/MMBtu's/Mcf on June 1, 1981 (Exh. 40 at 43, 44), and, according to the testimony of Mr. Davis, at the then current price on the June 5, 1985, hearing date of $4.776/Mcf (Tr. 139).

In order to supply the huge quantities of LNG which they had contractually agreed to deliver by the use of two oceangoing LNG tankers, each of which was some 800 feet long, had a loaded draft not in excess of 32-½ feet, and had a carrying capacity of 450,000 barrels of LNG (Exh. 20 at 2), Marathon and Phillips found it necessary to construct pipelines and related facilities in order to convey the separately situated wellhead gas supplies to a LNG liquefaction plant which also had to be built, as well as arranging for the construction of the two tankers to be used in delivering the LNG to the agreed upon delivery point, the flange connecting the unloading piping of the LNG tanker with the piping of Tokyo Gas in Yokohama, Japan (Exh. 20 at 2). The sale of the gas took place at that agreed upon delivery point, since the sales agreement further provided that title to the LNG purchased and sold thereunder would pass from Marathon and Phillips to Tokyo Electric and Tokyo Gas at that specific point (Exh. 20 at 3). Loading of the tankers at the LNG plant took 12 hours to 3 days, depending upon conditions, and the elapsed port-to-port shipping time was approximately 8 days.

On March 8, 1967, 2 days after Marathon and Phillips had entered into the LNG sales agreement with Tokyo Electric and Tokyo Gas, Marathon and Phillips entered into another written agreement for the construction of a LNG plant in or near Nikiski,

Alaska, on land which Marathon owned on the Kenai Peninsula. That liquefaction plant, which included a gas treater and compressors, attendant docking facilities for loading the LNG tankers, and a causeway, became known as the Nikiski LNG plant and was located close by the separately situated sources of natural gas. The dock and causeway which served the LNG plant were located on land which was owned by the State and leased to Marathon. In their March 8, 1967 agreement, Marathon and Phillips agreed that the Nikiski LNG plant would be owned by Kenai LNG Corporation, which was beneficially owned by Marathon and Phillips, and would be leased to Marathon and Phillips, who in turn designated Phillips as the operator of that facility, the role in which Phillips oversaw the construction of the LNG plant and dock. The necessary pipelines and related facilities were constructed by another corporate subsidiary and Marathon and Phillips arranged for the formation of two Liberian corporations, one on April 26, 1967, and the other on November 21, 1967, and those firms became the owners of the two newly constructed LNG tankers christened the Polar Alaska and the Arctic Tokyo, which were later placed in service, apparently under Liberian registration, in order to deliver the LNG to Yokohama, Japan (Exh. 40 at 46-51).

* * * * * * *

Before Marathon began delivering LNG at the initial sales price of $0.52/MMBtu/Mcf in November 1969, * * * officials [of Marathon and MMS] met for the purpose of establishing the royalty payments on the Federal share of Marathon's Kenai Field gas being liquified. Royalty payments on gas in fields surrounding the Kenai Field Unit were then being made on the basis of $0.15/Mcf. MMS proposed that if Marathon paid on the basis of $0.16/Mcf, a pipeline transportation allowance might be acceptable as a deduction (Exh. 211) but Marathon decided to pay royalties on the basis of $0.16/Mcf for the LNG feedstock gas and did not request a transportation allowance (Exh. 119 at 2).

That so-called "LNG feedstock gas," or that portion of Marathon's share of the natural gas produced from the subject leases which was delivered by the pipelines constructed by Marathon and Phillips from the Kenai Field to the nearby Nikiski LNG plant, comprises approximately 17 percent of the Kenai Field production and represents some 32 percent of Marathon's share of the gas produced and sold from the subject leases.

From the time gas was first produced in 1959 and initially delivered in 1961 on the subject leases in the Kenai Field Unit through 1974, Marathon continued to pay royalties on the LNG feedstock gas at the rate of $0.16/Mcf, or 12-½ percent of the sales price which Marathon received from APL under APL I, the agreement between Marathon and APL dated May 13, 1960, for the sale of other gas which was produced on the subject leases in the Kenai Field Unit. Meanwhile, the price paid for Marathon's LNG in Japan started at $0.52/MMBtu/Mcf on June 1, 1969, with increases to $0.57/MMBtu/Mcf in May 1972, $0.684/MMBtu/Mcf in March 1974, and $0.9999/MMBtu/Mcf in October 1974 (Exh. 40 at 43, 216). Thereafter, the field price for Kenai Field gas escalated and Marathon maintains that it voluntarily increased the amount of its royalty payments to MMS, although the documentary evidence is not instructive on that point.

* * * * * * *

Since the mid-1970's, Marathon and MMS have been involved in a dispute over the value of the Kenai Unit gas which is sold by Marathon in Japan as LNG, or the so-called LNG feedstock gas. MMS has contended that under the provisions of 30 CFR 206.103, *supra*, the royalty value of that gas cannot be less than Marathon's gross proceeds, that is, the sales price of the LNG in Japan, since the first sale of that gas did not occur until it was delivered in Japan, less the costs which Marathon had incurred in the liquefaction and transportation of that gas. Meanwhile, Marathon has continued to maintain that the value of the LNG, for purposes of computing royalty, should be that which reflects the price paid by APL for other gas produced from the subject leases. Moreover, Marathon had continually refused MMS' requests that Marathon furnish the liquefaction and transportation costs for the LNG sold in Japan and Marathon's refusal to supply that

data has effectively deprived MMS of the information which it must have had in order to have computed the gross proceeds of the sale of the LNG in Japan.

The origin of that dispute is most likely attributable to the fact that beginning in April 1975, the price of LNG delivered in Japan began to escalate beyond the prices which Kenai Field gas brought when sold in Alaska. As a result of that disparity, a dispute arose between Marathon and MMS concerning which method was to be employed in order to calculate the royalty value of the LNG feedstock gas. Resultingly, in letters dated October 21, 1977, and January 9, 1979 (Exh. 109), MMS maintained that the royalty value should be based upon the sales price of the LNG in Japan less expenses, using a workback method to arrive at the "gross proceeds" at the wellhead (Exh. 145 at 2).

Marathon objected to that method of determining the value of its Kenai Field LNG feedstock gas production, urging that that method improperly attributed to the wellhead value a portion of Marathon's return on its investment in the LNG plant and transportation facilities. In addition, that method also included incremental values resulting from factors present only in Japan which Marathon felt should not be considered in determining the wellhead value in Alaska. Finally, Marathon argued that the value basis to be utilized in computing royalties should be based on other arm's-length sales of Kenai Field gas, such as its gas sales to APL, the method which Marathon had employed previously in order to determine its royalty payments on the LNG feedstock gas.

On May 4, 1977 (43 FR 22610), MMS issued Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases (NTL-5) (Exh. 212).

Commencing in 1977, also, portions of the Federal interest in the subject leases began to be transferred to CIRI [Cook Inlet Region, Inc.], a for-profit Alaska Native regional corporation which had been created pursuant to the provisions of the Alaska Native Claims Settlement Act, *supra* (Exh. 14). In correspondence from MMS dated April 9, 1981, and August 25, 1982 (Exh. 15), Marathon was advised that a portion of six of the seven leases would be transferred to CIRI, but that MMS would continue to administer the leases, the lease records, and all pertinent documents. The entire Federal interest in the seventh of the subject leases, No. A 028142, was ceded to CIRI. In addition, Marathon makes royalty payments each month to MMS for the Federal Government's interests in the subject leases and at MMS' direction Marathon pays directly to CIRI all royalties due on CIRI's interests in the subject leases (Exh. 15). Marathon also submits monthly production reports directly to CIRI (Exh. 205) and submits reports of sales and royalties within 60 days of production to MMS (Exh. 305; J. Statement at II-7.-10).

As a result of the transfer of the Federal interests in the subject leases to CIRI, the current royalty ownership of the overall Kenai Field production, based upon February 1985 production figures, is approximately as follows: CIRI - 50.3 percent; Federal Government - 31.4 percent; State of Alaska - 15.5 percent; and private interests - 2.8 percent (Exh. 224).

However, both CIRI and the Federal Government are required to distribute to third parties most of the royalties they receive. CIRI is required to distribute 70 percent of the royalties it receives from the subject leases to the 12 Alaska Native regional corporations created pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1606(i) (1982) (J. Statement at II(11)) and the Federal Government is required to distribute 90 percent of its royalties to the State of Alaska (30 U.S.C. § 191 (1982)), which results in the net Federal interest in the Kenai Field being less than 3 percent.

During the period from April 1, 1975, through January 1, 1980, Marathon continued to calculate its royalty payments on the Kenai Field feedstock gas on the prevailing sales price it was then receiving from APL for Kenai Field gas under its May 13, 1960, gas sales contract with APL (APL I). Meanwhile, MMS continued to issue specific directives to Marathon during that same period in which it sought unsuccessfully to have Marathon base its royalty payments instead upon the sales price received by Marathon for the LNG in Japan, less liquefaction and tankering expenses.

On September 12, 1980, MMS advised Marathon by letter that a new formula for determining the value of its LNG feedstock gas had been adopted. That new formula, the so-called "Phillips Formula," would coincide with that which was then being used to establish the price of Phillips' LNG feedstock gas then being furnished to the Nikiski

LNG plant and which Phillips was producing under State leases in the North Cook Inlet Field, *i.e.*, 36 percent of the LNG contract price delivered in Japan, less $0.555/MMBtu/Mcf, adjusted for quality, as provided for in NTL-5. * * * MMS felt that the use of the "Phillips Formula" for purposes of determining the wellhead value of gas for purposes of royalty was more reflective of the market conditions then present in Alaska. Marathon agreed to the use of that method of evaluating production in computing royalty amounts due MMS beginning on January 1, 1980, and further agreed to calculate and pay all future royalty payments on its LNG feedstock gas based upon that method. The three-page written agreement, embodying that compromise settlement, was dated February 6, 1981 (Exh. 145). Marathon subsequently paid to MMS the sum of $1,834,160.83 in additional royalties due under the "Phillips Formula" for the period January 1, 1980, through February 1981.

The February 6, 1981, agreement (Exh. 145) also clearly provided that the "Phillips Formula" method of royalty determination would remain in effect "until such time as changes in market conditions, State or Federal law, or regulations adopted thereunder, or the occurrence of facts such as National Emergency or Act of God, necessitate a revision in the method used to determine the wellhead value."

(Decision of Administrative Law Judge at 4-12).

The events which form the focal point of the controversy in this case commenced with a letter dated January 6, 1983, from MMS to Marathon giving notice of an intent to determine the reasonable value for royalty computation purposes of LNG feedstock gas produced from the leases by a method other than the Phillips formula (Exh. 47). The letter explained that: "The basic netback valuation theory of this [Phillips] formula is sound, but adjustments to the formula are necessary to reflect changing costs and prices due to economic conditions." A new method of valuation was proposed for use commencing with production in May 1983 involving:

> [D]etermining the ratios of annual costs to total annual sales value and total annual sales volume respectively for the following categories:
>
> (1) Liquifying, storing, and tankering the natural gas, and
>
> (2) Transporting the gas via pipeline from the lease to the inlet of the LNG plant.
>
> The cost categories will consist of allowable yearly operating costs and yearly capital recovery costs, including a return on capital and development expenditures. [Footnote omitted.]

Exh. 47. Marathon was invited to submit written comments on the proposal to MMS and to appear at public hearing on the matter in Anchorage.

By letter dated February 28, 1983, MMS provided Marathon with further details on the procedures to be used for valuing gas from the leases used for LNG feedstock and notified it the valuation should be applied prospectively commencing with the July 1, 1983, royalty payment (Exh. 47). Appellant's response to the February 1983 letter was to commence court litigation and to cease paying current royalty obligations on the basis of the Phillips formula (Tr. 124).

On April 14, 1983, Marathon filed a suit in the U.S. District Court for the District of Alaska against the United States, CIRI, and the State of Alaska seeking a declaratory judgment regarding its royalty

obligations under Kenai Field leases (Exh. 209). John Davis, appellant's manager of LNG, responsible for the LNG project, testified for appellant that, subsequent to the filing of the lawsuit, appellant ceased computation of royalties on the LNG feedstock gas on the basis of the Phillips formula used from January 1980 through April 1983 (Tr. 114-15). After April 1983, royalties were "computed on the basis of the highest arm's-length contract for the majority of the gas sold from the field," the contract with Alaska Pipeline known as APL I (Tr. 115). Davis testified this latter action was predicated on the belief MMS had breached the earlier agreement to compute royalties on the basis of the Phillips formula (Tr. 124). Davis acknowledged that, subsequent to receipt of the February 1983 letter from MMS, Marathon made calculations to project the value of the gas at the well head for royalty computation purposes under the revised net-back formula, and he recollected the figure as being something in excess of $3 per Mcf (Tr. 125, 141, 144). Robert Boldt testified on behalf of MMS that the Phillips formula used between January 1980 and early 1983 produced a valuation for computation of royalty from $1.71 to $1.80 per Mcf, whereas after the rollback Marathon paid on the basis of $0.61 per Mcf up to the time of the hearing (Tr. 38-39). This was essentially confirmed by Davis who acknowledged that, despite a projected valuation for royalty purposes under the revised net-back formula of slightly over $3 per Mcf, Marathon reduced the valuation on which it paid royalties from something over $1.70 per Mcf to $0.61 per Mcf (Tr. 141).

Thereafter, on July 8, 1983, MMS issued a formal order requiring Marathon to calculate its royalty payments using the revised net-back formula as set forth in the January and February 1983 MMS letters (Exh. 8). The order directed Marathon to begin calculating royalties on this basis with the royalty period commencing August 1, 1983. Further, the order notified Marathon of its right to file an administrative appeal to the Director, MMS. The order also advised Marathon that the act of filing an appeal would not suspend the requirement of compliance with the order. A protective administrative appeal was subsequently filed with MMS on August 12, 1983, noting the existence of the pending litigation (Exh. 190). The management at Marathon made a conscious decision not to comply with the July 8, 1983, order (Tr. 127). The decision, recommended by counsel and concurred in by a senior vice president and by the manager of the natural gas division, was based on the fact that the issue was already being litigated in the U.S. District Court and on Marathon's concern that CIRI's obligation to disburse 70 percent of its royalty receipts to other Native corporations presented difficulty in recouping any overpayment should appellant be successful in the litigation (Tr. 127-28).

Subsequently, in an order dated October 5, 1983, MMS noted that Marathon (through its paying agent, Union) had ceased to pay royalty on the basis of the Phillips formula (which was in effect through July

1983), beginning in April 1983, and paid royalty on the basis of a value "less than the minimum value directed by MMS" (Exh. 9). The order billed appellant for additional royalties in the amount of $717,705; ordered the recalculation of royalties from April through July 1983 on the basis of the Phillips formula; and further ordered Union, as agent for Marathon, "to calculate and pay royalty due for periods after July 1983 consistent with the 'Phillips Formula' " (Exh. 9). Marathon filed an administrative appeal of this order on November 7, 1983 (Joint Statement at 6).

Appellant's failure to comply with these orders during the course of the litigation received attention at the highest level of the Department. By order dated June 11, 1984, the Assistant Secretary for Land and Minerals Management, acting on behalf of the Secretary, directed Marathon to comply with the terms of the orders of July 8 and October 5, 1983, and pay the royalties due for the period April through July 1983 as "prescribed in the letter [order] of October 5, 1983," and the royalties due after July 31, 1983, in accordance with the terms of the July 8, 1983, order. Further, Marathon was directed to pay the royalties due thereunder within 30 days or the Department would initiate proceedings in the district court to cancel the subject leases (Exh. 11). The order expressly noted that the requirement to pay royalties is not suspended by an administrative or judicial appeal of the orders.

Thereafter, the Director of MMS issued the September 29, 1984, notice to Marathon of its liability for civil penalties for failure to comply with the orders of July 8, 1983; October 5, 1983; and June 11, 1984 (Exh. 12). The notice explained that:

> Pursuant to section 109(c) of [FOGRMA] and 30 C.F.R. § 241.51(b)(2), MMS has determined that because of Marathon's willful and intentional disregard of the requirement to pay additional royalties as specified in the above-described MMS orders, Marathon is liable for a penalty of $10,000 per day on each of its seven leases, for a total of $70,000 per day.

Id. at 2. The notice further advised appellant that penalties would accrue from July 13, 1984, the date by which Marathon was required to comply with the royalty order of June 11, 1984. Marathon requested a hearing on the civil penalty and now brings this appeal from the decision of Judge McGuire upholding the penalty after the hearing.

Subsequent to issuance of the civil penalty notice and prior to the hearing before the Administrative Law Judge in this case, the U.S. District Court issued its decision on February 20, 1985, affirming the MMS orders to compute royalties at the well head on the basis of the net-back method and ordered Marathon to comply with the orders. *Marathon Oil Co.* v. *United States*, 604 F. Supp. 1375 (D. Alaska 1985), *aff'd*, 807 F.2d 759 (9th Cir. 1986), *cert. denied*, _____U.S._____,

107A S. Ct. 1593 (1987). [1] Testimony at the hearing disclosed that payment was made to MMS of additional royalties due under the MMS orders from April 1983 through June 3, 1985, in the amount of "about $8.1 million plus almost $1 million additional payment for interest" just prior to commencement of the hearing on June 3, 1985 (Tr. 131-33).

In the decision under appeal, the Administrative Law Judge found that the action of Marathon in refusing to comply with the MMS orders was "knowing and willful," regardless of the absence of any specific intent to violate the provisions of FOGRMA, where its conduct is characterized by a reckless disregard of whether its action is prohibited by statute. Judge McGuire further held that the record supports the assessment of the maximum penalty of $10,000 for each day of the violation for each lease over the 292-day period from July 13, 1984, to April 30, 1985, for which the penalty was assessed (*See* Joint Statement at 6). The Administrative Law Judge also found that the conveyance of part or all of the mineral interest under lease to CIRI did not render the civil penalty provision of FOGRMA inapplicable since the United States had not waived its right to administer the leases under section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(g) (1982). Finally, the Administrative Law Judge failed to find that the record supported the existence of a 90-day extension for compliance with the June 11, 1984, order which would either invalidate the penalty notice or toll the assessment of the penalty for the period thereof.

In its statement of reasons for appeal, Marathon argues that the record fails to establish the existence of a "knowing or willful" violation as required under section 109(c) of FOGRMA to support assessment of a civil penalty. Appellant argues that the proper standard of what constitutes willful conduct for purposes of assessment of a civil penalty is whether there was a reckless disregard of the governing statute, citing *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985). Marathon contends that this standard requires consideration of good faith and reasonableness in determining whether conduct is willful. Appellant asserts its refusal to comply with the MMS orders was reasonable in light of the pending litigation which it had initiated previously in order to determine the extent of its royalty obligation.

Marathon also argues that section 109(c) of FOGRMA authorizes imposition of penalties only for failure to pay royalties, which term is expressly defined to include payments to the United States, Indian tribes, or Indian allottees. Appellant contends that most of the payments at issue are due to CIRI as a result of the conveyance of the mineral interests embraced in the leases to the Native corporation

[1] Since the propriety of the royalty valuation method has been finally resolved between the parties as a consequence of the litigation, the merits of the royalty valuation orders are not before the Board in this case.

under ANCSA. Hence, Marathon asserts these payments do not qualify as royalty payments.

Further, appellant argues that the MMS royalty payment orders which were issued after the court had assumed jurisdiction of the dispute were ineffective until they were affirmed by the court. Marathon also argues that assessment of a penalty in the circumstances of this case is inconsistent with the purposes of FOGRMA where it was seeking to ascertain the extent of its royalty obligation rather than to evade that obligation. Marathon further notes that its motion for stay of the MMS orders was pending before the court for 107 days of the penalty period during which nearly $7,500,000 in penalties accrued. Appellant contends that payment of the amount assessed by MMS pending administrative and/or judicial review of the amount due has not been held by the courts or this Board to be indispensable to royalty collection activities, citing *Placid Oil Co.* v. *Department of the Interior*, 491 F. Supp. 895 (N.D. Texas 1980); *Conoco, Inc.* v. *Watt*, 559 F. Supp. 627 (E.D. La. 1982); *Marathon Oil Co.*, 90 IBLA 236, 93 I.D. 6 (1986).

Marathon further argues that the amount of the penalty assessed is not supported by the record. Appellant notes that the amount of the assessment was initially set by MMS at the statutory maximum without explanation and, hence, contends the assessment was arbitrary. Appellant asserts the Department is bound by regulation to base the penalty on the severity of the offense and the violator's history of noncompliance, citing 30 CFR 241.51(c) (1985). Additionally, Marathon contends the assessment improperly fails to consider mitigating factors including its prior history of compliance on these 30-year-old leases, the complexity of calculating the amount due under the net-back orders, and the pending litigation of the issue in court. Further, appellant points out that MMS stipulated in court to the jurisdiction of the court to review the royalty orders in question.

In its answer to appellant's brief, counsel for MMS argues that Marathon knowingly or willfully failed to comply with the MMS royalty payment orders. MMS contends the failure to comply was a considered and deliberate decision. Further, MMS asserts the filing of the lawsuit regarding the royalty determination did not excuse compliance with the MMS orders, noting that no stay of the orders was obtained from the court. MMS argues that appellant acted with a reckless disregard for compliance with the royalty payment orders. Marathon's lack of good faith is asserted by MMS to be manifested by its unilateral rollback of the valuation of the LNG feedstock gas in the face of the royalty orders.

Further, MMS contends that section 109(c) of FOGRMA applies to all of the leases at issue. MMS argues that the United States is still the lessor as to six of the leases for which a partial interest in the mineral estate has been conveyed to CIRI and that, with respect to the lease

embracing a mineral estate conveyed in its entirety to CIRI, the Secretary has retained rather than waived the right to administer the lease as authorized by section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982).

Counsel for MMS also asserts that the assessment of the penalty at the statutory maximum of $10,000 per day is supported by Marathon's conduct and the severity of its noncompliance. Finally, MMS argues that penalties were properly assessed for the entire period from July 13, 1984, to May 1, 1985.

Accordingly, the critical issues before the Board on review of this appeal are threefold. The first question to be answered is whether appellant "knowingly or willfully" violated the royalty payment orders within the meaning of section 109(c) of FOGRMA. If the first question is resolved in the affirmative, the next issue is whether FOGRMA authorizes assessment of civil penalties for failure to pay royalties due to Alaska Native regional corporations for lands embraced in an oil and gas lease issued by the United States the mineral estate in which was subsequently conveyed to the Native corporation pursuant to ANCSA subject to the existing lease. If both of these questions are answered in the affirmative, the remaining issue is the appropriate amount of the penalty to be assessed based on the record in this case.

[1] Section 109(c) of FOGRMA deals with liability for civil penalties and provides in pertinent part that: "Any person who--(1) knowingly or willfully fails to make any royalty payment by the date as specified by statute, regulation, order or terms of the lease * * * shall be liable for a penalty of up to $10,000 per violation for each day such violation continues." 30 U.S.C. § 1719(c) (1982). The statute has not defined the terms "knowing or willful," but the parties to this appeal have acknowledged the relevance of the recent Supreme Court case of *Trans World Airlines, Inc.* v. *Thurston, supra.* In considering whether the conduct violative of the Age Discrimination in Employment Act was "willful" and, thus, subject to the punitive sanction of double damages under section 7(b) of the Act, 29 U.S.C. § 626(b) (1982), the Court held that the issue was whether the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [Act]." 469 U.S. at 126. The Court declined to uphold an assessment of punitive damages merely on a finding that the charged party knew of the existence of the Act and of its potential applicability to its actions. *Id.* at 127-28. The Court reversed the punitive damage assessment on the ground the "record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the [Act]." *Id.* at 129 (citation omitted). We note that in interpreting the word "willful" in the context of the same Act the Court has recently reaffirmed the reckless disregard standard, declining to include therein actions taken without a reasonable basis for believing they were in compliance with the statute. *McLaughlin* v. *Richland Shoe Co.*, _____U.S._____, 108B S. Ct. 1677 (1988).

Section 109(c) of FOGRMA provides for a civil penalty for any person who knowingly or willfully fails to make a royalty payment by the date specified in an order. As noted above, Marathon was notified by letter of January 6, 1983 (Exh. 47), of the requirement, in light of changed market conditions, to apply a new net-back method of valuation of the LNG feedstock gas to replace the existing Phillips formula. Further details on the new net-back method of computation were provided in the MMS letter of February 28, 1983 (Exh. 47). The testimony reveals that Marathon made calculations of the effect of the new net-back method of valuing the LNG feedstock gas for royalty computation purposes and projected a value of something in excess of $3.00 per Mcf. In response to the MMS letter of February 1983, the testimony reveals that Marathon filed a lawsuit to ascertain its royalty obligation and unilaterally rolled back the valuation for royalty purposes of the LNG feedstock gas from the range of $1.71 to $1.80 per Mcf under the Phillips formula to $0.61 per Mcf.

Thereafter, when MMS issued the July 8, 1983, order formally requiring Marathon to calculate its royalty payments on the basis of the revised net-back method set out in the January and February 1983 letters commencing August 1, 1983, the testimony reveals that Marathon made a conscious decision not to comply with the order. John Davis testified that the decision was made, with the advice and participation of counsel, by the manager of Marathon's Natural Gas Division, the Senior Vice President of Production and Exploration, and himself (Tr. 126-27).

Subsequently, when the Assistant Secretary issued the June 11, 1984, order to Marathon directing it to comply with the July 8, 1983, order (and the October 5, 1983, order regarding Phillips formula royalties for April through July 1983) and pay the royalties due thereunder within 30 days, appellant was faced with another critical decision. Davis testified on behalf of appellant that at this point the participants in the decision included the manager of Marathon's Natural Gas Division, the Senior Vice President of Production and Exploration, the President of Marathon, and himself, along with counsel (Tr. 130). Davis acknowledged that the orders were considered seriously and the failure to pay at the higher rate was not an oversight (Tr. 142). He explained the failure to comply on appellant's belief that the "case was before the Federal Court in Alaska that was the proper forum to adjudicate the question" (Tr. 142).

Notwithstanding appellant's belief that the matter was properly before the district court, and, therefore, it was excused from compliance with the orders, we note that the Assistant Secretary's royalty order of June 11, 1984, explicitly advised Marathon that: "The obligation to pay royalties determined by MMS to be due and owing is not suspended by an administrative or judicial appeal of these orders"

(Exh. 11). This statement is supported by the relevant regulation governing compliance with royalty payment orders:

> Compliance with any orders or decisions, issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rents, bonuses, penalties or other assessments, shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, MMS, * * * and then only upon a determination, at the discretion of the Director * * * that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

30 CFR 243.2. [2] The efficacy of this so-called "pay-pending-appeal" regulation requiring immediate payment pending administrative review in the absence of acceptance of a bond adequate to indemnify the lessor from risk of loss and a finding that a suspension will not be detrimental to the lessor was recognized by this Board in *Marathon Oil Co.*, 90 IBLA at 236, 93 I.D. at 6. [3]

Although the June 11, 1984, order of the Assistant Secretary, unlike the July 1983 and October 1983 MMS orders, was a final Departmental decision not subject to further administrative review within the Department, *see Blue Star, Inc.*, 41 IBLA 333 (1979), compliance with the order was not excused pending judicial review. Statutory authority is provided for obtaining relief from an administrative decision pending judicial review:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (1982). The courts have recognized that the institution of a lawsuit for judicial review of an administrative action does not, by itself, stay the effectiveness of the challenged action in the absence of a stay granted pursuant to this statutory provision. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155-56 (1967) (effectiveness of a regulation);

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[2] Appellant points out that this regulation was promulgated subsequent to issuance of the royalty payment order of June 11, 1984. 49 FR 37353 (Sept. 21, 1984). Although the effective date of the revised regulations generally was Oct. 22, 1984, 49 FR at 37336, the preamble to the regulatory revision explained the basis for the retroactive effect of the regulation at 30 CFR 243.2:

"This provision is being made retroactive to orders and decisions issued by the Royalty Management Program after August 12, 1983. The retroactive effectiveness is necessary for consistent application of MMS's procedure because on that date 30 CFR Section 221.66, the predecessor to new Section 243.2, was unintentionally removed from MMS's regulations along with other rules which were removed by virtue of the transfer of MMS's onshore operational program to the Bureau of Land Management (48 FR 36582, August 12, 1983)." 49 FR at 37344. The former regulation at 30 CFR 221.66 (1982) imposed substantially the same requirements for suspension of an order, *i.e.*, a determination by the Director that suspension would not be detrimental to the lessor and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. Thus, it appears that even prior to the promulgation of 30 CFR 243.2, a suspension of the effect of the royalty payment order pending an administrative or judicial appeal was required to stay the obligation of payment pending review on appeal. *See Atlantic Richfield Co.*, 21 IBLA 98, 103, 82 I.D. 316, 318 (1975).

[3] In the *Marathon* case, the Board reversed an MMS decision denying a request to suspend payment of late payment charges on additional royalties pending administrative review of the pending appeals of appellant's liability for the charges. The Board's action was predicated on a finding that, given the statutory obligation of the lessee to pay interest on late royalty payments and the willingness of the appellant to comply with the requirement of filing a bond deemed adequate by MMS to protect against loss, no adequate basis had been shown in the record for finding a suspension would be detrimental to the interest of the lessor. 90 IBLA at 245-48, 93 I.D. at 11-13.

Winkler v. *Andrus*, 614 F.2d 707, 709 (10th Cir. 1980) (decision rejecting appellant's oil and gas lease application).

However, it was not until November 5, 1984, after receipt of the notice of civil penalties at issue here and the Department's counterclaim filed in the district court for cancellation of the leases, that Marathon filed a motion for preliminary injunction in the district court requesting a stay of the effect of the royalty orders. Subsequently, on February 20, 1985, the district court issued an opinion denying Marathon's motion for a stay, granting MMS' motion for summary judgment, and requiring an accounting. 604 F. Supp. 1390. [4]

In this case, appellant chose to ignore the explicit warning contained in the June 11, 1984, order of the Assistant Secretary that the effect of the decision was not stayed pending appeal. The testimony established that the failure to comply with this order was a conscious decision made at the highest levels of the corporation. In this context we must affirm the finding of the Administrative Law Judge that the failure to comply with the June 11, 1984, royalty payment order was knowing and willful. In view of the warning in the June 11, 1984, order that the requirement for compliance was not stayed pending administrative or judicial review, we have no trouble finding the failure to comply was willful and knowing. Appellant's conduct, at the very least, constituted a reckless disregard of whether compliance with the order was required by law. Any element of good faith in appellant's conduct relating to compliance with the order which might otherwise be argued was totally eviscerated by the unilateral rollback of royalty payments to a level less than that existing prior to the royalty orders and the steadfast refusal to pay further until ordered to do so by the district court.

We must also affirm the finding of the Administrative Law Judge that the record fails to support the existence of a 90-day extension for compliance with the June 11, 1984, order. It is true that the June 11 order was issued pursuant to a Secretarial decision of April 16, 1984, on the question of whether the Department should take further administrative action to collect the unpaid royalties from Marathon pending the outcome of the lawsuit (Exh. 38). This decision called for issuance to Marathon of a notice of lease cancellation with followup contact by the Department for negotiations and to relate conditions of settlement. The Secretarial decision further provided that, if no agreement was reached within 90 days, action would be taken to cancel the leases. The June 11, 1984, order (Exh. 11) was issued to implement this decision.

Hugh V. Schaefer, appellant's general attorney for domestic production, testified concerning a June 19 telephone conversation with

[4] An interim stay of the district court order was allowed pending appeal to the Ninth Circuit.

Associate Solicitor Larry Jensen, the Department's chief negotiator in this matter, regarding an extension of time for compliance with the June 11 order (Tr. 156). Schaefer testified that in response to Marathon's concern that negotiations might take longer than 90 days and it did not want the negotiations terminated, Jensen "replied by saying that he had no problem with that; he didn't want to leave things open ended; but, that if progress was being made at the end of 90 days, then he would not be--he would not terminate settlement discussions" (Tr. 156). A meeting was set for July 3 at the Department. On June 29, Jensen called Schaefer to reach an understanding of the topics to be discussed at the July 3 meeting and to set preconditions to the settlement negotiations, *i.e.*, that Marathon would value the natural gas for April 1 through July 31, 1983, under the Phillips formula and from August 1983 forward under the APL 2 contract price (Tr. 163). Schaefer testified that at the July 3 meeting, Jensen further specified the Department's preconditions to negotiation including renegotiation of royalty values on all Kenai field gas; inclusion of CIRI in the discussions; retroactive effect of renegotiated values for other Kenai field gas; and payment of royalties on LNG feedstock gas for the period from April through July 1983 under the "Phillips 1 formula" and thereafter under the "Phillips 2 formula" (Tr. 165). Marathon responded by indicating at the meeting that it would have to "take the list of preconditions back to [Marathon's] management" (Tr. 176). Schaefer acknowledged the July 11 deadline for a response to the preconditions at which point Interior would have to make a decision how to proceed (Tr. 177). Schaefer further testified that at the followup meeting between Marathon management and Interior officials on July 11, appellant advised Interior officials that it could not agree to the preconditions set for further negotiations (Tr. 167).

Jensen acknowledged in his testimony that an extension beyond 30 days to comply with the June 11 order was a possibility "if the negotiations were serious" (Tr. 188). Further, Jensen testified that in his June 29 telephone call he indicated that good faith payment of substantially higher royalties on LNG was a precondition to any negotiation, including extension of the 30-day timeframe for compliance with the June 11 order (Tr. 190-91). Good faith payment of the minimum amount owed was a precondition (Tr. 192). Further Jensen testified that the purpose of the July 11 meeting was to ascertain whether the preconditions for an extension to negotiate had been met (Tr. 193) and that after the meeting of July 11 he perceived that negotiations had broken off (Tr. 204).

It is clear from the factual record that no extension was granted for compliance with the June 11, 1984, order beyond the 30 days expressly provided therein. Although the Department was willing to continue negotiations if Marathon complied with certain conditions including payment of royalty in the interim at a higher rate, appellant was not willing to comply with the conditions. Thus, no extension was granted.

Having affirmed the finding of the Administrative Law Judge that Marathon knowingly and willfully failed to comply with the royalty payment order of June 11, 1984, in violation of section 109(c) of FOGRMA, we are presented with the question of the applicability of FOGRMA to royalties payable to an Alaska Native corporation for interests in oil and gas conveyed under ANCSA. Specifically, the issue is whether the civil penalty provisions of FOGRMA are properly applied to royalty payment obligations under the terms of a United States oil and gas lease where the royalties are payable to an Alaska Native corporation as a consequence of the conveyance (subsequent to lease issuance) of the subsurface estate in lands pursuant to the provisions of ANCSA.

As a threshold matter we recognize that of the seven leases at issue here, all except one (A-028142) still embrace in part public lands for which royalties on oil and gas are owed to the United States. Thus, for purposes of the applicability of the civil penalty provisions of FOGRMA under review here, the issue pertains only to lease A-028142.

Marathon points out that the term "royalty" is defined at section 3(14) of FOGRMA:

> (14) "royalty" means any payment based on the value or volume of production which is due to the United States or an Indian tribe or an Indian allottee on production of oil or gas from the Outer Continental Shelf, Federal, or Indian lands, or any minimum royalty owed to the United States or an Indian tribe or an Indian allottee under any provision of a lease[.]

30 U.S.C. § 1702 (14) (1982). The term "Federal land" is also defined in FOGRMA: "(1) 'Federal land' means all land and interests in land owned by the United States which are subject to the mineral leasing laws, including mineral resources or mineral estates reserved to the United States in the conveyance of a surface or nonmineral estate[.]" 30 U.S.C. § 1702(1) (1982).

[2] The record establishes that all of the seven oil and gas leases at issue in this royalty dispute were issued by the United States for public domain lands pursuant to the authority of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. §§ 181-287 (1982). There is no doubt that the rights of the lessee(s) are still governed by the terms of those leases and of the statutes and regulations pursuant to which they were issued, as well as amendments thereof which are not inconsistent with the lease terms. These valid existing rights were explicitly recognized in section 14(g) of ANCSA which provided in pertinent part:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease * * * and the right of the lessee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the * * * United States as lessor * * * in any such leases * * * covering the estate patented * * *. *The administration of such lease * * * shall continue to be by*

** * * the United States, unless the agency responsible for administration waives administration.* [Italics added.]

43 U.S.C. § 1613(g) (1982). The relevant regulation implementing this statutory provision provides in part:

> Leases * * * granted prior to the issuance of any conveyance under this authority shall continue to be administered by the * * * United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease * * * unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. In the latter event, the Secretary shall not renegotiate or modify any lease * * * or waive any right or benefit belonging to the grantee until he has notified the grantee and allowed him an opportunity to present his views.

43 CFR 2650.4-3.

In the absence of a waiver of administration of an oil and gas lease embracing lands conveyed under section 14(g) of ANCSA, the United States retains the right to administer the lease based on a finding it is in the interests of the United States to do so. In this context, the provisions of FOGRMA are properly applied to the lessee's royalty obligations under the lease. The royalty payment under this oil and gas lease issued by the United States pursuant to the Mineral Leasing Act of 1920, is still due to the United States as lessor, notwithstanding the subsequent conveyance of the mineral interest and assignment of the lessor's rights to CIRI. The fact the royalty payments were made directly to CIRI on the instructions of MMS does not alter this result. It is clear from the record that Marathon accounted for all production and royalty due thereon to MMS as well as to CIRI (Tr. 50). The continuing administrative responsibility of MMS over this lease was the basis for assessment of a civil penalty for failure to comply with the June 11, 1984, royalty payment order (Tr. 50, 55, and 58).

Appellant asserts, however, that administration of this lease was waived by the Department. Decisions to waive the administration of rights-of-way and airport leases under this regulation on lands conveyed to Native corporations have been upheld by this Board in the absence of a finding that the interests of the United States dictate retention of administration. *Ahtna, Inc.*, 103 IBLA 71 (1988) (power line right-of-way); *Kuitsarak, Inc.*, 102 IBLA 200 (1988) (airport lease).

Reference to the voluminous record amassed in this case file discloses no compelling evidence that the Department waived its statutory right under section 14(g) of ANCSA to continue to administer lease A-028142. The only document in the record which might suggest that conclusion is a copy of a letter of August 25, 1982, from the accounting operations division of MMS to Union, appellant's agent for royalty payment on the subject leases at the time. The subject of that letter was identified as "Federal Gas Leases Transferred in Part or in Whole to Cook Inlet Region, Inc., (CIRI), Oil and Gas Leases A-028047, A-028142, and A-028143." With respect to A-028142, the letter advised at page 2 that all of the lands embraced in the lease had been

conveyed to CIRI on July 20, 1982, pursuant to Patent No. 50-82-0088 and interim conveyance No. 519. With respect to the latter lease the letter further related:

> Lease A-028142 has been transferred in its entirety to the Cook Inlet Region Inc. Section 14(g) of the Alaska Natives Claims Settlement Act states that, upon issuance of patent, the patentee shall succeed and become entitled to any and all interest[s] of the United States as lessor, subject to the right of the lessee to the complete enjoyment of all rights, privileges, and benefits granted him under the lease. This section further provides that the United States may waive administration of a lease containing lands which have been conveyed in their entirety.
>
> Pursuant to the above, your case file will be transferred effective the first day of the month following receipt of this notice to [CIRI].

(Exh. 15).

Other evidence, however, indicates the Department did not waive administration of this lease. The testimony of the MMS Associate Director for Royalty Management noted the continuing administrative responsibility of MMS for this lease (Tr. 50, 55, and 58). The January and February 1983 letters to Marathon detailing the net-back method of valuation for royalty purposes, as well as the implementing order of July 1983, clearly related to all the LNG feedstock leases, although the lease numbers were not specified (Exhs. 8, 47). The attachments to the royalty payment order of October 5, 1983, regarding payment of additional royalties under the Phillips formula from the time of Marathon's unilateral rollback to the effective date of the new net-back method of calculation specifically referred to additional royalty owed for lease A-028142 (Exh. 9).

In the Memorandum of Understanding Between Minerals Management Service & Cook Inlet Region, Inc. (MOU I), signed January 3, 1983, by the Associate Director for Royalty Management, MMS, it was expressly recited that: "Administration of CIRI's interest as lessor in the leases [including A-028142] was reserved in the Secretary, now acting through MMS, in the conveyance to CIRI under ANCSA" (Exh. 17). In MOU I the Secretary made a "partial waiver," pursuant to 43 U.S.C. § 1613(g) (1982), of the authority to administer the leases at issue here for the purpose of allowing CIRI to negotiate royalty valuation issues concerning the leases for the period from April 1, 1975, to January 15, 1983 (Exh. 17). This agreement was followed by MOU II dated August 9, 1983 (Exh. 18). This latter agreement explained in some detail the responsibilities assumed by MMS in administering the subject leases. In MOU II it was again recited that the right to administer these leases was retained by the United States and MMS under section 14(g) of ANCSA. Thus, it becomes clear upon review of the entire record that the Secretary has not waived administration of the subject oil and gas leases. [5]

[5] We reach this conclusion on the basis of the record before us. While this same conclusion was reached by the district court in the litigation over the extent of Marathon's royalty obligation, 604 F. Supp. at 1390, we note that the

Continued

The remaining critical issue which this appeal poses is the amount of the civil penalty assessed for violating section 109(c)(1) of FOGRMA. That section provides that any person who "knowingly or willfully" fails to make any royalty payment by the required date as specified in an order "shall be liable for a penalty of up to $10,000 per violation for each day such violation continues." 30 U.S.C. § 1719(c) (1982). The civil penalty provision of FOGRMA further provides that "the Secretary may compromise or reduce civil penalties under this section" on a "case-by-case basis." 30 U.S.C. § 1719(g) (1982). Finally, the statute provides that: "In determining the amount of such penalty, or whether it should be remitted or reduced, and in what amount, the Secretary shall state on the record the reasons for his determinations." 30 U.S.C. § 1719(i) (1982).

The essence of appellant's argument regarding the amount of the penalty assessed is threefold. Marathon argues that the assessment of cumulative penalties in this case on a daily basis pending judicial review of the royalty payment orders violates constitutional due process restraints by inhibiting the exercise of the right to judicial review. Further, appellant asserts that both the statute and the regulations require the exercise of discretion in setting the amount of any penalty, and that the amount of the penalty was arbitrarily assessed at the statutory maximum amount without any analysis of mitigating factors. Marathon also contends the penalty levied is inconsistent with the Department's enforcement policy on civil penalties under FOGRMA approved by the Director, MMS, on April 1, 1986 (App. C to appellant's brief).

[3] The due process argument of Marathon has its foundation in the principle established initially in *Ex Parte Young*, 209 U.S. 123 (1908). In reviewing a challenge to the validity of a statute setting railroad rates and establishing substantial civil and criminal penalties for overcharging, the Court noted that if the penalties for disobedience of the rates are so "severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147. The Court found that to condition the right to judicial review of the validity of a rate upon the risk of substantial fines and imprisonment is effectively "to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts [are valid]" in holding the acts unconstitutional. 209 U.S. at 148. The doctrine was explained cogently by the court in *United States* v. *Reilly Tar & Chemical Corp.*, 606 F. Supp. 412 (D. Minn. 1985):

> The decisions of the Supreme Court in *Ex Parte Young* and its progeny clearly establish that a person has a due process right to challenge the validity of an administrative order

court of appeals held the district court did not need to decide the waiver issue because Marathon did not properly preserve the question at the administrative decision level. 807 F.2d at 762. Hence, appellant may also be collaterally estopped to argue administration of the leases was waived.

affecting his affairs without being forced to pay exorbitant penalties if the challenge is unsuccessful. *Ex Parte Young*, 109 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115 (2d Cir. 1975). The rationale of *Ex Parte Young* and its progeny is that the imposition of severe penalties effectively denies a person subject to the penalties the right to a judicial review of the validity of an order and that such a denial of judicial review is a violation of due process. However, *Ex Parte Young* and its progeny also establish that a statute imposing penalties for noncompliance with an administrative order will be constitutional if it is a defense to the imposition of penalties that the party disobeying the administrative order interposed a good faith defense to the validity of the order. It follows that a person will not be intimidated into not seeking judicial review if he knows that good faith is a defense to the imposition of penalties.

606 F.Supp. at 418. The *Reilly Tar* case involved a challenge to the constitutionality of the punitive damages provision of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(c)(3) (1982). In 1980 the United States had instituted suit seeking an injunction to force Reilly to take action to abate soil and groundwater contamination. During the pendency of the litigation in which Reilly contested the necessity of the expensive remedy sought, an administrative order was issued by the Environmental Protection Agency (EPA) requiring Reilly to construct and maintain a water treatment system for water withdrawn from local wells. The order subjected Reilly to treble damages for failure to comply without sufficient cause. In ruling on the motion of Reilly for a preliminary injunction to prevent the accrual of penalties pending judicial review of the propriety of the relief ordered, the court denied the motion on the ground that a good faith defense to the validity of an EPA cleanup order is sufficient to avoid imposition of punitive damages and, thus, upheld the punitive damages provision of CERCLA against the due process challenge. After noting that the "central teaching of the *Ex Parte Young* line of due process decisions is that a person has a right to challenge the validity of an agency order affecting his affairs without being forced to pay exorbitant penalties," the court found that a good faith defense to the validity of the EPA order is sufficient to avoid imposition of punitive damages. 606 F. Supp. at 421.

However, due process attacks on a civil penalty provision have generally been rejected by the courts where the appellant seeking judicial review has failed to avail itself of the opportunity to obtain a stay of the effect of the administrative order. In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Williams*, 251 U.S. 63 (1919), an early case applying the principle of *Ex Parte Young*, the Court was faced with a challenge to the constitutionality of an Arkansas statute regulating railroad rates based in part on the ground that it violated due process by imposing a penalty so severe as to preclude the railroad from exercising its right to judicial review in order to challenge the validity of the rate as confiscatory. The Court rejected the due process claim on the ground that if the railroad regarded the rate as

confiscatory "the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction." 251 U.S. at 65 (citations omitted). In *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300 (1937), the Court rejected a due process challenge by a pipeline company to a state administrative order on the ground of potential liability for cumulative penalties pending judicial review noting the company had failed to request a stay of the order:

> As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, *Ex Parte Young*, 209 U.S. 123, 147 * * *, but no reason appears why appellant could not have asked the commission to postpone the date of operation of the order pending application to the commission for modification. Refusal of postponement would have been the occasion for recourse to the courts. But appellant did not ask postponement. [Citations omitted.]

302 U.S. at 310. The Court noted that a temporary injunction was not necessary to protect the appellant from penalties pending final resolution of the suit, as the commission agreed (subsequent to commencement of litigation) not to enforce the order before issuance of the decision of the lower court on the application for injunction, and because the administrative order had been further stayed by process of the courts pending the decision on appeal.

The Court had further occasion to rule on the effect of due process limitations on the imposition of civil penalties for noncompliance with an administrative order pending judicial review of the order in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961). Noting that after entry of the notices of default by the Commission the petitioner might have sought relief itself before the penalties began to accrue, the Court held:

> As was said in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654 (1950), "we are not prepared to say that courts would be powerless" to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity. There the record did not present and the Court did not determine "whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order." Similarly, as this matter comes here now, the petitioner has pursued none of these remedies, and we could not therefore say that it had "no chance" to prevent the running of the forfeiture pending a test of the validity of the orders. Cf. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 310 (1937).

368 U.S. at 226-27.

Other courts have also recognized the availability of equitable relief. In *Floersheim v. Engman*, 494 F.2d 949 (D.C. Cir. 1973), a case cited by appellant in support of its due process objection, the court noted:

> It is by now settled doctrine that a person may have relief in equity to avoid invalid official action where the risk of penalties, if he is remitted to defense of enforcement

actions, is so coercive as to be a denial of due process. Ex Parte Young, [*supra*]. Equitable doctrine has been advanced with the presumptions of reviewability in the Administrative Procedure Act as to agency regulations or orders that have presently compulsive and coercive effects. Abbott Laboratories v. Gardner, [*supra.*]

494 F.2d at 954.

Applying these principles, we must reject the contention that assessment of a civil penalty for failure to comply with the royalty payment order of June 11, 1984, would be violative of due process where appellant has failed to do that which is necessary to obtain a stay of the decision pending judicial review. Prior to entry of the final Departmental order of June 11, 1984, the earlier orders of July and October 1983 were subject to administrative review within the Department. *See* 30 CFR Part 290. As noted above, such an order may be suspended pending appeal upon the written authorization of the Director, MMS, based on a finding that such a suspension will not be detrimental to the interests of the United States and the submission and acceptance of a bond deemed adequate to protect the United States from loss. 30 CFR 243.2 (formerly codified at 30 CFR 221.66 (*see* note 2, *supra*)). In a different case involving this same appellant, this Board reversed a denial of a request for a stay of a payment order under 30 CFR 243.2 in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raised a bona fide legal issue, lessee was faced with the threat of irreparable injury if the stay was not granted, it appeared the threatened injury to the lessee outweighed any potential harm the stay might cause the lessor, and it did not appear from the record that a stay was contrary to the public interest. *Marathon Oil Co., supra.* The Board decision was predicated in significant part on a lack of any "reason apparent from the record in this case why an adequate indemnity bond will not suffice to protect the interest of the United States in guaranteeing payment." 90 IBLA at 247, 93 I.D. at 12 (footnote omitted). In support of its holding, the Board noted that under the Administrative Procedure Act, 5 U.S.C. § 704 (1982), and Departmental regulations, 43 CFR 4.21, the failure to stay the order requiring payment would make it a final Departmental decision subject to immediate judicial review and concluded that the public interest is not generally served by short-circuiting the administrative review process within the Department. 90 IBLA at 248, 93 I.D. at 13. [6]

Although issuance of the final Departmental decision by the Assistant Secretary on June 11, 1984, precluded further administrative review, this not only verified that the case was then ripe for judicial review, but also allowed appellant to avail itself of the remedy of a

[6] It appears from the record appellant sought an administrative stay subsequent to the October 1983 order, but not the July 1983 order. Apparently no decision was issued in response to the stay request. Since the civil penalty assessment did not commence until 30 days after the final Departmental decision of June 11, 1984, which was not subject to further administrative review, we need not consider the applicability of civil penalties during the pendency of an administrative stay request.

judicial stay pending review by the court pursuant to 5 U.S.C. § 705 (1982). [7] Pursuit of this remedy would have allowed the Department to argue before the court the need to enforce the decision pending appeal. Further, it would have placed the court in a position to evaluate the need for a stay pending judicial review in view of the appellant's likelihood of success on the merits, the threat of irreparable injury to appellant, the potential harm to the nonmoving parties, and the public interest. *See Placid Oil Co.* v. *United States Department of the Interior*, 491 F. Supp. at 905. In light of the availability of a stay pursuant to the provision of 5 U.S.C. § 705 (1982), pending judicial review, we are unable to afford relief from the assessment of civil penalties on the basis of appellant's due process objection where appellant has failed to avail itself of this remedy.

We recognize that a motion for preliminary injunction and for a judicial stay of administrative action was filed with the district court on November 5, 1984. Although appellant asserted therein it was "prepared to post a bond with this Court sufficient to secure the payment of the total amount of royalties being sought by the Federal Defendants in this action together with interest thereon," there is no indication in the record that an indemnity bond was ever filed to protect the royalty interest holders against loss of royalty and interest on late payments. This lack of a tender of payment, either in the form of a bond or an escrow deposit, is a critical element distinguishing this case from two of the three cases cited by appellant for the principle that payment of the amount assessed by MMS has not always been held to be indispensable by the Board or the courts. In *Marathon*, as noted above, the Board reversed a refusal to consider an acceptable bond in the absence of apparent risk of damage to the lessor's interest if an acceptable bond is provided. Similarly, the temporary restraining order issued by the court in *Conoco, Inc.* v. *Watt, supra*, was predicated in part on a finding that deposit of the funds into the court would adequately protect the Department's interest in collection of the amount of penalty due. 559 F. Supp. at 630.

In this case, the critical interest at risk and unprotected was that of the United States and the Native corporations in receipt of the royalties to which they were entitled on gas sold from the Kenai leases. This interest was unprotected from the time of appellant's rollback of the royalty payments in April 1983 to the late payment of the additional royalty owed on the day of the hearing in June 1985. Had appellant timely pursued a temporary restraining order before the district court, the court could have considered a stay of the royalty payment order to the extent deemed appropriate by the court conditioned upon protection of the royalty interest through provision of a bond or escrow deposit. *See* 5 U.S.C. § 705 (1982); Fed. Rules Civ.

[7] The remedy of a judicial stay was apparently available to appellant from Dec. 6, 1983, when Marathon and the Department stipulated in the district court suit that Marathon need not further exhaust any available administrative remedies regarding the royalty valuation orders.

Proc. Rule 65. In this regard, we note that Rule 65(c) provides in pertinent part that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In the absence of evidence of a tender by Marathon of some type of acceptable security for the payment of the royalty obligation in support of its motion for preliminary injunction, we are unable to conclude that application of the civil penalty provisions of FOGRMA offends due process limitations. This follows from the availability of a stay pending administrative review under 30 CFR 243.2 upon the posting of an acceptable bond and the further availability of a stay after a final administrative decision pending judicial review under statutory authority such as that provided by 5 U.S.C. § 705 (1982), conditioned upon providing such security as the court may deem adequate. The availability of this relief means that a party need not be intimidated from pursuing its right to judicial review by the threat of a burdensome cumulative penalty.

The implementing regulation provides scant guidance regarding the amount of any penalty to be assessed: "The penalty amount shall be determined by MMS taking into account the severity of the violation and the person's history of noncompliance." 30 CFR 241.51(c). There is no indication in the record that any discretion was exercised in setting the proposed penalty amount at the statutory maximum in the September 29, 1984, civil penalty notice (Exh. 12). Indeed, at this stage of the process prior to a hearing, it may be difficult for MMS to ascertain many of the facts relevant to the amount of any penalty to be imposed.

[4] Appellant asserts that the provisions of section 109(c) of FOGRMA require the Department to make a rational determination of the penalty amount apart from its finding that the violation was willful. We agree that this conclusion is supported by the requirement that the Secretary shall state on the record the reasons for his finding as to the amount of the penalty and as to whether and to what extent the penalty should be remitted or reduced. 30 U.S.C. § 1719(i) (1982).

As a threshold matter, we must reject appellant's contention that the determination of the amount of the civil penalty is controlled by the Department's enforcement policy on civil penalties under FOGRMA approved April 1, 1986. Review of the terms of the policy make it clear that it pertains to civil penalties levied under 30 CFR 241.51(a) rather than the separate provisions for civil penalties for intentional violations set forth at 30 CFR 241.51(b). It is the latter regulation involving knowing and willful violations under section 109(c)(1) of FOGRMA which is at issue in this case.

Judicial precedents under other statutes authorizing cumulative civil penalties for violation of administrative orders offer significant guidance in exercising the discretion required in determining the amount of the civil penalty. In *United States* v. *Louisiana-Pacific Corp.*, 554 F. Supp. 504 (D. Ore. 1982), [8] a civil penalty action brought by the United States for violation of a Federal Trade Commission (FTC) divestiture order involving a potential civil penalty of $10,000 per day, the court recognized five factors in setting the penalty amount: the good or bad faith of the appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter similar behavior and vindicate the FTC and the integrity of its orders. 554 F. Supp. at 507. [9] These same factors have been utilized by other courts as well in assessing civil penalties. *See United States* v. *Phelps Dodge Industries, Inc.*, 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984).

Applying these factors to the context of the present appeal, we first examine whether Marathon's response to the June 1984 royalty payment order manifested good faith. In April 1983 after receipt of the letters explaining the net-back method of valuation to be used for LNG feedstock gas, appellant simultaneously filed suit to obtain a court determination of the amount of its royalty obligation and unilaterally rolled back its royalty valuation to a level approximately one-third of the valuation under the Phillips formula previously used. This was done with the knowledge that the valuation under the newly ordered net-back formula would be something in excess of $3 per Mcf, a valuation approximately five times that used after the rollback. Subsequently, when the July 1983 MMS royalty order directing use of the net-back method of valuation effective August 1 was received, no effort was made to comply with the order and appellant adhered to the rolled back valuation. The testimony reveals this was a decision reached by high level corporate officials which was based in part on the belief the issue was now within the jurisdiction of the court and in part over concern for the ability to recoup any royalty overpayment from CIRI. Although a protective administrative appeal was filed noting the pending litigation (Exh. 190), it does not appear that a stay of the effect of the order was requested.

Thereafter, upon receipt of the Assistant Secretary's royalty order of June 11, 1984, Marathon again refused to comply notwithstanding the admonition therein that the obligation to pay royalties determined by MMS to be due and owing is not suspended by an administrative or judicial appeal of the order. Settlement negotiations with Departmental officials broke down due in large part to the attitude of Marathon officials that compliance with the royalty valuation orders was excused pending an ultimate decision from the court. However

[8] *Rev'd in part and vacated in part on other grounds*, 754 F.2d 1445 (9th Cir. 1986).

[9] On appeal, the civil penalty assessment was vacated on the ground the FTC had improperly rejected summarily appellant's petition for modification of the order. 754 F.2d at 1445.

comforting this erroneous perception was, it was not until after the Department issued the civil penalty notice on September 29, 1984, and filed its counterclaim in the district court for cancellation of the subject leases that Marathon filed a motion for preliminary injunction in the court requesting a stay of the royalty orders. Further, there is no evidence that any bond or other security to protect the royalty interest holders for the value of the LNG feedstock gas removed from the leases and sold was ever filed, and the royalty order was never stayed.

We wish to make it clear that the filing of suit for judicial review of a final Departmental decision regarding royalty valuation does not constitute bad faith. However, the failure to comply with a royalty payment order in the absence of a stay on administrative appeal pursuant to the regulations at 30 CFR 243.2 or, on appeal from a final Departmental decision to the courts, in the absence of a court-ordered stay of the effect of the administrative decision pending judicial review, pursuant to 5 U.S.C. § 705 (1982), or other authority, may properly be construed as an absence of good faith. This conduct may be construed as bad faith where, as occurred in this case, the failure to comply is coupled with both a failure to obtain a stay of the administrative decision and a unilateral rollback of the royalty valuation to a substantially reduced level.

With respect to the injury to the public resulting from the violation, we must conclude that evidence of actual injury was not established by the record at the hearing. [10] Under section 111(a) of FOGRMA the Secretary is required to charge interest on payments not received on the date due. 30 U.S.C. § 1721(a) (1982); *see* 30 CFR 218.102. Specifically, section 111(a) provides that interest shall be charged on such payments at the rate applicable under section 6621 of the Internal Revenue Code of 1954. An explanation of the basis for charging interest at this rate is offered in the legislative history:

> This section established interest penalties for late payments in the cases where royalty payments are not received by the Secretary on the date that such payments are due and when the Secretary fails to make payment to a State or Indian tribe on the date required. The interest penalty so charged is at the rate applicable under section 6621 of the Internal Revenue code of 1954, a rate based in part but higher than the prime interest rate. Such interest penalties are deemed part of royalty payments. Imposition of such high penalties against those owing money to the United States is to remove the incentives such persons may have to hold the money owned and invest it rather than pay it on time to the MMS. Also, the high penalty required of the United States should be a strong incentive to the MMS to disburse moneys under the mineral leasing laws of 1920 promptly.

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[10] We note, however, that CIRI has asserted in its amicus curiae brief that 70 percent of the royalties owed to CIRI were subject to sharing with the other Native regional corporations and, in turn, with Native village corporations within each region. CIRI contends in its brief that the royalty "revenue stream may be critical to the survival of many of the ANCSA Native Corporations, and, thus, to the ultimate success of ANCSA."

H.R. Rep. No. 859, 97th Cong., 2d Sess. 36, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4268, 4290. Thus, as a result of the delay in payment, the public has been compensated by the payment of interest on the unpaid funds at a substantial rate higher than the prime rate of interest on borrowed funds. Hence, we cannot conclude that injury to the public has been established on the record in this case. For the same reason, we are unable to find that Marathon benefitted significantly from its delay in payment of the royalty obligation.

With respect to the question of the ability of Marathon to pay a penalty, we find the record to be inconclusive except for the evidence recognized by the Administrative Law Judge that the LNG gas project was substantially profitable.

An additional factor we find appropriate in determining the amount of the civil penalty to be assessed is the need to deter similar behavior and to uphold the authority of MMS and the integrity of its royalty payment orders. This objective is consistent with the purposes of Congress in enacting FOGRMA. Thus, section 2(b) of FOGRMA provides, in pertinent part, that:

> (b) It is the purpose of this Act–
>
> * * * * * * *
>
> (2) to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases on Federal lands * * *;
>
> (3) to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States * * *

30 U.S.C. § 1701(b)(2) (1982). Although Marathon was seeking judicial review of the royalty valuation orders issued by the Department, it not only failed to comply with those orders, but flaunted them by rolling back the royalty valuation to a value approximately one-third of that used prior to the orders. The absence of discernible damage to the public interest on the record in this case in view of the subsequent payment with interest does not negate the substantial risk of loss attendant upon the failure to pay royalty timely on the full value of oil and gas removed from the ground. Unforeseen circumstances, *e.g.*, bankruptcy, a not unheard of event in the oil and gas industry in recent years, threaten the public interest in recovery of full royalty value. In the absence of the tender of an acceptable bond in support of an application for a stay, either before the Department or the courts, there is no opportunity for either the Department or the courts to ensure the public interest is protected pending completion of administrative and/or judicial review. Allowing a payor to unilaterally determine the level of royalty payment pending final resolution of a royalty dispute as happened here is clearly unacceptable. Consequently, we find a substantial need to uphold the authority of MMS and the integrity of its orders, as well as to deter conduct such as that engaged in by Marathon in the present case.

Accordingly, we hold that the absence of apparent injury to the public interest coupled with the lack of any apparent benefit to Marathon from the failure to timely comply with the royalty payment orders are mitigating factors which tend to support a reduction in the amount of the civil penalty. On the other hand, the lack of good faith manifested by appellant militates in favor of a substantial penalty. Further, the need to uphold the authority of MMS to require timely payment of royalty on oil and gas production in accordance with its value determination, in the absence of approval of a stay, and the corresponding need to deter noncompliance tend to support a substantial penalty.

Balancing these factors, we find that the amount of the civil penalty in this case is properly assessed at 50 percent of the proposed amount (the statutory maximum) or the sum of $10,220,000.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed as to the finding of a knowing and willful failure to comply with the order; affirmed as to the finding of the applicability of the provisions of FOGRMA; and, affirmed as modified as to the amount of the civil penalty assessed.

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

[95 I.D. 293]

FRESA CONSTRUCTION CO. *v.* OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

106 IBLA 179 Decided: *December 20, 1988*

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying appellant's application for review of and temporary relief from a cessation order. CO No. 87-11-018-01.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under the Surface Mining

Control and Reclamation Act of 1977, bears the burden of affirmatively demonstrating entitlement to the exemption.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Coal Exploration Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State

OSMRE has jurisdiction to issue a cessation order without giving the state regulatory authority 10 days notice when a person is conducting surface mining operations under a notice of intent to prospect.

3. Surface Mining Control and Reclamation Act of 1977: Coal Exploration Permits: Generally

Coal may not be extracted for commercial sale under a notice of intent to prospect, unless the sale is to test for coal properties necessary for development of a mine, for which a surface mining permit application will later be submitted.

4. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

Because conducting surface mining operations without a surface mining permit is specifically defined at 30 CFR 843.11(a)(2) to constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm, OSMRE may issue a cessation order solely on the grounds that surface mining operations are being conducted under a notice of intent to prospect.

APPEARANCES: James N. Riley, Esq., and David J. Romano, Esq., Clarksburg, West Virginia, for Fresa Construction Co., Inc.; Wayne A. Babcock, Esq., U.S. Department of the Interior, Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Steve Barcley, Assistant Attorney General, Environment and Energy Division, for the West Virginia Department of Energy, intervenor.

OPINION BY ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF LAND APPEALS

Fresa Construction Co., Inc. (appellant), appeals from a June 1, 1987, decision issued by Administrative Law Judge Joseph E. McGuire, rejecting its application for review of and temporary relief from Cessation Order (CO) No. 87-11-018-01. The CO was issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on April 17, 1987, pursuant to the provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). [1] The West Virginia Department of Energy (WVDOE) has intervened in the appeal, opposing the issuance of the CO.

The facts in this matter were developed during an administrative hearing held by Judge McGuire on May 28, 1987, in Morgantown, West Virginia. At the hearing, Michael R. Fresa (Fresa), president and owner of appellant, testified that WVDOE issued a prospecting permit

[1] All further citations to the *United States Code* are to the 1982 edition.

to appellant in 1983 and a surface mining permit in 1984 covering a 37-acre tract of land. The area encompassed by this tract had previously been deep mined by Consolidation Coal Co., from whom appellant acquired the mineral rights. Beginning in 1984 and continuing through the time of the hearing, appellant conducted a surface mining operation on the 37-acre tract. It holds the mineral rights, however, to a much more extensive area.

On December 30, 1986, a representative of Jno. McCall (McCall), a coal broker located in Baltimore, Maryland, sent a telex message to appellant stating: "Confirming near-term requirement for unit train of 10 A, 2.5 S, 3,000 BTU for export to consumers in Belgium and Portugal. Phil Lehr from Jno. McCall Coal Export Corp" (Exh. C). [2] According to testimony at the hearing, the telex set forth a request for shipment of a unit train of coal, *i.e.*, 7,000 tons of coal, with 10 percent or less ash, 2.5 percent or less sulphur, and, after correcting an obvious error, 13,000 Btu.

On January 2, 1987, appellant filed with WVDOE a Notice of Intent to Prospect covering 1.3 acres of land adjacent to its 37-acre permitted site (Exh. 6). The notice indicated that approximately 7,000 tons of coal would be removed from the site "for a coal test order." Operations were scheduled to begin on January 17, 1987, with the area regraded by April 17, 1987. Because of the amount of coal appellant proposed to remove, it was required to describe why an amount in excess of 250 tons was necessary to assess the coal resources or make feasibility studies, and to state how the coal would be used. Appellant stated: "As further detailed on the attached letter, a market for this coal might be established, if a shipment of 7,000 tons can be mined and delivered quickly. It is for this reason that we need to prospect and produce more than the normal 250 ton limit" (Exh. G at item 13). The attached letter was the telex described above.

WVDOE approved the Notice of Intent to Prospect on January 21, 1987 (Exh. 6). A copy of appellant's approved Notice of Intent to Prospect was sent to OSMRE in the regular course of business. Because of an OSMRE study which indicated abuse of prospecting approvals, OSMRE had begun to closely monitor all prospecting approvals. In particular, OSMRE was concerned that applicants were not being required to describe how they would control run-off and sedimentation or show why they needed amounts of coal in excess of 250 tons for test purposes, and that prospecting approvals were in fact being used to circumvent the requirements of SMCRA (Tr. 60).

OSMRE inspector C. Donald Summers testified that after receiving a copy of appellant's prospecting approval, he inspected the site on March 24, 1987. No operations had begun. On April 14, 1987, he returned to the site and observed that coal was being removed, the

[2] All exhibits referred to in this decision are exhibits admitted into evidence at the hearing before Judge McGuire.

operation had created a 50 to 60-foot highwall, operations were being conducted within 300 feet of an estimated 33 homes and four other buildings and within 100 feet of a public road, and the existence of boreholes indicated blasting had occurred (Tr. 84, 89-91). [3] He testified that there were no drainage controls and spoil was being stored on the adjacent 37-acre permitted site (Tr. 90).

Summers attempted to determine whether the coal was being removed for a test burn as stated in the prospecting approval. The site supervisor indicated the coal would be sold to the P.H. Gladfelter Paper Co. (Tr. 97). [4] Summers contacted McCall, who had sent appellant the telex, and spoke to an unidentified person who, according to Summers, did not give a "straight answer" with regard to the intended use of the coal, except to say that McCall purchased coal or made contracts to purchase coal for buyers (Tr. 118). Summers also contacted Gladfelter, and was informed that it purchased coal through McCall and did not purchase coal for test burns (Tr. 97).

OSMRE officials determined that appellant should be issued a CO for mining without a valid surface mining permit. OSMRE contacted WVDOE, informed officials there of its position, and asked them if they would issue a CO. WVDOE apparently declined to issue a CO. [5] OSMRE then determined to issue its own CO. Summers, accompanied by another OSMRE official, served the CO on April 17, 1987.

The CO, citing section 22A-3-8 of the West Virginia Surface Mining and Reclamation Act, section 521(a)(2) of SMCRA (30 U.S.C. § 1271(a)(2)), 30 CFR 773.11(a), and 30 CFR 843.11(a)(2), provided: "The operator is conducting surface coal mining operations on a Notice of Intent to Prospect approval, without first obtaining a valid surface coal mining permit from the state regulatory authority. The area is adjacent to surface mining permit S-2-84 in the same coal seam. Coal is being sold commercially" (Exh. G). The CO required the operator to "[i]mmediately cease all surface coal mining operations. Reclaim all disturbed area by 8:00 a.m. April 30, 1987; or obtain a valid surface coal mining permit from the State Regulatory Authority by 8:00 AM May 17, 1987" (*id.*).

Appellant requested and was granted an informal minesite hearing, which was held on April 24, 1987. Appellant informed OSMRE that McCall had refused to accept delivery of the coal, which it had instead stockpiled at its nearby tipple. OSMRE amended the CO to delete the statement that the coal was being sold commercially, and to give appellant an extension of time to reclaim the land. No other relief was granted.

On May 18, 1987, appellant filed with the Hearings Division, Office of Hearings and Appeals, a Motion to Dismiss, Application for Review,

[3] Summers further indicated that an individual present at the site stated he was there to monitor blasting activities (Tr. 91).

[4] Other testimony showed that coal from the 37-acre permitted site had been sold to Gladfelter.

[5] OSMRE did not call as a witness its official who contacted WVDOE. Instead, testimony concerning the telephone call to WVDOE was presented through other witnesses.

and Motion for Temporary Relief from enforcement provisions of the CO. The administrative hearing discussed above was scheduled and held by Judge McGuire. Prior to taking evidence on the Motion for Temporary Relief and Application for Review, Judge McGuire denied appellant's Motion to Dismiss. At the conclusion of the hearing, Judge McGuire denied appellant's Motion for Temporary Relief. Appellant immediately sought temporary relief through the United States District Court for the Northern District of West Virginia. On June 19, 1987, the district court approved a consent order which essentially granted appellant temporary relief and permitted it to remove a block of 250-400 tons of coal, which constituted the only coal remaining on the 1.3-acre site (Exh. I).

In his June 1, 1987, decision, Judge McGuire identified the issue in the case as whether OSMRE properly issued CO No. 87-11-018-01. He concluded that OSMRE established a prima facie case that appellant violated 30 U.S.C. § 1271(a)(2) by having conducted surface coal mining operations without first obtaining a surface coal mining permit from WVDOE, and that appellant failed to carry the ultimate burden of persuasion of showing that the order was not properly issued. Judge McGuire determined that appellant, in responding to an order for coal in which time was of the essence, made a business decision to obtain the coal under a Notice of Intent to Prospect rather than pursuant to a surface mining permit, the processing time and expense of which were considerably greater.

The respective burdens placed on the parties in proceedings reviewing the issuance of a notice of violation or CO under SMCRA were set forth in *Race Fork Coal Corp.* v. *OSMRE*, 84 IBLA 383, 388-89, 92 I.D. 68, 71 (1985):

> In administrative review proceedings under the Act, this Department has held consistently that one who contests OSM[RE] jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based. *Sam Blankenship*, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983); *Jewell Smokeless Coal Corp.*, 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982); *Daniel Brothers Coal Co.*, 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980). OSM[RE] carries the initial burden of establishing a prima facie case as to the validity of the notice or order. 43 CFR 4.1171(a). OSM[RE] has established a prima facie case where evidence sufficient to establish essential facts will remain sufficient if uncontradicted. Sufficient evidence justifies but does not compel a finding in favor of the one presenting it. *Belva Coal Co.*, 3 IBSMA 83, 88 I.D. 448 (1981); *James Moore*, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979). [6] OSM[RE]'s initial burden is limited to a prima facie showing that the one named in the [notice of violation] or cessation order was "engaged in a surface coal mining operation and failed to meet Federal performance standards." *Rhonda Coal Co.*, 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Such a showing would establish an activity that falls within the definition of surface coal mining operations in 30 U.S.C. § 1291(28) [1982], which caused a violation of one or more of the regulations governing surface coal mining. Such a showing by OSM[RE] as to the validity of the notice or order under 43 CFR 4.1171(a) shifts to the applicant for review, under 43 CFR

[6] OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. The violation will be sustained on appeal when OSMRE's evidence is not rebutted. *Turner Brothers Inc.* v. *OSMRE*, 103 IBLA 10 (1988); *Mullins Coal Co.* v. *OSMRE*, 96 IBLA 333, 335 (1987).

4.1171(b), the burden of going forward and the ultimate burden of persuasion as to (1) whether he was conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether this activity is excepted from the coverage of the Act or regulations and therefore not subject to OSM[RE] jurisdiction.

Thus, whether appellant challenges either OSMRE jurisdiction on the basis of a claimed exemption, or the merits of OSMRE's case against it, OSMRE bears the burden of establishing a prima facie case and appellant bears the ultimate burden of persuasion.

Appellant and WVDOE initially raise two arguments against OSMRE's jurisdiction over appellant's 1.3-acre site. First, they contend that because the tract subject to the prospecting approval was only 1.3 acres, OSMRE had no enforcement authority based on a statutory 2-acre jurisdictional limitation set forth in section 528(2) of SMCRA, 30 U.S.C. § 1278(2). [7]

[1] Contrary to appellant's arguments, the 2-acre exemption has consistently been held to constitute an affirmative defense. Consequently, the exemption must be pleaded and proved by the person claiming it. *Cumberland Reclamation Co.*, 102 IBLA 100 (1988); *OSMRE* v. *C-Ann Coal Co.*, 94 IBLA 14 (1986); *S & S Coal Co.* v. *OSMRE*, 87 IBLA 350 (1985). Accordingly, appellant bears the burden of proving entitlement to the 2-acre exemption.

Section 528(2) previously provided that SMCRA would not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." Departmental regulations at 30 CFR 700.11(b) implemented the statutory exemption and provided that SMCRA applied to all surface mining and reclamation activities except "the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." *S & S Coal Co., supra.* As a general rule, surface coal mining operations shall be deemed "related" if they occur within 12 months of each other, are physically related, and are under common ownership or control. 30 CFR 700.11(b)(2). "Affected area" is defined in 30 CFR 701.5 as:

[A]ny land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes * * * any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; * * * any area covered by surface excavations, workings, * * * refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, * * *.

There is no dispute that the 37-acre permitted tract and the 1.3-acre site at issue here are "related operations" within the meaning of 30 CFR 700.11(b). Evidence was presented that the tracts were contiguous, mining was still ongoing on the 37-acre permitted tract (Tr. 44), spoil from the 1.3-acre site was stored on the 37-acre tract (Tr. 90, 140), and the same coal seam was being mined on both tracts (Tr. 94). The evidence presented by OSMRE was sufficient to establish a prima

[7] This 2-acre exemption was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

facie showing that appellant's operations on the 1.3-acre site actually affected more area than just that tract and that appellant was not entitled to a 2-acre exemption. Accordingly, the burden shifted to appellant to show that its operations were limited to the 1.3-acre tract covered by the prospecting approval. Appellant failed to present any evidence showing that only the 1.3-acre tract was affected. Instead, it argued that there was no proof that any area beyond the 2 acres it had bonded had been affected. [8] Because it offered no evidence on this issue, appellant failed to carry its burden of proving that the total affected area was less than 2 acres, and failed to show its entitlement to the 2-acre exemption.

WVDOE contends that any activities related to the 1.3-acre site taking place on the 37-acre site may not be considered in calculating the affected acreage because the 37-acre site is covered by a surface mining permit. The definition of "affected area" includes *any* adjacent lands, the use of which is incidental to surface coal mining and reclamation operations. 30 CFR 701.5. No exception is made for adjacent *permitted lands*. Under the construction of the 2-acre exemption WVDOE advances, surface mining operators would be free to mine innumerable 1.99-acre tracts of land adjacent to a permitted area and use the permitted area for ancillary activities. There is no basis for such an interpretation of the 2-acre exemption, and we accordingly reject this argument.

[2] Appellant and WVDOE next contend OSMRE lacks jurisdiction because it failed to give the State the 10-day notice (TDN) they argue was required by SMCRA and applicable regulations. Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1), sets out the requirement for a TDN:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. *The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action.* [Italics added.]

Section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2), further provides:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this

[8] Testimony indicated that the bonding costs were the same for a fraction of an acre as for an entire acre, and that appellant had, therefore, bonded 2 full acres.

chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

Departmental regulations provide that, with certain exceptions not applicable in this case, "[s]urface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." 30 CFR 843.11(a)(2).

If appellant was conducting surface mining operations without a valid surface mining permit, that fact would, by definition, constitute a condition or practice causing or reasonably expected to cause significant, imminent environmental harm to land, air, and water resources. Because OSMRE is required by statute to issue a CO immediately upon determining that a person is engaging in surface coal mining operations causing or reasonably expected to cause significant, imminent environmental harm to land, air, and water resources, it would not be required to issue a TDN to the State. 30 U.S.C. § 1271(a)(2); 30 CFR 843.11(a)(1). *Firchau Mining, Inc.* v. *OSMRE*, 101 IBLA 144, 148 (1988); *Mid-Mountain Mining, Inc.* v. *OSMRE*, 92 IBLA 4, 6-7 (1986); *S & S Coal Co., supra* at 253; *Virginia Citizens for Better Reclamation*, 82 IBLA 37, 44-45; 91 I.D. 247, 251-252 (1984). Because of our holding, *infra*, that appellant has failed to show it was not conducting surface coal mining operations without a valid surface mining permit, we hold that OSMRE was not required to issue a TDN to the State.

Concerning the merits of this case, as previously discussed, OSMRE bears the burden of establishing a prima facie case. 43 CFR 4.1171(a). Appellant bears the ultimate burden of persuasion. 43 CFR 4.1171(b); *Miami Springs Properties*, 2 IBSMA 399, 404, 87 I.D. 645, 647 (1980); *Burgess Mining & Construction Corp.*, 1 IBSMA 293, 298, 86 I.D. 656, 658 (1979); *James Moore*, 1 IBSMA 216, 223-24, 86 I.D. 369, 373 (1979). The decision as to whether appellant's operations on the 1.3-acre site, conducted pursuant to a prospecting approval, were in fact surface mining operations, ultimately turns on the question of whether the coal was mined for testing purposes.

Surface coal mining operations are clearly distinguished from coal exploration operations under SMCRA. Under section 701(28)(A) of SMCRA, 30 U.S.C. § 1291(28)(A), coal exploration activities subject to section 512 of SMCRA, 30 U.S.C. § 1262, are excluded from the definition of surface coal mining operations. Coal exploration is defined at 30 CFR 701.5:

Coal exploration means the field gathering of: (a) surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or (b) the gathering of environmental data to establish the conditions of an area

before beginning surface coal mining and reclamation operations under the requirements of this chapter.

[3] Section 512 of SMCRA, 30 U.S.C. § 1262, requires any person undertaking coal exploration operations to file a notice of intent to explore. The rights acquired under an approved notice of intent to explore are restricted. Specifically, no more than 250 tons of coal may be removed during exploratory operations except with written approval of the regulatory authority, granted after the submission of a statement of why the extraction of more than 250 tons is necessary for exploration purposes. Section 512(d) of SMCRA, 30 U.S.C. § 1262(d); 30 CFR 772.12(a). Also, a person operating under an exploratory authorization may not extract coal for commercial purposes without first obtaining a surface mining permit, except when the regulatory authority "makes a prior determination that the sale is to test for coal properties necessary for the development of surface coal mining and reclamation operations for which a permit application is to be submitted at a later time." 30 CFR 772.14.

The potential for abuse of the exploration provisions to circumvent the more stringent provisions of SMCRA was apparent to both Congress in considering passage of SMCRA and to the Department when it promulgated the regulations implementing SMCRA. In analyzing section 512 of SMCRA, the Committee on Interior and Insular Affairs stated:

> This section prescribes the procedures and standards to apply to coal exploration. No permit is required, but exploration is to be performed subject to regulations designed to provide notice to the regulatory authority and compliance with environmental standards set out for surface mine operations. In order to limit the size of such operations, no more than 250 tons can be produced under such an operation.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 173, *reprinted in* 1977 U.S. Code Cong. & Admin. News 593, 704.

The preamble to the final Departmental regulations explained why written approval to mine more than 250 tons of coal was required:

> Section 512(d) of the Act requires specific written approval of the regulatory authority to remove more than 250 tons. It is important in the regulatory process to know exactly why it is necessary to remove more than 250 tons of coal, in order to prevent mining under the guise of exploration. This is particularly pertinent because of the abbreviated permit approval requirements and the lack of a requirement for a performance bond associated with exploration operations.

48 FR 40621, 40627 (Sept. 8, 1983). With regard to 30 CFR 772.14, the regulation governing the commercial sale of coal mined under an exploration permit, OSMRE stated:

> The substance of the previous section [815.17] was unchanged in the proposed rule except to clarify that a "surface coal mining and reclamation operations" permit will be needed for the commercial sale of coal extracted during exploration operations and that no such permit is needed if, prior to exploration, the regulatory authority determines the sale is to test coal properties for development of a mining operation for which a permit is to be submitted at a later time.

Id. at 40630. Finally, in responding to public concerns over possible abuse of the exploration permit, OSMRE stated:

> One commenter was confused as to why coal would be sold if it was to be used for testing purposes. Users, the commenter asserted, generally do not pay for "test burns." The commenter said if the sample load is so large it is paid for, then a permit should be required anyway. The commenter feared the provision would be abused by operators who negotiate purchase agreements with buyers of coal providing in those agreements for testing of the coal in order to fit within the exception.
>
> OSM[RE] agrees that it is common for larger operators to provide test loads to users rather than to charge for such tests. However, this is not necessarily always the case and thus the language of final § 772.14 allows a regulatory authority to distinguish between those situations where coal is sold in interstate commerce as part of a surface coal mining and reclamation operation, and those situations where, although the coal is sold, the objective is testing of the coal as part of coal exploration. *OSM[RE] agrees that care should be taken so that this provision is not abused.* [Italics added.]

Id.

The record in this case clearly establishes that appellant removed the coal on the 1.3-acre site in response to the telex from McCall. As OSMRE argues, no requirement for a test burn is apparent on the face of that telex. OSMRE presented further testimony that upon inquiry McCall did not confirm that a test burn was required. Appellant's only evidence on this issue was Fresa's testimony that a test burn was required, and its argument that Summers may have spoken with a McCall employee unfamiliar with the sale.

Although Fresa testified he was also exploring the feasibility of opening a deep mine adjacent to the 37-acre permitted site, this reason was not listed on the notice of intent to prospect (Exh. 6), and Fresa neither gave any information indicating that removal of all of the coal on the 1.3-acre site was necessary for this purpose nor explained how tests conducted at this site could assist in a determination of mining possibilities in an area quite far removed from it, as evidenced by his own testimony. Because this alleged exploratory purpose was not part of the original notice of intent to prospect, it will not be considered in determining whether that notice showed the coal from the site was being removed for exploratory and/or test purposes.

OSMRE's evidence was sufficient to establish a prima facie case. Standing alone, Fresa's statement concerning McCall's requirement for a test burn is insufficient to overcome OSMRE's prima facie case. Therefore, appellant has failed to carry its burden of proving that it was not conducting surface mining operations without a valid surface mining permit. [9]

[4] Appellant and WVDOE both argue that issuance of a CO was improper without a specific finding that significant, imminent environmental harm would result from the operation. In this regard, they note that OSMRE did not charge appellant with any of the

[9] Appellant argues that it had a valid permit in the form of its prospecting approval. As was noted in the text, *supra*, SMCRA clearly distinguishes between coal prospecting and coal mining. The fact that appellant had been given permission to explore an area for possible future mining does not insulate it from the requirement that it obtain a valid mining permit before it actually begins mining. We decline to equate a prospecting approval with a surface mining permit.

alleged problems discovered at the site, but merely raised the issue of mining without a permit. [10]

The CO was issued pursuant to section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2), quoted *supra*. This section requires OSMRE to issue a CO when it determines that a condition or practice exists that is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 843.11(a)(2), conducting surface mining operations without a surface mining permit is defined as constituting a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. Therefore, OSMRE properly issued a CO pursuant to section 521(a)(2) of SMCRA when it determined that appellant was conducting surface mining operations because it was extracting coal for a commercial purpose without a surface mining permit or a proper determination that the sale was to test coal properties necessary to the development of surface coal mining and reclamation operations. *Firchau Mining, Inc., supra.* [11]

Finally, appellant contends it was denied a fair hearing because Judge McGuire was biased against it. There is no indication from the transcript, nor does appellant assert, that Judge McGuire denied it the opportunity to submit any evidence into the record. Instead, appellant argues that Judge McGuire took an adversarial stance in questioning its witnesses. [12] In view of the facts that appellant was not precluded from building a complete record, and that the Board has reviewed this matter de novo, we find that appellant has been afforded a fair hearing. [13]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

KATHRYN A. LYNN
Administrative Judge
Alternate Member

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[10] Much time was spent at the hearing discussing the fact that, in a similar case involving alleged surface mining under a prospecting approval which occurred 2½ weeks before the present CO was issued to appellant, the other coal company was cited with numerous specific violations in addition to the allegation of mining without a valid permit.

[11] Appellant argues essentially that WVDOE's determination that the coal was being removed for a test burn cannot be challenged by OSMRE. The Federal oversight role under SMCRA allows and requires OSMRE to challenge any state enforcement decision it believes is erroneous.

[12] Appellant also contends that Judge McGuire's dismissal of its subsequently filed appeal of the civil penalty assessed in connection with this matter demonstrates his bias. The civil penalty issue was considered in *Fresa Construction Co.* v. *OSMRE*, 101 IBLA 229 (1988), and is not part of this appeal. We decline to address this issue further in the context of the present appeal.

[13] WVDOE argues that Judge McGuire erred in relying upon a consent order in *Humphreys* v. *Faerber*, Civ. No. 86-P-134 (Monongalia County Cir. Ct. Apr. 21, 1987). The consent order, which requires WVDOE to obtain detailed information from persons seeking to extract more than 250 tons of coal pursuant to a prospecting approval, took effect subsequent to the issuance of the CO at issue here. Because we have reached our decision without reliance upon the *Humphreys* consent order, we need not determine whether Judge McGuire erred in considering it.

I CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

STATE OF ALASKA

106 IBLA 160 Decided: *December 20, 1988*

Consolidated appeals from Instruction Memorandum AK 86-212 (Apr. 25, 1986), and from the decision of the Alaska State Office, Bureau of Land Management, placing certain land in a pool of properties available for selection by Cook Inlet Region, Inc. AA-58369, F-532.

Dismissed in part; affirmed in part; vacated in part and remanded.

1. Administrative Procedure: Adjudication--Rules of Practice: Appeals: Dismissal

An instruction memorandum is merely a document for internal use by BLM employees and has no legal force or effect. It is not directed to outside parties and neither initiates or disposes of an individual case, so it is not a "decision" subject to appeal under 43 CFR 4.410.

2. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally--Alaska Native Claims Settlement Act: Native Land Selections: State Selected Lands

Under sec. I.C.(2)(b) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet area, the Secretary is authorized to place lands into a pool for selection by Cook Inlet Region, Inc., if the State of Alaska concurs. In sec. 606(d)(5) of the Alaska Railroad Transportation Act of 1982, Congress provided that the concurrence required of the State as to the inclusion of any property in the pool shall be deemed obtained unless the State advises the Secretary in writing that it requires the property for a public purpose. By providing that transfer to the pool would occur unless notice were given that the State requires the property "for a public purpose," Congress opened to inquiry the State's basis for objecting to the transfer. As a result, BLM may properly require the State to demonstrate that it requires an out-of-region parcel for a public purpose in order for the State to block inclusion of the parcel in the CIRI selection pool.

APPEARANCES: Elizabeth J. Barry, Esq., Assistant Attorney General, for the State of Alaska; Mark Rindner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; Dennis Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; and Robert Perkins, Fairbanks, Alaska, for amicus curiae Skyline Ridge Park Committee.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

These are consolidated appeals by the State of Alaska (the State) from actions taken by the Alaska State Office, Bureau of Land

Management (BLM), involving the availability of land for selection by Cook Inlet Region, Inc. (CIRI). The central issue in this appeal involves statutory construction, so that it is necessary to set out the history of the provision to be construed.

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1638 (1982), with the goal of providing a fair and just settlement of aboriginal land claims by Natives in Alaska. 43 U.S.C. § 1601(a) (1982). ANCSA established 12 regional Native corporations, including CIRI, which were given the right to select land and to share in revenues derived from the sale of minerals. However, in the Cook Inlet Region (which includes the Anchorage metropolitan area and a large portion of the Kenai Peninsula), existing Federal withdrawals, State land selections, and other previous non-Native settlements greatly limited CIRI's selection options. CIRI, finding its selection rights unfulfilled, instituted litigation.

An effort to settle this litigation resulted in an agreement called "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" (Terms and Conditions). A version of the Terms and Conditions document was submitted to the House Committee on Interior and Insular Affairs in December 1975 and was expressly ratified as a matter of Federal law by Congress in section 12(b) of the Act of January 2, 1976, P.L. 94-204, 89 Stat. 1151 (1976). *See Cook Inlet Region, Inc.*, 90 IBLA 135, 140, 92 I.D. 620, 622-23 (1985). [1]

Under paragraph I.C.(2)(a) of the Terms and Conditions, the Department, in conjunction with the General Services Administration (GSA), was to attempt to place certain categories of surplus Federal land located inside the Cook Inlet Region into a pool to facilitate CIRI's selection. The selection pool was to be comprised of lands within the following categories: (1) abandoned or unperfected public land entries; (2) Federal surplus property; (3) revoked Federal reserves; (4) canceled or revoked power site reserves (5) public lands created by the reduction of certain Federal installations; and (6) other lands as agreed by the parties.

Additionally, under paragraph I.C.(2)(b) of the Terms and Conditions, in some circumstances, land in the same categories located *outside* the Cook Inlet Region could also be placed in the pool: "With the concurrence of CIRI [and] the State * * * the Secretary may, in his discretion, contribute to [the CIRI selection] pool properties * * * from without the boundaries of the Cook Inlet Region."

On January 14, 1983, Congress enacted the Alaska Railroad Transfer Act of 1982 (ARTA), P.L. 97-468, 96 Stat. 2556 (1983), the primary purpose of which was to transfer the Alaska Railroad from Federal to

[1] The version of the Terms and Conditions that was ratified by P.L. 94-204 may be found in 1975 *U.S. Code Cong. & Admin. News* 2402-19. It has subsequently been amended several times. *See, e.g.*, sec. 3, P.L. 94-456, 90 Stat. 1935 (1976). The case record sent to the Board by BLM following receipt of the notice of appeal did not contain a copy of the Terms and Conditions. However, in response to a request from the Board, BLM supplied the version that resulted from the negotiations in conjunction with the consideration of the Alaska Railroad Transfer Act that is quoted below.

State ownership. Before enactment, CIRI and its villages had asserted competing claims to certain railroad lands which conflicted with the proposed transfer. As discussed more fully below, CIRI and the State negotiated amendments to the Terms and Conditions which resulted in extinguishing most of these CIRI claims. Congress, in section 606(d)(5) of ARTA, enacted the following provision concerning the State's concurrence right for out-of-region selections under paragraph I.C.(2)(b) of the Terms and Conditions:

> Section 12(b)(8) * * * is amended to read as follows:
>
> * * * * * * *
>
> (iii) The concurrence required of the State as to the inclusion of any property in the pool under subparagraph I(C)(2)(b) [of the Terms and Conditions] shall be deemed obtained unless the State advises the Secretary in writing, within 90 days of receipt of a formal notice from the Secretary that the Secretary is considering placing property in the selection pool, that the State, or a municipality of the State which includes all or part of the property in question requires the property for a public purpose of the State or the municipality. [2]

These appeals concern the interpretation of this provision.

[1] The State has appealed from BLM's Instruction Memorandum (IM) No. AK 86-212 (Apr. 15, 1986), which established BLM's internal procedures for adjudication of the State's public purpose assertions under section 12(b)(8) of the Act of January 2, 1976, as amended. The IM provides that BLM will give notice to the State that property is being considered for the out-of-region pool. If the State timely responds to such notice and asserts that a parcel is required for a public purpose, and CIRI also desires the lands, this assertion would not be considered to be conclusive, but would be subject to a "limited review" by BLM to determine whether the asserted requirement was "actual" and the asserted public purpose "identified." Thus, under the IM, a "bare allegation [by the State] that the land is required for a public purpose will be insufficient to automatically foreclose consideration of" placement in the CIRI selection pool. The IM sets forth four bases for "limiting or rejecting a State public purpose assertion." The State's appeal from the IM was docketed as IBLA 86-1222.

This appeal is not justiciable. Under 43 CFR 4.410(a) and (b), one must be a party who is adversely affected by a BLM *decision* to have a right to appeal to this Board. A BLM instruction memorandum is merely a document for internal use by BLM employees and has no binding legal force or effect. *The Joyce Foundation*, 102 IBLA 342, 345 (1988); *United States* v. *Kaycee Bentonite Corp.*, 64 IBLA 183, 214, 89 I.D. 262, 279 (1982). It is not directed to outside parties, and it neither initiates or disposes of an individual case, so it is not a

[2] The ARTA amendment, *i.e.*, sec. 606(d)(5) of P.L. 97-468, 96 Stat. 2569 (1983), was not the first provision enacted by Congress that amended sec. 12(b) of the Act of Jan. 2, 1976, *supra*. Sec. 12(b)(8) was enacted by Congress in 1980 in sec. 1435 of P.L. 96-487, 94 Stat. 2545-46 (1980). However, it is the language of sec. 12(b)(8)(iii), as ARTA amended it, which is at issue here. Similar language concerning the State's right to advise the Department that it "requires the property for a public purpose" also appears in sec. 12(b)(8)(i)(C) and (D) of the Act of Jan. 2, 1976, as amended. The current text of sec. 12 of this Act, including the ARTA amendments, is set out as a note to 43 U.S.C. § 1611 (1982).

"decision" subject to appeal under 43 CFR 4.410. Thus, the State's appeal from the IM must be dismissed.

However, even before the State filed its appeal from the IM, it had already received an adverse decision applying the provisions of the memorandum. That decision is subject to appeal.

Specifically, on April 16, 1986, BLM issued a decision placing 600 acres on Bender Mountain near Fairbanks in the pool of properties available for selection by CIRI, overruling the State's objection to such action. The area of the Bender Mountain parcel originally in dispute consisted of 810 acres located approximately 4 miles northwest of downtown Fairbanks. On October 22, 1985, the State was formally notified that the Secretary was considering placing the Bender Mountain property in the pool of properties available for selection by CIRI under the Terms and Conditions. [3] On January 17, 1986, the State notified BLM of its objection to the placement of any of the 810 acres comprising the Bender Mountain property into the selection pool because the State required the land for a public park. The State specified that "the entire property is required for a public park proposed by the Fairbanks North Star Borough," adding that the proposed park enjoyed widespread public support in the Fairbanks area, as demonstrated by documents attached to the State's objection. BLM provided CIRI 90 days in which to respond to the State's objection and to provide additional information.

In its April 16, 1986, decision, BLM denied the State's objection as to 600 acres of the 810 acre parcel, finding that the State had not demonstrated that it required those 600 acres for a public purpose. BLM granted the State's objection against placing 200 acres of the Bender Mountain parcel in that pool. [4] BLM's decision concluded that a "passive park" was consistent with BLM's "public purpose standards", *i.e.*, "the purpose must serve a State or municipal objective related to the promotion of the health, safety, general welfare, security, contentment, recreation, or enjoyment of all or some portion

[3] BLM's letter of Oct. 22, 1985, to the State is missing from the case file forwarded to us by BLM. Of course, BLM was required to include this document, as it must file the complete case file surrounding any appeal made to the Board, including all official correspondence received or sent by BLM. *See Mobil Oil Exploration & Producing Southeast, Inc.*, 90 IBLA 173, 177 (1986). The Oct. 22, 1985, letter provided notice to the State of the proposed inclusion of this land in the CIRI selection pool and started the protest period. As such, it is a critical document and should not have been omitted from the case file.

We find this omission troubling, because it appears from other documentation in the record that BLM adopted in this letter a different (and evidently contrary) position regarding the effect of the State's protest than that later taken in BLM's Apr. 16, 1986, decision. CIRI's letter of Oct. 28, 1985, to BLM states: "I have reviewed [BLM's] letter to [the State], dated October 22, 1985, and am disturbed by the apparent characterization of the objection rights of [the State]. Specifically, it appears that [BLM] may be granting to the State conclusive objection rights rather than the 'public purpose requirement' objection rights defined by Congress by Section 606(d)(5)(ii) [*sic*] of [ARTA]." Further, on Nov. 5, 1985, BLM wrote a letter to the State "to clarify the objection rights allowed the State," in which it set forth a policy similar to that later followed in the decision on appeal.

Failure to include the Oct. 25, 1985, letter in the case file in these circumstances may have been inadvertent, but it creates the unfortunate impression that BLM may have been attempting to obscure the fact that it altered its position on the point at issue in this appeal.

[4] The remaining 10 acres out of the 810-acre Bender Mountain parcel contain physical improvements and were reported as excess to GSA on Mar. 20, 1986. BLM withheld action on these 10 acres because it had not received a letter of concurrence from GSA.

of the public within the affected political subdivision" (Decision at 5). The decision recited the information in the record, including that provided by the State and by CIRI, concerning the uses of the parcel, and concluded:

> While the documentation submitted by the State does not support a requirement of the entire 810 acres for a park, it does demonstrate a requirement for a portion of the parcel, including the ridgetop and the south slope above the access road, as excerpted above. In accordance with the supporting documentation in the case file and the public purpose standards, the State's objection will stand as to the following described lands, which will not be placed in the selection pool of properties for Cook Inlet Region, Inc. * * * There was insufficient documentation to support the State's assertion that the remaining land on Bender Mountain is required for a public purpose. Therefore, pursuant to Sec. 12(b)(6) of the Act of January 2, 1976, 43 U.S.C. 1611, and Par. I.C.(2) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, the following described lands are hereby placed in the pool of properties and are available for selection by Cook Inlet Region, Inc., subject to valid existing rights.

(Decision at 6).

The State and CIRI both filed notices of appeal from this decision which were docketed as IBLA 86-1229. By order dated September 16, 1986, pursuant to a stipulation filed by BLM, CIRI, and the State, the Board dismissed the appeal of the State except for 2.5 acres of the 600 acres that had been placed in the pool. In addition, we dismissed CIRI's appeal and granted the Skyline Ridge Park Committee status as *amicus curiae*. [5] Thus, only 2.5 acres remain in dispute.

[2] The issue in this appeal is whether BLM had authority to overrule the State's objection under the amended statutory provision quoted above. To assist our analysis of this provision, it is helpful to isolate its operative language: "The concurrence required of the State [under sec. I.C.(2)(b) of the Terms and Conditions] * * * shall be deemed obtained unless the State advises the Secretary * * * that the State * * * requires the property for a public purpose."

The parties concur that, prior to the ARTA amendments, the State held an "absolute" or "unqualified" veto over CIRI's ability to obtain out-of-region surplus properties under section I.C.(2)(b) of the Terms and Conditions (State's Reasons at 4; BLM Answer at 7; CIRI Answer at 6, 10). [6]

They also concur that, as a result of "lengthy negotiations" between CIRI, the State, and the Department prior to the ARTA amendments, the State agreed to refine the nature of its veto, in exchange for CIRI's giving up its claims to Alaska Railroad lands.

The State asserts that the effect of the ARTA amendments was limited to changing the meaning of silence by the State from a veto to concurrence. But, it maintains, the amendment "did not alter the fact

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[5] Perkins has filed information supporting his contention that the entire 810-acre Bender Mountain parcel was in fact "required for a public purpose." To the extent that the matter has been settled as to all but 2.5 acres of this parcel, Perkins' comments are no longer relevant. Insofar as Perkins' comments relate to the 2.5 acres that remain in dispute, BLM should address them on remand.

[6] This view is apparently based on the parties' reading of the pre-ARTA Terms and Conditions. The parties have stated that this absolute veto power under sec. 12(b)(8)(i)(C) would remain in effect until July 15, 1987, at the latest, after which time the State's objection must be based on a public purpose.

that the state has a veto" and "did not give CIRI or BLM any right to second-guess the wisdom of the state's decision that property is required for a state or municipal public purpose" (Statement of Reasons at 5). Thus, it maintains that the language at hand provides that, if the State submits a written objection within 90 days setting forth a public purpose, BLM has no authority to require the State to demonstrate its public purpose needs to BLM's satisfaction (Statement of Reasons at 13).

CIRI and BLM assert that the ARTA amendments changed the State's absolute veto to a conditional veto whereby the State could only block placement of properties in the surplus property pool if the State required the land for a *demonstrable* public purpose. BLM's position is fully set out in IM No. AK 86-212 (Apr. 15, 1986):

> If * * * the State responds that a parcel is required for a public purpose, and the lands are still desired by CIRI, BLM is obliged to subject the State's assertion to a limited review to satisfy the Secretary's statutory responsibility to both parties. The overall objective of the review will be to assess the sufficiency of the public purpose assertion in light of the information of record and any additional evidence provided by the State and CIRI.

On appeal, BLM notes that, "[u]nder the State's view, its filing [of an objection] could be completely whimsical and even false, but as long as it was filed within ninety days CIRI's interests would be conclusively terminated" (BLM Answer at 8). BLM argues that this interpretation fails to give meaning and effect to section 606(b)(5) of ARTA, which amendment (it asserts) redefined the terms of the State's objection right under section I.C.(2)(b) of the Terms and Conditions.

CIRI supports the policy adopted by BLM in this IM, arguing that it will assure that

> the dual legislative objectives of fulfilling CIRI's land entitlement and protecting the State's legitimate public needs will be accomplished. If, as objectively determined by BLM, the State actually requires the land for a public purpose, then the State can properly veto any selection by CIRI. If the State does not actually require the land for a legitimate public purpose or if, as happened in this case, the State objectively does not need all the land at issue for its asserted purpose, then CIRI's land entitlement will be fulfilled. The legitimate interests of both CIRI and the State are fully protected. Moreover, because the claims of both parties are subject to review by BLM, amicable settlement of conflicting claims is encouraged.

(CIRI Answer at 12). CIRI states that the "required for a public purpose" standard imposed by the ARTA amendments must have definite boundaries of substance and procedure which serve the underlying purpose of ARTA. *Id.* at 14.

Both sides to this dispute point to the legislative history in support of their differing interpretations. However, the legislative history refers to the State's protest right to object in many situations, of which only one is at issue in this case. Further, the history is subject to conflicting interpretation. For example, CIRI notes that Senate Report

97-478, June 22, 1982, [7] refers to the State being able to block placement of lands in the pool only where it needs the lands for a "demonstrable" public purpose. However, the word "demonstrable" does not appear in the language of the Act. Opposite conclusions may be drawn. On the one hand, the fact that the parties used the term during negotiations may reflect that they intended the State to have to demonstrate its public purpose need in order for its objection to be honored. On the other hand, as the State maintains, the fact that the word is not in the final amendment suggests that the parties and Congress intended that no obligation to demonstrate need be included.

By the same token, the State notes that the word "veto" was used by the parties to describe the State's objection rights throughout the negotiations leading up to the ARTA amendment, emphasizing that this word suggests that it enjoyed a right of "authoritative prohibition." Although the word "veto" does appear in the legislative history, it does not appear in the final amendment as passed in 1983. As above, this fact cuts both ways. It may show that the parties intended the State to retain an authoritative right to prohibit placement of lands in the selection pool, but the fact that the term is not in the final amendment suggests that the final agreement, as ratified by Congress, was not intended to include such prohibition. Further, as BLM points out, references to the State's "veto" right may be read as entailing nothing more than a recognition of the State's ability to keep land reasonably required for a public purpose out of the selection pool.

The only language directly explaining the effect of the ARTA amendments on section I.C.(2)(b) of the Terms and Conditions appears in a Senate Report set out at 128 Cong. Rec. 33586 (Dec. 23, 1982):

> Sec. 12(b)(8)(iii). Sec. I(C)(2)(b) of the "Terms and Conditions" authorizes the Secretary to place lands into the in-region pool from outside the region which are in the same categories as lands listed at I(C)(2)(a) (e.g. abandoned or unperfected public land entries, surplus property, revoked Federal reserves, cancelled or revoked power sites, ANCSA 3(e) lands) if the State concurs. Under this amendment *the State will not withhold its concurrence* unless the State or one of its municipalities needs the land for a public purpose. [Italics supplied.]

The State argues that the ARTA amendments, in effect, refer to its right of approval as a "required concurrence," and it also points to the preceding language from the legislative history as recognizing that the State may "withhold its concurrence." It concludes from this that the State's concurrence is a "necessary prerequisite," and argues that, since the State can still withhold such concurrence, the State retains "a conclusive right of objection to prevent property from being placed in the pool" (Statement of Reasons at 7-8).

There is no dispute that the State can withhold its concurrence. The issue is whether failure to grant concurrence may be disregarded where the State does not objectively need the land for a public purpose,

[7] Although the State, BLM, and CIRI refer to this report, they have neither cited us to a published version nor enclosed a copy of it.

or, in other words, whether the State may block land transfer to CIRI by arbitrarily withholding its concurrence. Use of the mandatory words "will not withhold" in the legislative history set out above suggests that the amendment was intended to provide that concurrence could *not* arbitrarily be withheld, but could be withheld only if it (or one of its municipalities) actually needs the land for a public purpose.

The State and BLM both point to the discussion of the amendment of section 12(b)(8)(i)(C) in the legislative history of ARTA. 128 Cong. Rec. 33585 (Dec. 23, 1982). The amendment of this section affects section I.C.(2)(a) and (c) of the Terms and Conditions; it is thus not directly involved in this dispute, which concerns only section I.C.(2)(b) thereof. However, amended section 12(b)(8)(i)(C) and 12(b)(8)(iii) contain identical language concerning the State's opportunity to advise the Department that the State or a municipality of the State "requires the property for a public purpose." Thus, study of the legislative history of the amendment of section 12(b)(8)(i)(C) is illuminating.

The discussion of the amendment of section 12(b)(8)(i)(C) in the legislative history suggests that the ARTA amendments were intended to change the State's right to object from an absolute veto to a nonabsolute "public purpose" veto. That discussion states:

> Section 12(b)(8)(i)(C). Under this provision the State of Alaska may prevent the Secretary from making land available to CIRI from the in-region pool if the State or a municipality requires the land for a public purpose. The State's "public purpose" veto takes [effect] on military land on January 1, 1985 and on all other land when the Secretary's obligation under I(C)(2)(a) of the "Terms and Conditions" is fulfilled or on July 16, 1987, whichever occurs first. *Until the State's public purpose veto takes effect, the State retains the authority it has under existing law to prevent the Secretary from making land available for selection by CIRI under I(C)(2)(a)(vi) and (c) of the Terms and Conditions.*
>
> Under IC(2)(a)(vi) of the "Terms and Conditions", the Secretary may identify "other Federal lands" for CIRI's in-region pool only with the State and CIRI's concurrence. *The State's concurrence will be required until the State's public purpose veto takes effect.*" [Italics added.]

I.C.(2)(a)(vi) of the Terms and Conditions, like I.C.(2)(b), speaks in terms of the State's agreement or concurrence with an action of the Secretary.

The parties concur that, before the ARTA amendments, the State enjoyed an absolute veto power over CIRI selections under the Terms and Conditions. The legislative history of this provision clearly distinguishes between this pre-ARTA absolute "authority * * * to prevent the Secretary from making land available for selection by CIRI" and the new, post-ARTA "public purpose" veto. If, as the State maintains, it was intended that the State's authority to object after ARTA would remain absolute and insulated from any independent inquiry by BLM, there would have been no distinction to draw between before and after the public purpose veto took effect, and there would

have been no need to take action to amend the veto power. We are unwilling to interpret action of Congress as a nullity: some purpose must be imputed to the decision to amend.

We deem that the implication of this distinction is that the ARTA amendments were intended to restrict the State's previously unrestrained veto power to circumstances where the State in fact required the land for a public purpose. Otherwise, there would have been no need to amend this authority.

Turning to the language of the controlling statute itself, under section 12(b)(8)(iii) of the Act of January 2, 1976, *as amended* by ARTA, property shall be placed in the CIRI pool as provided by section I.C.(2)(b) of the Terms and Conditions, unless a specific condition occurs, that is, unless notice is given that the "State requires the property for a public purpose." The State would have us interpret this provision as though the operative conditional language were merely that "the State requires the property." If Congress had intended the State to retain an absolute veto power without needing the land for a public purpose, it could easily have done so simply by providing "the State desires the property." It did not do so. Instead, it provided that the State give notice that it "requires the property *for a public purpose*" (italics supplied). We hold that, by so doing, Congress opened to inquiry the State's basis for objecting to the transfer. Accordingly, we affirm BLM's decision insofar as it holds that the ARTA amendments require the State to demonstrate to the Department that it requires an out-of-region parcel for a public purpose in order to block inclusion of the parcel in the CIRI selection pool.

Section 12(b) of the Act of January 2, 1976, as amended, expressly delegates to the Secretary of the Interior the duty to make conveyances to CIRI "in accordance with the specific terms, conditions, procedures, covenants, reservations, and other restrictions set forth in the * * * Terms and Conditions," as amended elsewhere by ARTA. 43 U.S.C. § 1611 (note) (1982). This authority has been redelegated to the Bureau of Land Management. Having determined that section I.C.(2)(b) of the Terms and Conditions provides that the State must demonstrate to the Department an actual public purpose need for an out-of-region parcel in order to block its inclusion in the CIRI selection pool, it follows that BLM must be able to review the assertion of public purpose need in order to ensure that the conveyances are being made in accordance with the terms set forth in the Terms and Conditions, as dictated by Congress. Accordingly, we also affirm BLM's decision insofar as it holds that the State's assertion of public purpose need is subject to review by BLM to assess the sufficiency of the public purpose assertion in light of the information of record and any additional evidence provided.

We disagree with the State's assertion that BLM is not competent to make this assessment. The Department has considered Recreation and Public Purpose Act applications under 43 U.S.C. § 869 (1982) since 1927. There will doubtless be areas of disagreement between the State

and CIRI on such questions as the limits of the area whose residents would actually be served by a public purpose. But we are confident that BLM is fully capable of resolving such land-use questions on behalf of the Department. If either the State or CIRI disagrees with a BLM decision, it may seek administrative review.

Although we affirm BLM's authority to review the State's assertions of public purpose, we cannot affirm its decision to place the 2.5 acres that remain in dispute into the pool. The decision simply concludes that the State did not submit sufficient documentation to support the assertion that it was needed for a public purpose. That conclusion indicates neither what further documentation might be adequate nor which, if any, of the four reasons offered in the decision and the IM as "sufficient cause for limiting or rejecting a State public purpose assertion" serves as the basis for the conclusion and why it does so. [8] Accordingly, it is necessary to vacate BLM's decision insofar as it places this parcel into the CIRI selection pool and remand the case to BLM for adjudication of the merits of the State's assertion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the State's appeal from IM No. AK 86-212 (Apr. 15, 1986) docketed as IBLA 86-1222 is dismissed; BLM's decision of April 16, 1986, is affirmed in part, vacated in part, and remanded for further consideration, as discussed above.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

WILL A. IRWIN
Administrative Judge

[8] BLM's IM No. AK 86-212 states as follows:

"Any of the following shall be a sufficient cause for limiting or rejecting a State public purpose assertion: 1. The lands that the State alleges are required for public purpose are unavailable for conveyance to the State or a municipality of the State under existing Federal or State authority. 2. The State fails to identify the required public purpose upon which the assertion is based. 3. Evaluation of the record, as supplemented by the State and CIRI, indicates that the public purpose can be reasonably accomplished through some other means, or through acquisition of less than the entire area. 4. The primary objective of the assertion is to benefit private and/or proprietary interests, either through promotion of material gain or extension of exclusive license or privilege (for example, avoidance of future taxes, or leasing land for commercial development)."

We note that, in view of the absence of an adequate factual basis in the record concerning the 2.5 acres still in dispute, we do not reach the question of whether these specific standards are proper.

UNITED STATES OF AMERICA *v.* VERNARD E. JONES; COOK INLET REGION, INC., NONDALTON NATIVE CORP., NONDALTON CITY COUNCIL, NONDALTON VILLAGE COUNCIL, (INTERVENORS)

106 IBLA 230 Decided: *December 29,1988*

Appeal from a decision of an Administrative Law Judge holding homesite claim AA-85 invalid.

Reversed and remanded.

1. Administrative Procedure: Generally--Appeals: Generally--Board of Land Appeals--Public Lands: Jurisdiction Over--Res Judicata--Rules of Practice: Generally--Secretary of the Interior--Stare Decisis

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of anagency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

2. Act of June 8, 1906

The Antiquities Act is not self-executing and does not withdraw land other than by a formal determination issued by Presidential proclamation affecting a specific parcel of land.

3. Act of June 8, 1906

A person who makes an "appropriation" of land by complying with the public land laws does not, by this action alone, "appropriate" under 16 U.S.C. § 433 (1982), objects of antiquity which may exist on that land.

4. National Historic Preservation Act: Generally

The NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to Federal undertakings which may adversely affect such resources. Whatever procedures the NHPA may require BLM to follow in reviewing a homesite application, the fact they must be undertaken neither invalidates the application nor necessitates its rejection.

5. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally--Conveyances: Generally--Patents to Public Lands: Generally

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

6. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Indians: Alaska Natives: Generally--Conveyances: Generally--Patents to Public Lands: Generally

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to

permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed, and gives the patentee the protection of a judicial forum.

7. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally

A protest of the acceptance of a notice of location of a homesite which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act, 43 U.S.C. § 1165 (1982), could apply and, correspondingly, the protest could not be a "protest against the validity of such entry" so as to preclude application of the Act.

8. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally

A field investigation report prepared by BLM is not a protest.

9. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally--Conveyances: Generally--Patents to Public Lands: Generally

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

10. Alaska: Alaska Native Claims Settlement Act--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims

With the exception of the rights specifically granted or retained by that Act, Sec. 4 of ANCSA, 43 U.S.C. § 1603 (1982), extinguished all forms of aboriginal title however characterized or described. Its three subsections apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

11. Alaska: Alaska Native Claims Settlement Act--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on aboriginal use and occupancy but property rights created by Congress.

12. Alaska: Alaska Native Claims Settlement Act--Alaska: Homesites--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

Subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that homesite location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homesite was located, and thus is barred.

13. Alaska: Land Grants and Selections--Alaska: Possessory Rights

Although the occupancy provisions of the Alaska Organic Acts (Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26 and Act of June 6, 1900, ch. 786, § 27, 31 Stat. 330) protected Native and missionary station occupation of lands as of the dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants.

14. Alaska: Possessory Rights

Cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy, or claim to the land terminates all possessory interests protected under the Alaska Organic Acts and restores the land to its original status as vacant and unappropriated land, regardless of subsequent allegations that the former occupants never intended to permanently abandon use and occupancy of the land. Unless evidence of continued use and occupancy can be shown, prior use and occupancy does not serve as a bar to the initiation of rights in the lands by others.

15. Alaska: Possessory Rights--Notice: Generally--Settlements On Public Lands

The presence of deteriorated partial remains of a church and unattended graves are not by themselves sufficient evidence to establish use and occupancy which is notorious, exclusive, and continuous, and of such nature as to put others on notice that another continues to use and occupy the land.

APPEARANCES: Thomas E. Meacham, Esq., Anchorage, Alaska, for appellant; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Russell L. Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; James Vollintine, Esq., Anchorage, Alaska, for Nondalton Native Corp., Nondalton City Council, and Nondalton Village Council.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Vernard Jones has appealed a September 3, 1986, decision by Administrative Law Judge Michael L. Morehouse which held appellant's homesite claim (AA-85) invalid because the land is occupied and claimed by Natives of Alaska. The decision was rendered after an evidentiary hearing held in Iliamna, Alaska, on August 22, 1976. A previous decision on other issues relating to the homesite claim was issued by the Assistant Solicitor on June 30, 1969. *Vernard E. Jones*, 76 I.D. 133 (1969) (hereinafter *Jones*).

This case and appellant's homesite claim have a long history. The numerous and sometimes complex legal issues were argued in a series of posthearing briefs filed by appellant, the Bureau of Land Management (BLM), and intervenor Cook Inlet Region, Inc. (CIRI). Additional issues were raised in joint briefs filed by intervenors, Nondalton Native Corp., Nondalton City Council, and Nondalton Village Council (Nondalton).

The facts necessary to understand the controversy are not complex but concern sensitive matters, and at times the briefs have reflected the emotions of the parties. Since the hearing in 1976, the parties have amplified the record with additional factual evidence in support of their legal arguments. The facts and issues are best understood in the context of the events leading to the present appeal.

I

On July 22, 1966, Vernard E. Jones filed a "Notice of Location of Settlement or Occupancy Claim" form with BLM's Anchorage District Office. The notice stated that on July 17, 1966, Jones had begun to settle or occupy a 5-acre parcel of land on the north shore of Lake Clark immediately to the east of the mouth of the Kijik River. The notice was filed pursuant to the Alaska Homesite Act, which provides:

> [A]ny citizen of the United States, after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form, without any showing as to his employment or business, upon payment of $2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior * * *.

Act of May 26, 1934, ch. 357, 48 Stat. 809-10, *repealed by* Federal Land Policy Management Act of 1976, P.L. 94-579, § 703(a), 90 Stat. 2743, 2789-90.

BLM sent Jones a form acknowledgement dated September 20, 1966, and assigned serial number AA-85 to the claim. One paragraph of the form stated: "Our records show that the lands are subject to settlement or occupancy. Your notice of location is therefore recognized as of the date filed." Shortly thereafter, Joseph McGill and Grant H. Pearson, members of the Alaska State Legislature, sent a letter concerning Jones' homesite to the Director of the Division of Lands, State of Alaska, stating, in part:

> The location where his homestead is staked in [sic] on the old Russian Church that was built in 1896. The old Indian graveyard is located near this church and is also on the area staked.
>
> It is very important that these Historical remains be protected and we highly recommend that this homestead be disallowed.

Jones, supra at 134; Exh. 42 at 45.

The letter was referred to BLM, and by notice dated February 6, 1968, BLM vacated its acknowledgement of Jones' homesite and declared his location notice unacceptable. BLM's notice stated that a protest against settlement of the land had been filed and a field investigation had found the homesite to be "within the old Kijik Native Village which contains the ruins of an old Russian Orthodox church, archaeological deposits, and between two and three hundred Native graves." BLM concluded that under the Antiquities Act of 1906 (ch. 3060, 34 Stat. 225, codified at 16 U.S.C. §§ 431-433 (1982)), "the antiquities located on the old Kijik Native Village at Lake Clark are the property of the United States" and could "only be removed or disposed of" in accordance with Departmental regulations promulgated under the Act. In addition, BLM noted that Public Land Order No. (PLO) 2171 (25 FR 7533 (Aug. 10, 1960)) had withdrawn and reserved "public lands customarily used by Indians, Eskimos, and Aleuts as burial grounds for their dead."

Jones appealed BLM's decision to BLM's Office of Appeals and Hearings. [1] By decision dated March 13, 1968, the Office of Appeals and Hearings found BLM's determination that "the homesites are incompatible with the 1906 law is correct." [2] Jones then appealed to the Assistant Solicitor-Public Lands. By decision dated June 30, 1969, Ernest F. Hom, Assistant Solicitor, Land Appeals, issued the *Jones* decision addressing four matters relevant to the present appeal.

First, the decision noted that the parties "appear to have viewed appellant's notice of location as the equivalent of an application for land" which BLM could reject upon determining that the land "should not be disposed of in the manner contemplated in the filing of the notice." *Jones, supra* at 136. The opinion pointed out that, in Alaska, a notice of location is not an application, and a determination of suitability is not a prerequisite to settlement.

> If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights in the land which will ultimately entitle him to receive patent to the land. * * *
>
> * * * The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title. [Citations omitted.]

Id. at 136-37. The Assistant Solicitor concluded that acceptance of appellant's notice of location "did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land." *Id.* at 137.

The *Jones* decision next addressed "the premises for the Bureau's determination that the land was closed to settlement." *Id.* BLM's reliance on PLO 2171 was rejected because "[t]he record clearly indicates that no plat of survey has been filed which delineates any native cemetery on the land in question." *Id.* at 138. By its terms, the PLO was effective immediately for Native cemeteries which had been surveyed and for others "upon the filing * * * of an accepted plat of survey designating an area as a cemetery, and the notation thereon of the character of such cemetery as a Native cemetery." 25 FR 7533 (Aug. 10, 1960).

The decision then addressed the Antiquities Act. It noted that section 2 (16 U.S.C. § 431 (1982)) "speaks of a reservation of lands but it provides for accomplishing this by a Presidential proclamation designating the reserved land as a national monument." *Jones, supra* at 139. Addressing the other sections of the Act (16 U.S.C. §§ 432-433 (1982)), the Assistant Solicitor found that "nothing in the express

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[1] At the time BLM maintained an Office of Appeals and Hearings. The Office of Hearings and Appeals, and its component, the Interior Board of Land Appeals, were created in 1970 by order of the Secretary of the Interior. See 35 FR 10012 (June 18, 1970), 35 FR 12081 (July 28, 1970).

[2] Jones was joined in the appeal by Hollis E. Justis who had filed a homesite selection next to Jones'. *See Hollis E. Justis*, 21 IBLA 63 (1975). A description of the Justis appeal is found in *Jones, supra*.

language of those sections has anything to do with the reservation of lands." *Id.* Consequently, it was determined that: "As the record does not show that the land in question has been withdrawn as an historic site or that it was withdrawn for any other purpose at the time of appellant's settlement, we cannot conclude that it was proper to refuse to accept appellant's notice of location." *Id.* at 140.

The *Jones* decision noted one additional matter which may have anticipated the current proceedings: "Inasmuch as the land embraced in appellant's homesite claim apparently was included in the site of Kijik Village, it may be that there are vested rights in the former villagers or their descendants which would preclude the obtaining of any rights through settlement on the land in 1966." *Id.* The opinion also noted that, with a limited exception, all public lands in Alaska had been withdrawn from all appropriation pending action by Congress to resolve the rights of Native Aleuts, Eskimos, and Indians. PLO 4582, 34 FR 1025 (Jan. 23, 1969). Pointing out that the withdrawal did not preclude recognizing Jones' homesite claim, the decision stated:

> [S]hould it be determined that appellant's settlement was preceded by the establishment of rights in others, appellant's homesite location would necessarily have to be declared null and void. If, on the other hand, the land is found to have been vacant, unappropriated and unreserved on July 17, 1966, appellant is entitled to credit for his acts of occupancy and use after that date.

Jones, supra at 140. The *Jones* decision reversed BLM and the case was remanded "for action consistent with this decision." *Id.*

The *Jones* decision was issued June 30, 1969. On July 17, 1969, Jones filed a request for reinstatement of his homesite selection. On October 31, 1969, he filed an application to purchase the land. There is no indication that BLM acted on his homesite application until February 3, 1976, when it filed a complaint initiating the contest proceeding which is the subject of this appeal.

The contest complaint listed three charges [3] based on the Homesite Act and 43 CFR 2563.2-1(e)(4), which requires a homesite applicant to show:

> That no portion of the tract applied for is occupied or reserved for any purpose by the United States, or occupied or claimed by any native of Alaska, or occupied as a townsite, or missionary station, or reserved from sale, and that the tract does not include

[3] The charges were:

"(a) Section 10 of the act of May 14, 1898 (30 Stat. 413) and the act of March 3, 1927 (44 Stat. 1364), as amended to date, (43 U.S.C. section 687(a)), and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that no portion of the land claimed may be occupied or reserved for any purpose by the United States or occupied or claimed by Natives of Alaska. Contestee has attempted to claim land claimed by Natives as burial grounds.

"(b) Section 10 of the act of May 14, 1898, as amended, *supra*, and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that the land must be unoccupied, unimproved, and unappropriated by any person claiming the same other than the applicant. Contestee has attempted to appropriate lands which are not unimproved and unappropriated by any other person.

"(c) Section 10 of the act of May 14, 1898, as amended, *supra*, and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that no portion of the land claimed may be occupied or reserved for a missionary station. The St. Nicholas Russian Orthodox Church of Nondalton claims the church building and the burial grounds on the claim."

improvements made by or in the possession of any other person, association, or corporation.

Neither the charges nor the case presented at the hearing were directed toward establishing that Alaska Natives or other persons were living on the land when Jones filed his notice. Rather, the evidence presented at the hearing and documents subsequently admitted into the record pertain to the nature and extent of the previously existing Kijik village, the remains of the Russian Orthodox Church and associated burial area, and the alleged continuity of Native claims to the land based upon these facts. The contest hearing was held before Administrative Law Judge Dean F. Ratzman on August 22, 1976. Completion of posthearing briefing was delayed by a number of extensions granted to facilitate negotiations among the parties.

Following passage of the Alaska Native Claims Settlement Act of 1971 (ANCSA), P.L. 92-203, 85 Stat. 688, codified at 43 U.S.C. §§ 1603-1627 (1982), *as amended*, CIRI filed a selection application pursuant to section 14(h)(1), 43 U.S.C. § 1613(h)(1) (1982). The lands described in the application included Jones' homesite. By decision dated October 22, 1981, BLM held that the land described in Jones' homesite application was not available for selection. By order dated December 28, 1981, the contest proceedings were suspended pending CIRI's appeal of BLM's October 22, 1981, decision to this Board. On appeal BLM conceded error and the Board set aside the BLM decision. *Cook Inlet Region, Inc.*, 77 IBLA 383, 384 n.1, 90 I.D. 543, 544 n.1 (1983).

Following issuance of the *Cook Inlet* decision, briefing resumed and, after further extensions and submittal of additional documents, the record was closed by order dated February 25, 1985. In the interim between the hearing and the completion of the record, Judge Ratzman retired and the case was assigned to Administrative Law Judge Morehouse. After reviewing the record, in a decision dated September 3, 1986, Judge Morehouse made findings of fact and concluded:

> [A]t the time Jones filed his notice of location in 1966, at the time he filed his application to purchase the land in 1969, and at the time of the hearing in 1976, the land covered by Jones' homesite claim was occupied and claimed by Natives of Alaska and the tract contained improvements made by and in the possession of others; that Jones was, or should have been, fully aware of the claims and interests of the Nondalton natives; and that by reason of the regulations * * * the land was not available for entry as a homesite claim.

(Decision at 5). On October 18, 1986, Jones filed a notice of appeal. The parties then filed a series of briefs addressing legal issues pertaining to a number of Federal statutes enacted between 1884 and 1971.

Unlike the issues of law, the facts concerning the occupation of Kijik village are not in dispute. The record includes anthropological and archeological studies which also review historical records pertaining to the area. Lynch, *Qizhjeh* (U. of Alaska, paper No. 32, 1982); [4]

[4] The copy of the study in the record is missing pages iv, viii, and 33.

Vanstone & Townsend, *Kijik: An Historic Tanaina Indian Settlement* (Fieldiana: Anthropology, vol. 59, 1970). These sources provide the following information.

Tanaina Indians migrated to the Cook Inlet area prior to European exploration and some may have moved inland to the Lake Clark area late in the 18th century to avoid Russian harassment (*Qizhjeh* at 6-7; *Kijik* at 21-22). At least two sites were occupied prior to the establishment of Kijik village near the shore of Lake Clark sometime before 1840, although some sites may have been occupied simultaneously (see *Qizhjeh* at 9, 12-16). The Kijik villagers lived in small houses built of hewn log walls with base logs laid a foot or so into the ground (see *Kijik* at 29-45). Population figures for the village are inconsistent but suggest that people may have been moving away during the late 1800's. [5]

Around the turn of the century a number of maladies struck the village, and by 1909 the village was abandoned (although at least one person may have remained in the area) (*Qizhjeh* at 10, 76; *Kijik* at 23, 25; see also Tr. 120-21). The survivors moved approximately 35 miles to the old village of Nondalton on Sixmile Lake, and moved again in 1940 to the present town of Nondalton (*Qizhjeh* at 10). Most or all of the houses at Kijik were dismantled and moved by the former villagers (*Kijik* at 23). [6]

Although no structures remain standing at the village site, to the south is the three-part, bay-window shaped wall of the altar end of a Russian Orthodox Church and the partial remains of the side walls (see *Qizhjeh* at 60-65; *Kijik* at 45-49). The date of church construction is not known, but 1877, 1881, and 1884 have been suggested (*Qizhjeh* at 60, *Kijik* at 21). Associated with the church is a cemetery area of scattered graves which extends a considerable distance east and southeast of the church along a ridge to a point on the shore of Lake Clark (see *Qizhjeh* 14, 18; *Kijik* at 48). Although at least some graves were originally marked with Russian Orthodox crosses, the gravesites were not maintained and the precise number of graves is not known. [7] Within the cemetery area there are also several house sites and a number of cache pits (*Qizhjeh* at 18, 26, 34, 65).

Although in issue at the hearing, there no longer appears to be any question that the remains of the church are within appellant's

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[5] See *Qizhjeh* at 9-10; *Kijik* at 22-23. The census reports for 1880 and 1890 list villages which may be Kijik. If so, the population was reported as 91 in 1880 and 42 in 1890. Other reports place the population at 106 in 1898 and 22 in 1902.

[6] *Kijik* at page 23 reports that two houses were left standing. If so, they no longer exist. See also Exh. 40 at 18. Additional details of the moving of the houses were provided at the hearing by Nicholia Kolyaha who was born in Kijik in 1892 (Tr. 61). He also testified that during the winter a priest had come and the church was dismantled and moved to Old Nondalton (Tr. 68-70). Because some walls of the church still exist, his testimony may describe the removal of the vestibule, which was constructed with milled wood (very valuable at the time), and the church roof, which may have been copper. See *Qizhjeh* at 63, but see Tr. 82-83. If so, a tree may have been planted at the site of the altar. See *id.* at 24; Olekasa Deposition at 16-17; Tr. 71, 73-74, 275.

[7] *Qizhjeh* at pages 63-64 cites no source for the statement that more than 100 crosses were standing in the 1930's. The number may originate with Tr. 96-97. But cf. Tr. 146-47, 150. *Kijik* at page 48 reports finding nine crosses during excavations of the village site in 1966. See also Exh. 40 at 41-43.

homesite (see Statement of Reasons at 3; Reply Brief at 4, 8-9). There is no evidence as to the total number of graves within the homesite, but, based on the location of the remains of the church and other evidence presented at the hearing, there is no question that some lie within the homesite (see Tr. 177, 197, 207, 230-32, 253).

The ultimate issue before us concerns conflicting claims of rights to the 5-acres within appellant's homesite. The factual issues concern the acts of use and occupancy on which the claims are based. Prior to considering Judge Morehouse's findings on these matters, we must address the legal arguments which would obviate our review of the factual issues.

II

We begin with the issues raised by Nondalton. If Nondalton is correct, the outcome of the contest is irrelevant, and there is no reason to review the proceedings.

Nondalton first argues that we should reconsider and overrule the ruling regarding the Antiquities Act made in the *Jones* decision (Nondalton Brief on Appeal at 8). Nondalton notes that the Board's authority to do so was recognized in *Ideal Basic Industries* v. *Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976):

> Recognition of the IBLA's power to reconsider under the circumstances of this case is consistent with the fact that it has long been recognized that the Secretary of [the] Interior has broad plenary powers over the disposition of public lands. He has a continuing jurisdiction with respect to these lands until a patent issues, and he is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest. So long as the legal title remains in the Government, the Secretary has the power and duty upon proper notice and hearing to determine whether the claim is valid. [Citations omitted.]

Appellant responds by arguing that the *Jones* decision was issued under delegated Secretarial authority and cannot be overturned because it reversed a decision made by the predecessor to this Board (Reply Brief at 13-14).

[1] The Board of Land Appeals is a part of the Office of Hearings and Appeals, a component of the Office of the Secretary of the Interior, and is authorized "for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 CFR 4.1. When considering appeals, the Board exercises the authority previously delegated to the Office of the Solicitor. 35 FR 12081 (July 28, 1970).

Under the principle of stare decisis, rules of law established by prior Departmental decisions are binding precedent. However, such decisions, including Secretarial decisions, may be overruled when found to be erroneous. *See United States* v. *Union Carbide Corp.*, 31 IBLA 72, 84 I.D. 309 (1977); *United States* v. *Winegar*, 16 IBLA 112,

166-80, 81 I.D. 370, 392-98 (1974). [8] Under the principle of administrative finality--the administrative counterpart of res judicata--an agency decision may not be reconsidered after a party has been given an opportunity for Departmental review and did not seek review, or appealed and the decision was affirmed. *See, e.g., Turner Brothers, Inc.* v. *OSMRE,* 102 IBLA 111, 121 (1988). However, as recognized in *Ideal Basic Industries,* as a matter of administrative authority, so long as title to the affected land remains in the Department, the Secretary, or those exercising his delegated authority, may correct or reverse an erroneous decision. [9]

Having authority to reconsider the *Jones* decision, we find no need to do so. Nondalton's Antiquities Act arguments are without merit.

[2] With respect to section 2 of the Act (16 U.S.C. § 431 (1982)), Nondalton argues that the Department erred in *Jones* when finding the land not to have been withdrawn, because, according to Nondalton, the Act grants the Secretary broad authority and, by virtue of the Department's trust responsibilities, lands containing Indian ruins must be regarded as reserved (Nondalton Posthearing Brief at 10-11, Brief on Appeal at 10). This argument has no statutory foundation. Nothing in the Antiquities Act suggests that it is self-executing or operates other than by a formal determination affecting a specific parcel of land. Section 2 of the Act does not directly grant Secretarial authority to withdraw land. Instead it authorizes the President of the United States "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * * to be national monuments, and may reserve as a part thereof parcels of land * * *." 16 U.S.C. § 431 (1982).

We know of no instance in which section 2 has been applied to reserve land without a proclamation. The Antiquities Act was passed in 1906. If it had reserved land by virtue of the presence of Indian ruins or artifacts, every pending or subsequent public land entry would have been placed in jeopardy by the discovery of a qualifying object. We know of no prior decision which has even considered the question. *Cf. United States* v. *Gunn,* 7 IBLA 237, 79 I.D. 588 (1972); *Grand Canyon Scenic Railway Co.,* 36 L.D. 394 (1908). To the contrary, the Act itself contains ample evidence that Congress anticipated that significant objects would be found on public lands to which private parties had acquired rights. In section 2 Congress also provided:

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[8] *Winegar* overruled *Freeman* v. *Summers (On Rehearing),* 52 L.D. 201 (1927). The result was reversed by the U.S. District Court for the District of Colorado based on its finding of congressional ratification of the rule of discovery set forth in *Freeman. Shell Oil Co.* v. *Kleppe,* 426 F. Supp. 894, 899-902, 908 (D. Colo. 1977), *aff'd, Shell Oil Co.* v. *Andrus,* 591 F.2d 597 (10th Cir. 1979), *aff'd,* 446 U.S. 657 (1980).

[9] *See also Gabbs Exploration Co.* v. *Udall,* 315 F.2d 37, 40 (D.C. Cir.) *cert. denied,* 375 U.S. 822 (1963); *cf. Northwest Alaskan Pipeline Co.,* 99 IBLA 201, 206-07 (1987); *A. W. Schunk,* 16 IBLA 191, 197 (1974) (A.J. Stuebing concurring and dissenting in part); *Harkrader* v. *Goldstein,* 31 L.D. 87, 91 (1901). Within its procedural rules the Board provides a limited exception, when allowing petitions for reconsideration to be filed within 60 days of the date a decision is issued; otherwise its decision is final for the Department. 43 CFR 4.403.

When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract * * * may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

16 U.S.C. § 431 (1982). By providing for relinquishment, Congress recognized the validity of rights to lands containing qualifying objects.

Nondalton also argues that *Archaeological Ruins*, 52 L.D. 269 (1928), cited and relied upon in *Jones*, can be distinguished (Nondalton Brief on Appeal at 9-10). Nondalton, however, does not point to any error in the discussion of the Antiquities Act presented in *Archaeological Ruins*. Although *Archaeological Ruins* clearly addressed a different question than did *Jones*, the difference does not render the earlier decision irrelevant. *Jones* did not simply apply the conclusion of *Archaeological Ruins*, but examined its reasoning regarding the question whether the Antiquities Act made an implied reservation of lands containing historic ruins or objects of antiquity. *Jones, supra* at 139. It found that implicit in the answer given to one question addressed in *Archaeological Ruins* "was the conclusion that land subject to the act is not thereby withdrawn or reserved from future entry under the homestead law." *Id.* Based on this, and other matters, *Jones* concluded that "the Antiquities Act itself has no segregative effect." *Id.* at 140. Both decisions rejected the position now advanced by Nondalton that lands containing Indian ruins are reserved by the Antiquities Act. Nondalton has not shown that either was in error. [10]

Finally, Nondalton argues that by making a homesite application Jones violated section 1 of the Antiquities Act, which provides a fine and imprisonment for "[a]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government" without having received prior permission from the department having jurisdiction over the lands. 16 U.S.C. § 433 (1982). Nondalton views appellant's homesite as an illegal attempt to "appropriate" the remains at the Kijik site, and thus maintains that the homesite is invalid (Nondalton Brief on Appeal at 9).

[3] Nondalton views the homesite as an "appropriation" under the Antiquities Act but offers no basis for this conclusion. Nondalton's reading of the statute shares the defects found in its position regarding section 2. Within the context of public land laws, an individual who claims a tract of land in compliance with such a statute is sometimes said to have "appropriated" the land. However, there is no legal history indicating that the verb "appropriate" carries this meaning in the Antiquities Act. As with section 2, every person acting pursuant to public land laws would have been in jeopardy of the cancellation of his

[10] One conclusion reached in *Archaeological Ruins* was that objects within the purview of the Antiquities Act "belong to the United States--the owner of the fee--at least until the entryman has earned the equitable title to the land, and are subject to the right of the Government to issue permits or licenses for the examination, excavation, and recovery thereof * * *." *Archaeological Ruins, supra* at 271. However, "an entryman of public lands embracing ruins and archaeological sites, upon showing compliance with statutory conditions, is entitled to an unrestricted patent." *Id.* at 272.

claim and prosecution in the courts upon the discovery of artifacts. As a matter of statutory interpretation, it would be incongruous to conclude that Congress recognized private parties might acquire rights to public lands containing antiquities, provided a mechanism for the relinquishment of such rights, and at the same time subjected the party to prosecution for having selected the land. More sensibly, Congress intended "appropriate" in section 1 to prohibit the removal of objects from Federal lands and understood the statute to operate within the context of the criminal laws.

[4] Nondalton also argues that transfer of title to appellant's homesite is precluded by the National Historic Preservation Act of 1966 (NHPA), P.L. 89-665, 80 Stat. 915, 16 U.S.C. §§ 470-470w-6, *as amended*, (see Nondalton Brief on Appeal at 13). Nondalton raises a valid point as to the NHPA, but its conclusion that the NHPA bars approval of appellant's application for patent does not follow. Appellant's homesite is within the Kijik Historic District, which is on the National Register of Historic Places. 45 FR 17446, 17447 (Mar. 18, 1980). As a result, the NHPA must be considered by BLM when reviewing appellant's homesite application. *See* 16 U.S.C. § 470f (1982); 36 CFR Part 800; *State of Alaska*, 85 IBLA 196, 204-05 (1985). In the present posture of this case, however, it would be premature to specify the review BLM must undertake. For the purposes of this appeal it is sufficient to note that "the NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources." *Solicitor's Opinion*, 87 I.D. 27, 29 (1979). The fact that NHPA procedures must be undertaken when reviewing appellant's homesite application neither invalidates the homesite location nor necessitates rejection of the application for patent.

III

We turn next to appellant's argument that, regardless of the findings now under appeal, he is entitled to receive a patent under the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act was enacted as part of the General Revision Act of 1891. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095. As originally enacted, the pertinent portion stated:

> *Provided*, 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; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Id. at 1099. As a result of changes in administrative organization, the reference to a "receiver's receipt" was changed to "receipt of such officer as the Secretary of the Interior may designate." 43 U.S.C. § 1165 (1982).

Appellant first alleged entitlement to patent under the Confirmation Act in his 1984 posthearing brief. In the period between the hearing and his brief, the U.S. Court of Appeals for the Ninth Circuit characterized the Alaska Homesite Act as a "homestead law" under the Confirmation Act and found the contest before the court to be barred by the latter statute. *Grewell* v. *Watt*, 664 F.2d 1380, 1384 (9th Cir. 1982). Appellant argues that, having been initiated more than 2 years after he filed his application for patent, the BLM contest was too late and he is entitled to a patent as a matter of law (Contestee's Posthearing Brief at 7-8).

Jones' opponents raise four arguments against his contention: (1) the statute does not preclude the United States from exercising its trust responsibility to protect the possessory rights of Natives (BLM Answer at 14-17; CIRI Response on Appeal at 13); (2) the statute does not bar a Government contest based on prior third-party rights (CIRI Posthearing Brief at 32-34; CIRI Response on Appeal at 13); (3) even if the statute applies, the 2-year period did not run because a protest was pending (CIRI Posthearing Brief at 30-32; BLM Posthearing Reply Brief at 2-3; CIRI Posthearing Reply Brief at 27-34; BLM Answer at 17-19; CIRI Reply Brief at 10-12); and (4) even if the statute applies, Jones does not qualify because he has never paid the purchase price and received a receipt (BLM Posthearing Reply Brief at 3-6; BLM Reply Brief at 8-14; CIRI Reply Brief at 7-10). The first two counter-arguments raise an issue whether the Confirmation Act may apply, and the second two whether it does apply.

The opponents' first two arguments assert that there are circumstances in which "the two year period of limitation in the Confirmation Act" does not apply (BLM Answer at 15; see CIRI Posthearing Reply Brief at 32). Characterizing the Confirmation Act as a statute of limitations misconstrues its nature and effect. The court in *Grewell* v. *Watt, supra* at 1382 n.1, rejected this characterization of the Act, noting that "it is not a statute of repose, protecting against dilatory action," but rather "permits an entryman to ground affirmative rights on its language." Similarly, in *Payne* v. *Newton*, 255 U.S. 438, 444 (1921), the Supreme Court stated that "the evident purpose of Congress" was

> to require that *the right to a patent* which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, *shall be recognized and given effect* by the issue of the patent without further waiting or delay,–and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute. [Italics supplied.]

See also Stockley v. *United States*, 260 U.S. 532, 540-44 (1923); *Lane* v. *Hoglund*, 244 U.S. 174 (1917).

[5] The statute grants a right to a patent 2 years after issuance of a "receipt upon the final entry" when there is "no pending contest or protest." No contest may be initiated because the entry has matured into a right and the facts on which the entry was based may no longer be questioned. Nothing in the wording of the Act provides for an exception to its application, and the language used by the courts precludes recognizing one. When Congress creates a right, neither the Department nor this Board has the power to remove it by creating an exception. *Cf. Schade* v. *Andrus*, 638 F.2d 122, 124 (9th Cir. 1981).

[6] The argument that the Confirmation Act does not bar a Government contest to protect Native possessory rights is also based on an analogy between the Confirmation Act and 43 U.S.C. § 1166 (1982), which provides: "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents" (BLM Answer on Appeal at 15-17). The Supreme Court has held that the latter statute does not preclude suits by third parties and, consequently, is "without application to suits by the United States to annul patents * * * because issued in alleged violation of rights of its Indian wards and of its obligations to them." *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926); *see Cramer* v. *United States*, 261 U.S. 219, 233-34 (1923). Because the Confirmation Act is not a statute of limitations, the analogy fails and the cited cases cannot be applied.

The Board is keenly aware of the importance of the Department's obligation to protect Native rights. However, this duty does not extend to actions which would repudiate rights Congress has granted by statute or negate the duties the Department owes to other citizens. *See Milton R. Pagano*, 41 IBLA 214, 218 (1979); *Lane* v. *Hoglund, supra* at 181. Nor does our rejection of this argument render the Department unable to pursue its obligations to Native Americans. An entryman's right to receive a patent under the Confirmation Act does not preclude a subsequent judicial challenge of its validity. As quoted above from *Payne* v. *Newton, supra*, the Confirmation Act transfers authority over controversies concerning the validity of an entry to the courts after the 2-year period has passed, giving an entryman the protection of a judicial forum. The Supreme Court's decisions regarding 43 U.S.C. § 1166 (1982), expand the time within which the Department may bring such a suit to protect Native rights. However, this does not prevent the Confirmation Act from applying.

CIRI argues that the Confirmation Act does not bar BLM's initiation of a contest to protect third-party rights, based on *Henry King Middleton, Jr.*, 73 I.D. 25 (1966) (CIRI Posthearing Brief at 32-34). However, the *Middleton* opinion does not support this conclusion.

In *Middleton*, the appellant's homestead entry had been canceled for failure to comply with the cultivation requirements of the homestead law. On appeal to the Secretary, the appellant claimed entitlement to a

patent under the Confirmation Act, raising a question whether the Act was in conflict with the homestead laws and thus inapplicable in Alaska. *Id.* at 27. [11] A possible conflict was posed because the patenting procedure followed in Alaska allowed payment of the purchase price and issuance of a receipt prior to publication of notice of the patent application, rather than after publication. *Id.* at 28-29.

The *Middleton* opinion first considered whether the Alaska procedure would cause the Confirmation Act's 2-year period to commence with the publication of notice, rather than with issuance of a receipt. This possibility was rejected because in *Stockley* v. *United States*, the Supreme Court rejected the argument that the period, which by statute commenced with the issuance of the "receiver's receipt upon the final entry," could be varied to take into account changes in the Department's administrative procedures. *Id.* at 29-30.

The *Middleton* opinion next considered whether a 2-year period, commencing with issuance of a receipt and leading to "a present right to receive a patent," was in conflict with 43 U.S.C § 270-4 (1982) [12] which "precludes the issuance of a patent until after publication of notice and expiration of the period for a third party to institute adverse proceedings in court." *Id.* at 30. The Department found no conflict because, even though the requirement to publish notice and allow third parties to raise adverse claims "might require more than two years after the filing of final proof to determine the rightful patentee," this procedure "need not affect the determination of the entryman's compliance or the rights and obligations existing between the United States and the entryman." *Id.* at 31. Thus, the Department concluded that the statutes were not in conflict, because the Government need not delay action on an applicant's final proof pending publication of notice. *Id.* at 32. Consequently, the Confirmation Act was held to apply in Alaska, and the Government is required to take action on Alaskan applications within 2 years. If it does not, "the Department is without authority to challenge it thereafter." *Id.* at 33.

The *Middleton* opinion went on to note that:

> A modification in the procedure followed in other States would be required, however, where, as here, more than 2 years elapsed after the issuance of the final receipt without the initiation of a contest or protest and where publication was not made. In this situation notice of the filing of final proof must still be published, and third parties claiming rights adverse to those of the entryman must be given an opportunity to assert their claims.

Id. at 32. CIRI quotes this portion of the *Middleton* decision and concludes that the Confirmation Act does not bar a Government contest "so long as the government contest raised issues of prior third-party rights to the subject land" (CIRI Posthearing Brief at 34). The

[11] The Act of May 14, 1898, ch. 299, § 1, 30 Stat. 409, *as amended* by the Act of Mar. 3, 1903, ch. 1002, 32 Stat. 1028, extended to Alaska the provisions of the homestead laws "not in conflict with this Act."

[12] The statute was enacted as part of sec. 10 of the Act of May 14, 1898, ch. 299, 30 Stat. 409, 413-14, *repealed by* Federal Land Policy and Management Act of 1976, P.L. 94-579, § 703(a), 90 Stat. 2743, 2789-90.

conclusion does not follow from the decision. The reference is to the procedure followed in "other States," and the "modification" is that a patent will not issue at the end of the 2-year period when notice has not been published and third parties have not been given an opportunity to assert their rights. The statement does not pertain to Government contests. Under the statute, third-party adverse claims are prosecuted in the courts. 43 U.S.C. § 270-4 (1982). Nothing in *Middleton* suggests that such claims may be pursued within the Department by either the Department or a private party. To the contrary:

> If no action is taken within that period to challenge the sufficiency of an entryman's proof, the Department is without authority to challenge it thereafter. [2]

[2] The statute similarly cuts off any private contest or protest in which the entryman's performance is challenged, for, when the Department can no longer challenge the entryman's compliance with the law it is also precluded from entertaining a similar contest or protest brought by a private individual. *See John N. Dickerson*, 35 L.D. 67 (1906); *Milroy* v. *Jones*, 36 L.D. 438 (1908).

Id. at 32-33. Any other conclusion would negate a right granted by Congress. Thus, *Middleton* does not preclude application of the Confirmation Act to the present case to bar a contest based on the rights of third parties.

Having determined that the Confirmation Act *may* apply in the present case, we turn to the question whether it does. Jones' opponents argue that the statute does not apply because a protest was pending and appellant has not received a receipt. Both matters are controlled by well-settled law.

In *Lane* v. *Hoglund, supra* at 178, the Supreme Court commented upon the use of "pending contest or protest" in the Confirmation Act:

> As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant conducted in his own interest against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry.

The Court's description was based partially on the original Departmental instructions issued under authority of the Act. *See Instructions*, 12 L.D. 450, 453 (1891); *Instructions*, 13 L.D. 1, 3 (1891). It remains accurate under the current regulations, except that the term "contest" is now also used to designate a formal hearing initiated by the Government for the purpose of invalidating an entry. *See* 43 CFR 4.450-1, 4.450-2, 4.451. In *Jacob A. Harris*, 42 L.D. 611, 614 (1913), it was said that, to preclude application of the Confirmation Act, a contest or protest

> must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well established practice of the Department, such a proceeding will

be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge.

Jones' opponents point to two documents as constituting protests--the 1966 McGill-Pearson letter which led to the decision in *Jones*, and a field report dated June 12, 1967 (CIRI Posthearing Brief at 30). [13] There is no need to consider whether the McGill-Pearson letter was a protest. In *Jones, supra* at 134, the Assistant Solicitor stated that the letter was "treated as a protest" by BLM. This comment was based on BLM's characterization of the letter in its notice vacating acknowledgement of appellant's notice of location. The question on appeal is whether *Jones* resolved the protest, or in some sense the protest continued after remand, precluding application of the Confirmation Act (See Contestee's Posthearing Reply Brief at 3; BLM Answer at 18).

[7] The argument that the letter continued as a protest overlooks the context in which it was sent. At that time the only document Jones had filed with BLM was his notice of location. Presumably the objectionable "action proposed to be taken" was BLM's acceptance of Jones' notice of location. *See* 43 CFR 4.450-2. Upon investigation, BLM vacated its acknowledgment of the notice, thus requiring Jones to take action to defend his homesite. Until the decision vacating acknowledgement of his notice was reversed, Jones could not make an application to purchase the land.

In 1969 Jones filed a formal request for reinstatement of his notice of location. He then filed an application to purchase. When Jones filed his application to purchase, a protest could have been lodged objecting to the possible approval of the application. However, the letter filed in 1966 could not constitute a protest of pending approval of an application which had not been filed and was not filed until 3 years later. Until the patent application was filed, there could not be a final entry triggering the Confirmation Act. Correspondingly, the letter could not be a "protest against the validity of such entry" precluding the Act's application. *See* 43 U.S.C. § 1165 (1982).

The argument that the letter continued as a protest is also based on an assertion that the letter raised issues not addressed in *Jones*. In support of this contention, the parties point to the facts stated in the letter and its request that BLM "do all you can to protect this site" (BLM Answer at 18). The comment in *Jones* regarding possible Native rights and the remand to BLM are construed as having been directed to the additional issues raised by the letter.

The protest letter referred to the "old Russian Church" and "old Indian graveyard" and their historic importance as the relevant concerns on which BLM should act. Although these were not allegations of "issuable facts which, if true, would defeat the entry and

[13] The opponents also point to several other letters as constituting protests. None is dated within 2 years of Oct. 31, 1969, the date of appellant's patent application.

warrant its cancellation" (*Gildner* v. *Hall*, 227 F. 704, 705 (D. Or. 1915)), [14] the letter clearly raised a proper concern, the authors intended BLM to take action, and, upon investigation, BLM did. BLM's decision rejecting the notice of location responded to the concerns stated in the letter and placed Jones "on his defense" by giving the facts legal grounds. *See Jacob A. Harris, supra.* When the issue reached the Secretary, the Department held that, because the land had not been withdrawn, BLM acted improperly when rejecting Jones' notice of location. *Jones, supra* at 140. That decision settled the legal claims made in BLM's notice of rejection.

Having resolved the issues, the *Jones* decision noted that there may be "vested rights in the former villagers or their descendants," that the issue of Native rights was unresolved, and that if it is determined that others had prior rights, "appellant's homesite location would necessarily have to be declared null and void." *Id.* at 140. These statements do not suggest that it was thought that any issue raised by the protest letter or BLM's notice of rejection remained to be acted upon. Rather, they refer to the opinion's prior discussion of procedures for selecting lands in Alaska. The issues reviewed by the Assistant Solicitor were whether the land was "withdrawn or otherwise closed to operation of the public land laws," and not whether the "land is vacant and unappropriated" because "no prior rights have been established." *Id.* at 136. The opinion acknowledged that the issue of Alaskan Native rights was under congressional scrutiny and that, because of the procedures in Alaska for selecting a homesite, the question of prior rights remained open. However, these questions cannot be attributed to anything stated in the McGill-Pearson letter. If any issue raised by the protest had remained, the case would have been remanded with instructions to BLM to investigate and, if appropriate, conduct a hearing. It would have then been incumbent on BLM to again take action. Instead, the decision rejected Jones' request for a hearing because "we find no issue presently ripe for determination." *Id.* at 140.

Jones' opponents attempt to tie the unaddressed issue of prior rights to statements in the protest letter. The letter, however, stated facts about the site and did not assert Native rights to the land. The matters raised were addressed by BLM and the subsequent appeals. The suggestion that the letter continued (and continues) as a protest because the facts remain unchanged is simply an assertion that, so long as appellant's homesite is present, BLM must continue to find grounds to reject it. *See Jerry H. Converse*, 52 L.D. 648 (1929). BLM was aware that Natives continued to object to the homesite after the

[14] This wording must be interpreted in the context of the homestead laws. In such cases "issuable facts" are allegations that the applicant has not completed the required acts. If true, such facts are sufficient to cancel the entry. In contrast, the facts stated in the letter concern the availability of the land for entry and settlement. If true, they would alert BLM to the possibility that the land might be held by another, but would not necessarily "defeat the entry and warrant its cancellation." Rather, this result would follow only if others had acquired rights to the land making it unavailable for location as a homesite.

remand in *Jones* and Jones was aware that a further challenge might be brought based upon a claim of Native rights, but this situation is not equivalent to a pending protest requiring action by BLM. [15]

[8] For similar reasons the field investigation report cannot constitute a protest. It is an internal report of a field investigation undertaken by BLM in response to the McGill-Pearson letter. The report was a record of the factual findings on which BLM relied when it issued its notice of rejection of Jones' location notice. The recommendation in the report was made part of BLM's notice and the matter was resolved by the *Jones* decision. CIRI argues that the portion of the report stating that villagers of Nondalton "strongly objected to the appropriation of the village site" conveyed the villagers' protest to BLM. As a matter of law, neither the statement nor the report constitutes a protest within the meaning of the regulation so as to preclude application of the Confirmation Act. [16] Nor could it be considered a protest of appellant's yet-to-be-filed patent application so as to preclude application of the Confirmation Act.

We next consider the issuance of a receipt. Appellant admits that he has not paid or tendered his purchase price (Reply Brief on Appeal at 15), but argues that Judge Morehouse erred in rejecting his Confirmation Act claim for this reason (Statement of Reasons at 6-25). The Judge based his decision on the Board's opinions in *United States* v. *Braniff (On Reconsideration)*, 65 IBLA 94 (1982), and *United States* v. *Bunch (On Judicial Remand)*, 64 IBLA 318 (1982), *aff'd sub nom. Bunch* v. *Kleppe*, Civ. No. A76-115 (D. Alaska Jan. 14, 1983) (Decision on Appeal at 6).

Appellant argues that the decisions relied upon are inconsistent with the purposes of the Confirmation Act and fail to take into account changes in administrative procedures. Appellant argues that, under current procedures for patenting unsurveyed land in Alaska, payment is not required or possible until the land has been surveyed and the acreage determined, and that a survey is not ordered until after the application has been approved. Appellant points out that BLM's delay in reviewing an application also precludes application of the Confirmation Act. This, according to appellant, is contrary to the purpose of the Act identified by the Supreme Court in *Stockley* v.

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[15] CIRI also argues there has been a continuing protest because various documents in BLM files show BLM to have understood the homesite to be under Native protest (CIRI Posthearing Brief at 14-15). Although the documents show that BLM was aware that Natives objected to appellant's homesite, as discussed above, a protest is a document filed with BLM by a party raising objections to a pending BLM action. Internal BLM documents do not constitute a protest requiring a decision on the merits.

[16] "[T]he reference is to a proceeding against the entry and not some communication which at most is only suggestive of the propriety of such a proceeding and may never become the basis of one." *Lane v. Hoglund, supra* at 178 (report recommending cancellation made within 2-year period, but proceeding not ordered until after its expiration). *Accord United States* v. *Bothwell*, 7 F.2d 624, 626 (D. Wyo. 1925) ("a mere adverse report does not justify withholding a patent"); *Gildner* v. *Hall, supra* at 705 (report "not brought to knowledge or attention of the entryman" for at least 6 years "cannot be regarded or deemed a protest"). *See Alfred M. Stump*, 42 L.D. 566 (1913), *vacating* 39 L.D. 437 (1911); *George Judicak*, 43 L.D. 246 (1914), *overruling Herman* v. *Chase*, 37 L.D. 590 (1909).

Some cases appear to find that a report was sufficient, but a reading of the facts reveals that the Department had acted on the report prior to the expiration of the 2-year period by suspending the application or otherwise taking official action which gave notice of the matters pending. *See, e.g., United States* v. *Fisher*, 227 U.S. 445, 448 (1913), *Zwang* v. *Udall*, 371 F.2d 634 (9th Cir. 1967) (decision ordering cancellation of entries), *Neis* v. *Ebbe*, 189 P. 417, 419 (1920); *see generally United States* v. *Bryant*, 25 IBLA 247 (1976), *aff'd*, Civ. No. A76-84 (D. Alaska Jan. 5, 1978).

United States, supra at 540, of avoiding "delays for an unreasonable length of time–that is, for more than two years." Appellant argues that the Confirmation Act should apply beginning with the date of the application to purchase, so that, consistent with the Act's purpose, BLM is required to conduct timely review. The parties also argue about whether appellant could have or should have paid the purchase price for his land at the time he applied for patent.

Although appellant's argument has some merit, [17] we decline to overrule our prior decisions. Our decision in *Bunch* quoted extensively from *Stockley*. The district and circuit courts had found (and the Government argued on appeal to the Supreme Court) that at the time the Confirmation Act was enacted the "receiver's receipt upon the final entry" was issued following adjudication of final proof of compliance and, for this reason, the Act should not apply until after submission and approval of an applicant's final proof. *Id.* at 533, 538; *see Stockley* v. *United States*, 271 F. 632, 636 (5th Cir. 1921). The Supreme Court noted that:

> The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued upon the submission of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently, the former alone being authorized to issue the receipt and the latter to sign the certificate.

Stockley v. *United States, supra* at 538-39. Nevertheless, as noted in *Henry King Middleton, Jr., supra* at 29-30, the Court found that the Act applied upon issuance of a receipt for payment of the purchase price.

[9] Because a receipt is required, in *Bunch* the Board rejected the appellant's argument that the 2-year period began when she filed her application to purchase. *United States* v. *Bunch (On Judicial Remand), supra* at 324; *see also United States* v. *Braniff (On Reconsideration), supra*; *United States* v. *Boyd*, 39 IBLA 321, 328-29 (1979); *United States*

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[17] Appellant has also provided a copy of the decision in *United States* v. *Guild*, AA-8433 (July 19, 1985). Based on an extended review of judicial and Departmental decisions addressing the Confirmation Act, the Administrative Law Judge held that Guild did not qualify because a receipt had not been issued, but suggested that it would be within the Act's purpose and prior decisions to allow the statute to apply 2 years from the date of a tender of payment of the purchase price. *Id.* at 10-11. If, as appellant claims, under current administrative practice the purchase price for unsurveyed lands may not be paid until after proofs have been approved and the lands surveyed, it is possible that the Department could delay acting on an application. Such delay would be contrary to the purpose the Supreme Court assigned to the statute. *See Stockley* v. *United States, supra* at 540. Paradoxically, however, it would also create a situation akin to that existing prior to 1908 which the Court refused to restore in *Stockley*. We need not resolve this paradox. Appellant does not claim that he tendered payment of his purchase price and, therefore, we need not address the merits of the issue.

Appellant does argue, based on *Matthiessen & Ward*, 6 L.D. 713 (1888), that he would have tendered payment at his peril. However, that case concerns the Government's liability for a receipt issued by a receiver who later died. The decision found that, because the payment was not required when made, it was not received pursuant to the receiver's duties so that the receiver, not the Government or the receiver's surety bond, was liable for repayment. The case has no application to receipts issued by BLM. See Public Land Administration Act, P.L. 86-649, § 204(a), 74 Stat. 506, 507 (1960); 43 U.S.C. § 1734(c) (1982).

v. *Bryant*, 25 IBLA 247 (1976), *aff'd*, Civ. No. A76-84 (D. Alaska Jan. 5, 1978). The requirement was not created by a Board or court decision but by an act of Congress. Just as we cannot create an exception to the Confirmation Act to preclude recognition of a right established by Congress, we cannot eliminate a congressionally imposed condition for acquiring the right. Accordingly, we reaffirm our prior decisions and affirm Judge Morehouse's conclusion that the Confirmation Act does not apply in this case.

IV

We turn next to appellant's arguments regarding the effect of ANCSA on the contest. In his posthearing brief, appellant contended that "[s]ections 4 and 22 of ANCSA, 43 U.S.C. § 1603, 1621, control the resolution of any pre-1971 aboriginal claims or claims of use and occupancy, and has in effect extinguished those claims, *nunc pro tunc*, as to the contestee's homesite" (Contestee's Posthearing Brief at 11). In particular, Jones argued that each of the three provisions of section 4 had extinguished the use and occupancy rights which were the basis of the contest charges, and title should be transferred to him pursuant to section 22(b) of ANCSA. The issues were addressed in Judge Morehouse's decision and were again raised on appeal (see Reply Brief at 12-14, CIRI Response on Appeal at 7-8; Appellant's Rebuttal Brief at 4-7).

Section 4 of ANCSA, 43 U.S.C. § 1603 (1982), provides:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Jones' statutory arguments are: (1) compliance with the Homesite Act gave him equitable title which, as a conveyance of an interest in public land, extinguished aboriginal title under subsection 4(a); (2) the claims asserted in paragraphs 5(a) and 5(b) of the contest complaint are communal claims based on aboriginal use and occupancy and were extinguished by subsection 4(b); and (3) the contest charges are precluded by subsection 4(c) because they are either based on assertions of aboriginal use and occupancy or are based on a statute relating to Native use and occupancy (Contestee's Posthearing Brief at 12-15).

His opponents respond: (1) section 4 does not apply because the contest concerns actual use and occupancy rather than aboriginal title (BLM Posthearing Reply Brief at 7-9); (2) section 4 does not apply to *in praesenti* rights granted under 25 U.S.C. § 280a (1982) (CIRI Posthearing Brief at 24-26; BLM Posthearing Reply Brief at 8; CIRI Posthearing Reply Brief at 19-21); (3) appellant does not hold equitable title and, if he does, equitable title is not a "conveyance" under subsection 4(a) (CIRI Posthearing Brief at 22; BLM Posthearing Reply Brief at 7; CIRI Posthearing Reply Brief at 17-18); and (4) "statute or treaty" in subsection 4(c) refers to prior congressional acts which explicitly recognized aboriginal title but deferred decisions concerning Native claims (CIRI Posthearing Brief at 24-26; CIRI Posthearing Reply Brief at 22). Additionally, the parties argue about the prospective and retrospective application of subsection 4(b) and 4(c) and the effect of ANCSA's cemetery site provision, 14(h)(1) (43 U.S.C. § 1613 (1982)). [18]

As indicated by the court in *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980), the provisions of section 4 must be interpreted in the context of the history of prior legislation, judicial decisions, and legislative documents which constitute its background. *See id.* at 1014-19. For the present case, however, the details of those events are of less concern than the district court's and circuit court's conclusions regarding the scope of the statute.

The opinions of both courts quoted two passages from the legislative history:

> 1. The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title. The land and money grants contained in the bill are intended to be the total compensation for such extinguishment. [H.R. No. 92-523, reprinted in 1971 U.S. Code Cong. & Admin. News at 2198.]
>
> 2. It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska. [Conf. Rep. No. 92-746, reprinted in 1971 U.S. Code Cong. & Admin. News. at 2253 (italics in original).]

435 F. Supp. at 1029, 612 F.2d at 1136. Based on these passages and its review of the statutory provisions, the district court concluded that "Congress has expressly directed that the language of the Settlement Act be broadly construed to effectuate a comprehensive settlement of all Native claims based on aboriginal use and occupancy of land in Alaska and to bar any litigation based on such claims." 435 F. Supp. at 1029. The same intent that the statute be broadly applied was also noted by the circuit court. 612 F.2d at 1137.

[18] Sec. 14(h)(1) of ANCSA authorized the Secretary to "withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places." 43 U.S.C. § 1613(h)(1) (1982).

Within the broad scope attributed to section 4, we find that the claims of Native use and occupancy raised in the present case fall within the statute and are barred. Accordingly, we reject the argument that the statute does not apply because the case concerns issues of actual Native use and occupancy. As stated by the district court, section 4 is directed to "all Native claims based on aboriginal use and occupancy."

Some confusion over the question of whether there is a difference between aboriginal title and rights based on use and occupancy arose with the decision in *Miller* v. *United States*, 159 F.2d 997 (9th Cir. 1947). That case concerned the compensability of Tlingit Indian possessory rights to tidal lands which were to be condemned for the construction of wharves. *Id.* at 998-99. In examining the basis for the rights claimed, the court stated that "whatever 'original Indian title' the Tlingit Indians may have had under Russian rule was extinguished" by the Treaty of Cession of 1867 (15 Stat. 539) by which the United States purchased Alaska from Russia. *Id.* at 1001. Nevertheless, the court went on to find that the Indians held possessory rights under statutes enacted by Congress pertaining to the occupancy and use of lands, including section 8 of the Alaska Organic Act of 1884 (ch. 53, 23 Stat. 24, 26) and section 27 of the Second Organic Act of 1900 (ch. 786, 31 Stat. 321, 330) (which are of concern in the present proceeding) and also found that such possessory rights are compensable.

Miller was rejected by the Supreme Court in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, *reh'g denied*, 348 U.S. 965 (1955). In reference to the Alaska Organic Acts, *Miller*, and claims to proprietary rights to lands, the Court stated:

> We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. [Footnote omitted.]

Id. at 278-79. Having determined that the statutes did not grant legal rights to the land, which would be compensable if the land was later taken, the Court turned to the question of aboriginal title.

> That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

Thus, unless recognized by Congress, "aboriginal title" is not legal title to land but merely the fact of possession. Because aboriginal title

does not entail property rights, the Treaty of Cession is of no consequence. Congress is the only forum for obtaining recognition of Native claims of aboriginal title as property rights. It alone may grant legal rights to lands held by the United States. In the Alaska Organic Acts, Congress did not recognize or grant property rights. Rather, it authorized Native possession to continue and provided protection against intrusion of Native use and occupancy by third parties. *See Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1373 (D.D.C. 1973), *dismissed as moot*, No. 2014-71 (Feb. 16, 1977) ("rights based on aboriginal title are rights to undisturbed use and occupancy").

[10] Congress did not act to resolve Native claims of entitlement to lands until it enacted ANCSA in 1971. As can be seen from the legislative history quoted by the courts in *Atlantic Richfield*, Congress intended to end all litigation on the issue of Native rights to lands based on aboriginal use and occupancy. Section 4 was intended to extinguish all forms of aboriginal title however characterized or described. In this regard there is no difference in the nature of the aboriginal title addressed by the three subsections of section 4 of ANCSA. Subsection 4(a) refers to "aboriginal title," subsection 4(b) to "aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy," and subsection 4(c) to claims "based on claims of aboriginal right, title, use, or occupancy * * * or * * * based on any statute or treaty of the United States relating to Native use and occupancy." Consistent with *Tee-Hit-Ton Indians* and *Atlantic Richfield*, the provisions of section 4 apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

The subsections of section 4 do not differ as to the type of aboriginal title addressed, but do differ as to the time affected by the extinguishment. Subsection 4(a) extinguished aboriginal title as of the date of *past* conveyances so that, after enactment, a claim as to prior rights cannot be asserted to invalidate any conveyance. *United States* v. *Atlantic Richfield, supra*, 435 F. Supp. at 1022, 612 F.2d at 1135. Subsection 4(b) extinguished any aboriginal title *existing* on the date of enactment so that a claim as to such title could not be asserted in the *future*. Subsection 4(c) extinguished all legal claims based on claims of aboriginal title which could have been asserted *at the time of enactment* or were *pending* in any forum. Subsection (c) precludes all claims based on an assertion of aboriginal title. Aboriginal title includes claims based on use and occupancy of land. Accordingly, we reject the argument that section 4 cannot apply because the contest now before us concerns actual use and occupancy, rather than aboriginal title.

[11] Just as section 4 of ANCSA must be broadly construed to find that a claim based on aboriginal title does not survive its enactment, so also must "statute or treaty" in subsection 4(c) be construed to apply to

all statutes "relating to Native use and occupancy," rather than the restricted list of the Alaska Organic Acts and similar statutes offered by CIRI. To now construe the reference to statutes and treaties in subsection 4(c) in a manner which would allow a claim based on aboriginal use and occupancy to survive would be contrary to the broad scope of the section and the Congressional intent to resolve such claims by enacting ANCSA. [19]

We agree with CIRI, however, that section 4 does not extend to vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are neither claims of aboriginal title nor claims based on use and occupancy, but property rights created by Congress. *See Tee-Hit-Ton Indians* v. *United States, supra* at 278-79. Thus, the question remains whether, in the case now before us, vested rights were acquired under the missionary station provision of the second Alaska Organic Act, 43 U.S.C. § 280a (1982), or other provisions relied upon when bringing the contest charges. In other words, there remains the question of whether "there are vested rights in the former villagers or their descendants." *Jones, supra* at 140. [20]

It also follows that subsection 4(c) bars any assertion of a claim based on prior Native use and occupancy. In *United States* v. *Atlantic Richfield, supra*, 435 F. Supp. at 1025-26, the court stated:

> The language of subsection 4(c) is clear and unequivocal. It explicitly extinguishes *all* claims that are based on claims of aboriginal occupancy. Claims of past trespass to lands claimed by reason of aboriginal title require as an essential element of proof a showing of aboriginal use and occupancy at some time in the past. Such trespass claims are claims "based on claims of aboriginal occupancy" and fall within the scope of the plain language of subsection 4(c). [Footnote omitted.]

This conclusion was affirmed by the Ninth Circuit, 612 F.2d at 1135-36, which held that "the Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." *Id.* at 1134. Presumably, both courts were relying on the previously quoted statement of congressional purpose that the Act was to be "broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska."

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[19] Native allotments based on individual use and occupancy of land were specifically addressed in ANCSA, and to the extent such rights have been preserved by ANCSA, they do not fall within the broad scope of sec. 4. See 43 U.S.C. § 1617 (1982); *Aguilar* v. *United States*, 474 F. Supp. 840, 845-46 (D. Alaska 1979).

[20] Our agreement with CIRI does not extend to the manner in which CIRI characterizes its claims. At various times it characterizes the rights derived from the Alaska Organic Acts as "vested property rights" (CIRI Posthearing Brief at 26), an "*in praesenti* grant" (CIRI Posthearing Reply Brief at 2, 12, 19-20), and "Native occupancy and use" which gives "a stronger claim than one based merely upon aboriginal land claims" (CIRI Response on Appeal at 8). Only two kinds of rights to land can be asserted–a property right deriving from an act of Congress (or prior sovereign authority), or a possessory right. Mere possessory control of Federal lands is trespass against the Federal title. Native occupancy (whether characterized as a possessory right granted by Congress or a continuation of occupation under claim of aboriginal title) can no longer be asserted as the basis of any legal claim. The question of whether the Alaska Organic Acts granted property rights is not different from the question whether the Acts made an "*in presenti grant*" of property rights. The term "*in praesenti*, which means 'in the present' is a Latinism wholly without merit." Garner, *A Dictionary of Modern Legal Usage* 300 (Oxford U. Press 1987). In this regard both sides err when arguing whether ANCSA extinguished and barred claims based on vested rights (see Reply Brief at 14, 20).

The holding in *Atlantic Richfield* resolved the ongoing issue of Native rights in areas selected by the State of Alaska for which the State had issued oil and gas leases. In *Edwardsen* v. *Morton, supra*, Native villages challenged the State's title to the selected lands and claimed compensation for trespass by the oil and gas lessees. The court concluded that the Natives' aboriginal title to the land gave them a right of undisturbed use and occupancy (*id.* at 1373) and that, for this reason, the land was not "vacant, unappropriated, and unreserved" under the Alaska Statehood Act so that tentative approvals of the selections by the Department were void when given (*id.* at 1375). The court further found that by extinguishing aboriginal rights with the enactment of ANCSA, Congress had retroactively validated the state selections and their tentative approval, defeating the plaintiff's claims to ownership. *Id.* at 1377-78. Nevertheless, the court held that claims of trespass and breach of fiduciary duty survived as accrued causes of action. *Id.* at 1379. *Atlantic Richfield* addressed the claims asserted in *Edwardsen*, with the Government prosecuting the trespass claims on behalf of the Natives. Finding ANCSA to have extinguished claims based on claims of aboriginal occupancy, the *Atlantic Richfield* courts rejected the trespass claims and, accordingly, dismissed them.

Native actions against the United States for the taking of legal claims by section 4 of ANCSA were addressed by the Court of Claims in *Inupiat Community of the Arctic Slope* v. *United States*, 680 F.2d 122 (Ct. Cl.), *cert. denied*, 459 U.S. 969 (1982). The court recognized that the logic of *Atlantic Richfield* was simply that "since the Settlement Act extinguished the aboriginal title * * * retroactively to the date of the patents and leases, the subsequent entries thereunder necessarily were not trespasses upon any protectible interest the Eskimos had." *Id.* at 127. The court also rejected the claim that lands not covered by Federal patents and state leases had been taken, stating that when Congress extinguished aboriginal title "it terminated not only the Inupiats' title but any claims based upon that title." *Id.* at 129.

[12] Just as the claims of past trespass and taking discussed above were claims based upon a claim of aboriginal title, in the present case the assertion that appellant's homesite is invalid because of prior Native use and occupancy of the land is a claim based on a claim of aboriginal title. As the testimony at the hearing makes clear, such a claim requires a showing of use and occupancy at some time in the past, in particular between the time Kijik village was abandoned and the date appellant located his homesite. Accordingly, this assertion is barred by subsection 4(c).

Nor does it matter that the assertion may be that the use and occupancy was protected by the Alaska Organic Acts. While Native occupancy was indeed protected by the Acts, that protection was extended by statutes "relating to Native use and occupancy," and, in accord with *Atlantic Richfield*, a claim that the occupancy of the land

was protected cannot serve as the basis for another claim. Thus, an assertion that Natives had occupied the land included in appellant's homesite under protection of the Alaska Organic Acts cannot serve as the basis for a further assertion that the land was unavailable and appellant's homesite was therefore invalid. Such claims are trespass claims. When Congress extinguished aboriginal title, it terminated all claims based upon such title. *Inupiat Community of the Arctic Slope* v. *United States, supra.* Accordingly, we find that subsection 4(c) precluded bringing those contest charges which asserted that appellant's notice of location and application are invalid because the land was used or occupied by Natives at the time of location. [21]

Accordingly, we hold that, to the extent the contest charges challenge appellant's homesite location and application because the land was used and occupied by Natives and therefore unavailable, the charges were precluded by subsection 4(c) of ANCSA. To the extent the charges concern vested rights acquired under statute prior to appellant's homesite location, they may represent proper allegations. Determining whether the charges raised a proper issue requires consideration of the specific statutes relied on at the hearing and evidence of record which would show that rights had been acquired under them. We consider this matter in the next section.

Having resolved the central issues concerning section 4 of ANCSA, the two remaining issues can be readily addressed. As pointed out by BLM and CIRI, appellant's arguments that he held a "conveyance" under subsection 4(a), had made a "lawful entry" under subsection 22(b), and is entitled to a patent presume that his homesite location was valid because there were no prior rights making the land unavailable. As explained below, neither subsection 22(b) nor 4(a) grants a separate right to obtain a patent.

Subsection 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws * * * and who have fulfilled all requirements of the law prerequisite to obtaining a patent." 43 U.S.C. § 1621(b) (1982). From the wording of the statute it is clear that any right appellant may have to obtain a patent depends upon his compliance with the requirements of other laws. The statute simply instructs the Secretary to resolve entries made under the public land laws prior to conveying lands to Native village and regional corporations. *See Lee* v. *United States*, 629 F. Supp. 721, 729-32 (D. Alaska 1985), *aff'd*, 809 F.2d 1406, 1411 (9th Cir. 1987).

Nor does subsection 4(a) grant a right to a patent. Rather, it provides that prior conveyances of land and interests in land "shall be regarded as an extinguishment of the aboriginal title thereto, if any." 43 U.S.C. § 1603(a) (1982). We need not resolve the issue of whether, prior to

[21] Although not explicitly analyzed, the conclusion that sec. 4 of ANCSA bars raising an issue based on Native occupancy which may have existed at the time an action was taken has been relied on by the Board in a number of prior decisions. *See Bristol Bay Native Corp.*, 71 IBLA 318 (1983); *State of Alaska*, 41 IBLA 315, 323, 86 I.D. 361, 365 (1979); *Louis P. Simpson*, 20 IBLA 387, 393 (1975).

ANCSA's enactment, appellant received a "conveyance" or "interest" in land within the meaning of subsection 4(a) which would extinguish aboriginal rights. All Native title and rights which may have existed were extinguished by subsection 4(b), and, under subsection 4(c), appellant's homesite cannot now be challenged on the basis of any right to occupy the land held by Natives prior to ANCSA's enactment. Accordingly, we need not decide whether such rights as may have existed were also retroactively abolished by subsection 4(a).

V

Thus, we arrive at the question whether other parties held vested rights to the Kijik site on the date appellant located his homesite (see Tr. 21-23). As further detailed at the outset of the hearing (Tr. 13-16, 26-27) and in BLM's posthearing briefs, the charges in the contest complaint were supported by claims that rights were held by the Russian Orthodox Diocese of Alaska, members of the St. Nicholas Church of Nondalton, and the Nondalton descendants of the villagers of Kijik which originated with section 8 of the Act of May 17, 1884, *supra*, and section 27 of the Act of June 6, 1900, (ch. 786, § 27, 31 Stat. 321, 330, codified at 25 U.S.C. § 280a (1982)) (BLM Posthearing Brief at 3-9).

These Acts are commonly referred to as the Alaska Organic Acts. The first statute was enacted as part of the legislation providing a civil government for the District of Alaska. It stated:

> [T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. * * * [T]he land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress.

Act of May 17, 1884, *supra*. The second statute made more detailed provisions for the civil government, both continuing and superseding the prior legislation. The relevant provision stated:

> The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong * * *

Act of June 6, 1900, *supra*.

Early Departmental decisions concluded that the 1884 Act required recognition of rights based on actual use and occupancy, although a

few decisions differed as to the effect those rights might have when the United States acted to withdraw or reserve the land. [22] Apparently because the statute referred to future Congressional legislation "under which such persons may acquire title to such lands," several courts also suggested that the statute granted a right to acquire title to the land. In *Russian-American Packing Co.* v. *United States*, 199 U.S. 570, 576 (1905), the Supreme Court commented:

> It is quite clear that this section simply recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress.

See also Bennett v. *Harkrader*, 158 U.S. 441, 445 (1895); *Young* v. *Goldsteen*, 97 F. 303, 308 (D. Alaska 1899).

The statute was equally understood to protect use and occupancy of land by missionary stations. See *Opinion*, 25 L.D. 480, 483 (1897); *Instructions*, 22 L.D. 330 (1896). The words "now occupied" in the 1884 statute were understood to refer to the date of the statute's enactment and "hence only reserve and protect such land as was then used as missionary stations." 25 L.D. at 484. The interpretation of the provision to apply only to land actually occupied or used as of its date of enactment was consistent with other Departmental decisions, including decisions regarding Native occupancy. *See, e.g., Wrangell Townsite*, 37 L.D. 334, 337 (1908); *Naval Reservation*, 25 L.D. 212, 214-15 (1897); *A. S. Wadleigh*, 13 L.D. 120 (1891). Following enactment of the missionary station provision in the Second Alaska Organic Act, the Department issued regulations allowing "any organized religious society that was maintaining a missionary station in the district of Alaska on June 6, 1900," to apply for patent to land actually used and occupied as of that date. *Regulations*, 32 L.D. 424, 446 (1904).

These early Departmental and judicial decisions are consistent with the later judicial decisions discussed in the preceding section which reviewed the Alaska Organic Acts in relation to the issue of aboriginal rights. However, the statements in the early decisions regarding a right or power to acquire title are in clear conflict with both the courts' analysis of ANCSA in *Atlantic Richfield* and the Supreme Court's decision in *Tee-Hit-Ton Indians*. As previously quoted, in response to arguments that the Alaska Organic Acts represented congressional recognition of Native possessory rights sufficient to be compensable as a taking, the Court stated that it found "nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress." *Id.* at 278. Rather, the Court stated, the provisions were intended "merely to retain the *status quo* until further

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[22] *Compare Baranof Island*, 36 L.D. 261, 263 (1908) ("protected as against any attempted subsequent disposition or reservation of the land"), *with Alaska Commercial Co.*, 39 L.D. 597, 598 ("acquired by such occupancy no vested right against the United States" "inoperative to prevent the United States from reserving the land for its own uses"), *vacated on other grounds*, 41 L.D. 75 (1912). The difference was resolved by decisions holding that possessory rights did not preclude Government reservation or withdrawal of land, though a reservation could except prior possessory rights. *See Pan Alaska Fisheries, Inc.*, 74 IBLA 295, 300-302 (1983).

congressional or judicial action was taken." *Id.* As a result of this analysis of the Alaska Organic Acts, the earlier statements indicating that those Acts granted a right to obtain title must be regarded as dicta.

Legislation was enacted to permit the conveyance of title to Alaskan land in a variety of circumstances, including missionary stations and the Native Allotment Act of 1906. However, Congress was not *required* to provide for the transfer of title. Nor can the provisions of the Alaska Organic Acts be regarded as a commitment by Congress to do so. Consistent with the Supreme Court's ruling in *Tee-Hit-Ton Indians*, by enacting ANCSA Congress did not resolve the issue of Native claims by providing for the transfer of lands actually occupied, but opted to authorize the conveyance of large parcels selected by village and regional corporations. *See Wisenack Inc.* v. *Andrus*, 471 F. Supp. 1004, 1009 (D. Alaska 1979). At the same time Congress extinguished all Native claims based on use and occupancy.

[13] Consistent with ANCSA, *Tee-Hit-Ton Indians*, and *Atlantic Richfield*, we conclude that, while the Alaska Organic Acts protected Native and missionary station use and occupancy of land as of their dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants. Neither statute granted vested property rights to the Natives living at Kijik on May 17, 1884, and June 6, 1900, or to the Russian Orthodox Diocese of Alaska, or St. Nicholas Church of Nondalton.

The only basis for a contrary conclusion offered by the parties is found in *Bolshanin* v. *Zlobin*, 76 F. Supp. 281 (D. Alaska 1948) (Tr. 16; BLM Posthearing Brief at 4; CIRI Posthearing Reply Brief at 11, 19). That suit was brought by church members against their priest to recover possession of the church building and land patented to the archbishop in 1914. The plaintiffs claimed title based on the Treaty of Cession. The court rejected this claim, finding, on the basis of early Departmental decisions, that the Treaty of Cession had "merely recognized a possessory right in the land" occupied by the church to which "the title was imperfect and incomplete * * * until the political department took further action." *Id.* at 287. "This," the court said, "was done with the passage of the act of June 6, 1900" and "[i]t was not until then that the title could be perfected." *Id.*

Jones' opponents claim that the court found the 1900 Act to have granted a vested or "*in praesenti*" right to lands. We do not think so. The court did not say that the "imperfect and incomplete" title became perfected upon enactment of the 1900 provision but that with the enactment "the title could be perfected." Consistent with this difference, the *Bolshanin* court found that the patent issued to the archbishop was not "merely confirmatory of a previously existing complete title, but was the grant of a fee simple title of the land described therein." *Id.* at 288.

Because the Second Alaska Organic Act did not grant the Kijik Natives, the Russian Orthodox Diocese of Alaska, or the local church at Kijik vested property rights, it follows that neither the Nondalton descendants of the Kijik villagers nor the Russian Orthodox Church (either in its own right or as successor to the rights of the church at Kijik) held vested rights to the land at the time Jones made his homesite location. As the cases previously discussed make clear, the Second Organic Act granted only a right of continued undisturbed occupancy. As analyzed in the preceding section, any claim to a right of occupancy held by Alaskan Natives was extinguished by section 4 of ANCSA, and a claim based on prior occupancy cannot be asserted under subsection 4(c).

Section 4, however, does not apply to extinguish any occupancy right which may have been held by the Russian Orthodox Church at the time Jones located his homesite or bar claims based on such occupancy. As established in early Departmental cases, such right would apply only to lands actually used and occupied by the church on June 6, 1900.

Although raised by the complaint, the decision on appeal did not reach the issue of rights held by the Russian Orthodox Church. The parties have argued the question of continued use and occupancy by the church on two grounds. First, BLM argues that under the theological principles of the Russian Orthodox Church there could be no intent to abandon the church's right to the property (BLM Posthearing Brief at 16-17; BLM Answer at 2-3). Second, BLM argues that the church has continued actual occupancy of the land by virtue of the presence of the remains of the church and cemetery area. CIRI raises a similar argument of Native occupancy of the site as a missionary station (see CIRI Posthearing Brief at 18-19; BLM Posthearing Reply Brief at 10-11; BLM Answer at 4-6; CIRI Response Brief at 3-5).

[14] The first argument errs by assuming actual intent to abandon is required. The case before us does not concern fee title to property or a vested property right acquired by the church pursuant to congressional legislation. Rather, it concerns a protected right of occupancy, and the question is whether the church continued to exercise its right or had ceased to use and occupy the land. This difference is the same as that previously analyzed and applied to Native occupancy rights arising under the Alaska Organic Acts for claims made under the Native Allotment Act of 1906. In *United States* v. *Flynn & Orock*, 53 IBLA 208, 238, 88 I.D. 373, 389-90 (1981), the Board held:

> [A]bsent the filing of an application for allotment, *cessation of use or occupancy* for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, *terminated all protected rights* under both the allotment and permissive occupancy statutes *and restored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy.* Such prior use or occupancy does not serve as a bar for the initiation of rights in the lands by other individuals. [Italics supplied, footnote omitted.]

Accordingly, we reject the parties' first argument because it has no application to the issue now before us. [23] For similar reasons we will not discuss the related argument concerning the legal standards applicable to the abandonment of cemeteries. The case before us concerns public, not private land. There is no question of dedication of land to a public purpose, and the issue of use and occupancy does turn upon the intent but upon the actions of the Russian Orthodox Church.

The question whether the Russian Orthodox Church continued to exercise its right of occupancy is controlled by the rulings of the Alaska courts. Those courts have commonly followed the common law rule, that in order to assert a possessory right:

> the use or occupancy which gives rise to such a right must be notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent.

United States v. *10.95 Acres of Land in Juneau*, 75 F. Supp. 841, 844 (D. Alaska 1948); *see United States* v. *Alaska*, 201 F. Supp. 796 (D. Alaska 1962); *United States* v. *Alaska*, 197 F. Supp. 834 (D. Alaska 1961); *United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska 1952). The Department has frequently relied upon the standard provided by these decisions. *See, e.g., United States* v. *Flynn & Orock, supra* at 227; *Herbert H. Hilscher*, 67 L.D 410, 416 (1960).

The most relevant evidence in the record regarding the church's claim to the land is found in the deposition of Reverend Michael Oleksa, the local priest for the area including Kijik (Dep. at 3). He visits Nondalton several times a year, staying 3 or 4 days each time (Dep. at 6, 47). He was, however, unable to testify that he or other representatives of the church had actually used the church at Kijik since 1909, when the village was abandoned (see also Tr. 87, 91, 114). His inability to do so was due, in part, to the lack of locally available church records for the period prior to the late 1930's (Dep. at 42, 47-48; but cf. Tr. 81, 84, 93, 192-93). He had "visited" the site only by way of a low-altitude fly over (Dep. at 11-12, 35). Oleksa also testified that the bishop's permission (or at least notification that the church and items used in worship were being moved) would have been required to move the place of worship from Kijik to Nondalton (Dep. at 14-15).

Oleksa did maintain that the church remained interested in the site and that he had written BLM to present the church's objections to having the land used for any purpose other than a graveyard (Dep. at 28-29). A copy of this letter, dated October 16, 1975, appears as an exhibit to the deposition. It states that, on behalf of the members of

[23] As argued in the briefs, to address the intent of the Russian Orthodox Church, or use and occupancy based upon Native religious beliefs, would raise threshold questions regarding the First Amendment. Under *United States* v. *Flynn & Orock, supra*, there is no need to consider these matters. We believe our approach to be consistent with the recent decision of the Supreme Court in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 56 L.W. 4292 (Apr. 19, 1988).

the church at Nondalton "as well as the Russian Orthodox Diocese of Alaska," the author wished to assert the claim of the Orthodox Church of St. Nicholas "to the church building and Orthodox burial ground at Kijik" (Dep. Exh. at 3).

The purpose of the missionary station provision of the Second Alaska Organic Act was to allow those using land for missionary stations to continue their occupancy protected from encroachment by others. The Act further directed the Secretary to survey and transfer title to such lands. Upon its enactment, the Department established procedures by which religious organizations could apply for and receive title. Nothing in the record suggests that any official of the Russian Orthodox Church visited the Kijik site, expressed any interest in obtaining title to it, or did anything to maintain its right of occupancy until Reverend Oleksa directed his letter to BLM in 1975. The only evidence is to the contrary (see Tr. 248-49).

Early decisions addressing the occupancy provision of the Alaska Organic Acts indicate that the Russian Orthodox Church actively pursued its interest in lands on which it maintained churches. *See Opinion*, 25 L.D. 480 (1897); *Instructions*, 22 L.D. 330 (1896). The patent in dispute in *Bolshanin* v. *Zlobin, supra*, was issued in 1914. Following abandonment of the village of Kijik, the church was still entitled to file an application for patent based on its use and occupancy as of June 6, 1900. Later, it could also have requested that the area be surveyed and withdrawn under PLO 2171. However, we find no evidence that the church took action to preserve its occupancy right so as to make the land unavailable for appellant's homesite location.

[15] Nor do we believe the remains of the church and the presence of graves to be sufficient to establish "notorious, exclusive, and continuous" use under the concepts of public land law so as to give notice that the land is used and occupied. Over the years, numerous sites in Alaska, as in the West, were occupied by groups of Natives or settlers as homesites or townsites. When deaths occurred, land was designated as a cemetery. As the population increased and visits by the clergy became more frequent, churches were constructed. Many settlements grew and title to the land was obtained under the public land laws. Others were abandoned and title remained in the United States. When subsequent settlers came upon the land and saw the remains of buildings or other evidence left by the former occupants, they knew that the land had once been occupied, but the remains they observed were evidence of prior rather than present use and occupancy. If they recognized gravesites, they would likely understand that they should be left undisturbed. Nothing in the public land laws, however, suggests that the graves would affect the rights of subsequent settlers or give the descendants of those buried a right to the land. Similarly, in the present case the remains of the church and the graves, as they existed when Jones filed his location notice, were not sufficient to show continued use and occupancy by the Russian Orthodox Church or to put appellant on notice of occupancy by the

Church. *Cf. Pedro Bay Corp.*, 78 IBLA 196 (1984); *United States* v. *Flynn & Orock, supra; Herbert H. Hilscher, supra.*

Having ruled upon the issues presented, we turn to the conclusions of Administrative Law Judge Morehouse in the decision on appeal. We believe the factual conclusions of the Judge appearing on pages 4-5 of the decision are generally supported by the record. [24] However, three of the findings clearly led to the legal conclusions quoted earlier in this opinion which, based on our analysis of the law, must be reversed. The fourth, fifth, and sixth findings listed in the decision concern Native use of the land and their attitudes toward it; the Russian Orthodox Church's attitude toward the site and its lack of intent to abandon it, and Jones' knowledge of Native concerns about the site (Decision at 4-5). These findings led to the conclusion that the land within the homesite was occupied and claimed by Natives, that Jones knew of their claims, and that the land was not available for entry (Decision at 6).

After enactment of section 4 of ANCSA, the conclusion that the land was "occupied and claimed by Natives of Alaska"in 1966, 1969, and 1976 cannot serve as the basis for a conclusion that "the land was unavailable for entry as a homesite claim." Contrary to assertions made by CIRI, the Alaska Organic Acts provided Alaskan Natives only a right to occupy lands under claim of aboriginal title pending congressional resolution of the question of Native rights. After enactment of section 4 of ANCSA, such prior Native use and occupancy cannot serve as a basis for a conclusion that the land in appellant's homesite was unavailable in 1966 or in 1969. Similarly, a conclusion that the land was unavailable in 1976 requires a determination that the land was occupied and claimed under aboriginal title as of that date. Such title to the land could not exist after ANCSA.

Judge Morehouse conceded that appellant was "probably" correct that section 4 extinguished the Native claims of the Nondalton Natives to the land within the homesite, but concluded that "this would not have any bearing on the validity of Jones' homesite claim" because "ANCSA did not reach back and automatically turn previously unavailable land into available land and retroactively validate what was otherwise an invalid homesite claim" (Decision at 7). As we have analyzed the statute, the Judge correctly concluded that section 4 would not retroactively validate appellant's homesite location if it was previously invalid because the land was unavailable. If the homesite had been challenged on this basis prior to ANCSA's enactment, it

[24] The dates concerning the history of Kijik village set forth by the Judge differ from those stated earlier in this opinion. The Board's recitation relies on the written authorities cited. Other portions of the record provide different dates. Nothing of consequence to this opinion turns on those dates. Outside the context of this case, such dates are, of course, subject to change as archaeologists and historians further research the history of Alaska.

would not have been revived by the statute. However, no such determination was made prior to ANCSA's enactment.

ANCSA precluded a subsequent determination of whether the land was previously unavailable due to Native use and occupancy. The Act did not retroactively validate appellant's homesite, but prevented a determination that it was invalid as a result of prior Native use and occupancy. After ANCSA, decisions concerning prior use and occupancy were neither necessary nor possible. There was no need to protect such occupancy in order to make the required conveyances to Native regional and village corporations. All lands in Alaska were withdrawn in 1969 and the withdrawals were continued under ANCSA. *See* 43 U.S.C. §§ 1610, 1616(d) (1982). As a consequence, in the 1970's most Alaska lands were unavailable for entry under the public land laws. No new rights could be acquired until the process of transferring title to individuals, the State of Alaska, and village and regional corporations was completed, or sufficient land was designated for that purpose. The withdrawn status of the land, not continued use and occupancy or the Departmental regulation, prevented the acquisition of additional rights.

VI

Appellant asserts he has a claim of right by virtue of his compliance with the Alaska Homesite Act. BLM and CIRI have opposed his claim based on Native use and occupancy at the time he located his homesite. We have determined that the latter claims are barred by ANCSA. Congress intended to end future litigation regarding the extent and nature of aboriginal title and all litigation involving issues of Native use and occupancy of lands prior to ANCSA. Accordingly, we find Judge Morehouse erred in ruling on the question of Native use and occupancy of the Kijik site and reverse his decision. We additionally hold that the record does not show that the Russian Orthodox Church preserved its right to occupy the land it used and occupied as of June 6, 1900.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to permit final adjudication of Jones' application to purchase.

R. W. MULLEN
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

December 20, 1988

APPLICATION OF INTERSEA RESEARCH CORP.FOR FEES AND EXPENSES UNDER EAJA *

IBCA-2084 F Decided: *December 20, 1988*

Contract No. 14-08-0001-18984, U.S. Geological Survey.

Sustained.

Equal Access to Justice Act: Awards—Equal Access to Justice Act: Contract Disputes Act of 1978: Prevailing Party

Where the Board found that a contractor was not entitled to an EAJA award for an unsuccessful claim because it was not the prevailing party on that claim, but found that the contractor's attorneys spent a negligible amount of time on preparation and presentation of such claim in comparison to the time spent on the other three claims involved in the principal litigation, the Board determined by a jury verdict approach that appellant's attorneys and their paralegals spent no more than 6 and 10 hours respectively on the unsuccessful claim and held that therefore, only $800 should be deducted from the EAJA application request of $74,460.

APPEARANCES: Richard D. Gluck, Attorney at Law, Lane & Mittendorf, Washington, D.C., for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an application, pursuant to The Equal Access to Justice Act (EAJA), for attorney fees and costs incurred by Intersea Research Corp. (IRC) in connection with its appeal before this Board, in *Intersea Research Corp.*, IBCA-1675 (April 25, 1985), 85-2 BCA par. 18,058. Under a constructive acceleration theory, appellant was awarded $304,729.71 plus interest as allowed by the Contract Disputes Act of 1978.

The claims of IRC in the initial proceeding were: (1) $402,759 for 47.62 days of delay for bad weather at the contract standby rate per day of $8,456, plus 10 percent profit; (2) $2,275 for 0.269 days of delay caused by fishing boats at the same rate, plus 10 percent profit; (3) $97,392 for mobilization and demobilization costs of a second research ship, plus 10 percent profit; and (4) statutory interest on the claim total. The purpose of the contract involved was to obtain information regarding potential hazards to oil and gas exploration on and beneath the ocean floor in designated areas of the Georges Bank on the Continental Shelf. To do this, IRC was required to sail a research ship fitted with technical and intricate electronic surveying

* Not in chronological order.

equipment to the area to gather precise graphical and navigational data.

By this application, appellant seeks $67,615.76 for professional services rendered and expenses incurred with respect to the underlying appeal, together with $6,845 for attorney fees and costs in attempting to collect the Board's award and pursuing this EAJA application. Thus, the total amount claimed in this proceeding is $74,460.76. The fees claimed are based on the maximum rate allowed by the Act and the Department's regulations. In support, appellant has attached considerable detailed documentation in the form of exhibits to its application and to its initial and reply briefs.

It is undisputed, and by this documentation we find that appellant established eligibility for an award under the EAJA, since it had fewer than 500 employees and its net worth did not exceed $7,000,000 when the adversary proceeding was initiated. The Government does argue, however, that the Government's position was substantially justified and that appellant was not the prevailing party with respect to one of the four items claimed in the underlying appeal. That item was for $97,392 for mobilizing and demobilizing the second research vessel, with respect to which cost the Board held IRC to have assumed the risk at the time of entering into the contract.

The Substantial Justification Issue

As was pointed out in *Margaret Howard d/b/a River City Van & Storage*, ASBCA Nos. 28648, 29097 (March 21, 1988), 88-2 BCA par. 20,655, and the cases cited, the Government bears the burden of showing that its position both leading to and during litigation was substantially justified. In a recent decision of the U.S. Supreme Court, *Pierce* v. *Underwood*, No. 86-1512 (decided June 27, 1988), 56 Law Week 4806, the term, "substantially justified," as used under the EAJA, was interpreted to mean, "not justified to a high degree, but rather, justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." The Court went on to say: "That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of the other Courts of Appeals that have addressed this issue." Thus, we appear to be back to the "reasonableness" test to determine whether the Government position was substantially justified. Therefore, the obvious question we need to ask in determining each EAJA case is: Did the Government have a reasonable basis for its action or inaction? If we find that it did not, then it follows that the position of the Government must be held not to have been substantially justified.

In its brief in opposition to appellant's EAJA application, the Government does not attempt to explain the inflexibility of its lease sale schedule, despite the liklihood of extreme adverse weather at the time of year involved, and despite its awareness of appellant's stoic performance at great expense under conditions warranting extensions of time, but which were not granted. The primary thrust of this brief

seems to be that because there were different views of the factual scenario by the parties, and the Board happened to agree with appellant's version, on a different day, another finder of fact may well have upheld the Government's version and the result would have been different. This implies that where there are close factual issues, the Government's position must have been reasonable. But, we do not accept this implication where, as here, the Board found in several specific respects the Government position to be unreasonable. The Government's brief closes with the following conclusion: "As the Government's position was not shown to be substantially unjustified, no fees and expenses can be awarded." This conclusion, of course, demonstrates a misconception of the burden of proof. As pointed out above, the *Government* has the burden of showing its position to have been substantially justified. We hold that it has failed to meet that burden.

The Prevailing Party Issue and Amount of Award

We agree with that portion of the Government's opposition brief which argued that appellant was not the prevailing party with respect to one of the four items claimed in the underlying appeal. That item was the claim of $97,392 for mobilizing and demobilizing the second research vessel. The Board held, with respect to such claim, that IRC assumed the risk at the time of entering into the contract. Accordingly, appellant is not entitled to an award for attorney fees and costs incurred in connection therewith.

More difficult, is the problem of how to determine the appropriate amount, if any, which should be deducted from this EAJA application for the claim on which the appellant did not prevail. Appellant contends that the full amount of fees and expenses requested in its application should be granted on the basis of *Hensley* v. *Eckerhart*, 461 U.S. 424,435 (1983), which held "that where claims for relief 'involve a common core of facts' or are 'based on related legal theories,' a fee award should not be reduced simply because a prevailing plaintiff did not receive every single aspect or dollar of the relief requested." However, that case also stands for the propositions: (1) that where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee; and (2) in determining what fee would be reasonable in a given case, the adjudicator should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. The court also said: "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has the discretion in making this equitable judgment."

As we perceive the record of the primary litigation as a whole, it suggests that an infinitesimal amount of time was spent by appellant's attorneys to prepare and present the unsuccessful claim, compared to the other claims. The Government has not contended that appellant's counsel spent any appreciable amount of time in preparing and presenting that claim in the course of the main litigation, even though the dollar amount was some $97,000. Neither has the Government contended that the amount to be deducted from the EAJA request should be in the same proportion that the unsuccessful claim bears to the total claim figure of $443,034 contained in the main litigation. Rather, it simply implied that its position was substantially justified with respect to the denied claim because the appellant did not prevail.

In the supporting documentation attached to appellant's application, the hours and portions of hours spent by both attorneys and legal clerks have been meticulously itemized, dated, and correlated with the tasks performed for appellant in the principal litigation. The Government does not contest the accuracy of the figures for the hours or the rates charged. We find them to be reasonable and within the statutory limitations. Nevertheless, this supporting documentation is not organized in such a manner so as to seggregate or identify the time spent separately on any of the four claims involved in the primary litigation.

Under these circumstances, we believe that a jury verdict approach is in order, and by such approach, we find that appellant's counsel and their paralegals spent a negligible amount of time on the preparation and presentation of the unsuccessful claim, not exceeding 6 hours for the attorneys and 10 hours for the paralegals. Therefore, applying the respective rates of $75 and $35 per hour, we allot only $450 attorneys fees and $350 for paralegal costs, or a total of $800, to be deducted from the request of appellant in the EAJA application.

The Government has neither challenged appellant's application for attorney fees and costs in any other respect, nor has it contended that the attorneys for appellant did not achieve excellent results on the whole from the principal litigation. Therefore, we further find that the consequence of the allotted deduction is an award for attorney fees and costs which is in reasonable relation to the results obtained.

Decision

Accordingly, we sustain appellant's application for attorney fees and costs in the amount of $73,660.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

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than lots 4 and 5 and the NE1/4 SE1/4 sec. 28, the land described by the patents. *See Roland Oswald*, 35 IBLA 79, 88-89 (1978). An application to change the legal description of a patent may not be approved where the record does not support a finding that the entryman erred in describing the lands that he entered. *Ben R. Williams,* 57 IBLA 8 1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

JOHN H. KELLY
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

TURNER BROTHERS, INC. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

102 IBLA 299 Decided *May 31, 1988*

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming issuance of Notice of Violation No. 84-03-006-012. TU 5-2-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the *Federal Register* constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement is a preventative measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation. A violation may be established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area.

Alpine Construction Co. v. *OSMRE*, 101 IBLA 128, 95 I.D. 16 (1988), *modified.*

APPEARANCES: Mark Secrest, Esq., Assistant General Counsel, Muskogee, Oklahoma, for Turner Brothers, Inc.; Nell Fickie, Esq., Department Counsel, Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

Turner Brothers, Inc. (TBI), has appealed from a decision dated January 24, 1986, by Administrative Law Judge Frederick A. Miller affirming two violations cited in Notice of Violation (NOV) No. 84-03-006-012 issued September 27, 1984, at TBI's Welch No. 1 and No. 1B mines in Craig County, Oklahoma.

Pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1275 (1982), TBI filed an application for review of the NOV; the Office of Surface Mining Reclamation and Enforcement (OSMRE) filed an answer; and the matter was heard before Judge Miller in Tulsa, Oklahoma, on September 18, 1985.

TBI's first argument on appeal is that OSMRE lacked jurisdiction to issue the NOV because it failed to provide proper notice as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982), when it attempted to assume primary enforcement responsibility for surface coal mining operations in Oklahoma. In his decision, the Judge stated that this issue had been addressed in previous TBI appeals and ruled that OSMRE had jurisdiction to enforce the Oklahoma Permanent Program Regulations (OPRPR).

Judge Miller's ruling was correct. TBI's arguments regarding jurisdiction are identical to those addressed by this Board in *Turner Brothers, Inc.* v. *OSMRE*, 100 IBLA 365 (1988), and *Turner Brothers, Inc.* v. *OSMRE*, 99 IBLA 349 (1987), among others. As in the previous *Turner Brothers'* cases, we affirm Judge Miller's dismissal of TBI's challenge to OSMRE's jurisdiction.

Next, TBI contends that OSMRE failed to establish a prima facie case with respect to violation No. 1 cited in the NOV.[1] Violation No. 1 alleged that the operator had failed to direct all water from disturbed areas to a sedimentation pond in violation of section 816.42(a)(1) of the OPRPR.[2] The NOV stated that this violation was occurring on the

[1] Appellant does not challenge Judge Miller's decision to the extent that it affirmed violation No. 2 (failure to certify a sedimentation pond).

[2] This regulation is the same as 30 CFR 717.17(a)(1) and 30 CFR 816.46(b)(2) which require that all surface drainage from disturbed areas shall be passed through a sedimentation pond or a siltation structure prior to leaving the permit area during the interim program and permanent program, respectively. We note, however, that by notice in the *Federal Register*, 51 FR 41961 (Nov. 20, 1986), the Department suspended 30 CFR 816.46(b)(2).

north and east sides of the coal pad on permit No. 82/86-4049, on the north and south berms directed to pond No. 2, and on diversion No. 1 directed to pond No. 4 on permit No. 84/86-4090.

TBI contends that in order to establish a prima facie case of a violation of section 816.42(a)(1) of the OPRPR, OSMRE was required to establish a prima facie case as to each of the elements of the violation, which, as enunciated in *Avanti Mining Co.*, 4 IBSMA 101, 107, 89 I.D. 378, 381 (1982), are: (1) The existence of surface drainage from areas disturbed in the course of mining and reclamation activity; (2) that such drainage was not passed through a sedimentation pond; and (3) that such drainage flowed off the permit area. TBI argues that OSMRE failed to establish the existence of surface drainage in disturbed areas or that such drainage flowed off the permit area without passing through a sedimentation pond. TBI contends that OSMRE must show a likelihood, not mere speculation, that the harm designed to be prevented by the regulation will occur.

OSMRE contends it established a prima facie case that the violation occurred in all three areas.

The Board in *Alpine Construction Co.* v. *OSMRE,* 101 IBLA 128, 95 I.D. 16 (1988), recently addressed the type of proof that is necessary to establish a violation of 30 CFR 717.17(a)(1). We stated that the elements of proof required to support such a violation are (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left or will leave the permit area. Thus, we concluded that proof that surface drainage has actually left the permit area is not mandatory. In so holding we expressly overruled to the extent inconsistent *Avanti Mining Co., supra*; *Consolidation Coal Co.*, 4 IBSMA 227, 89 I.D. 632 (1982); and *Turner Brothers, Inc.* v. *OSMRE*, 98 IBLA 395 (1987).

At the hearing before Judge Miller, OSMRE Inspector Joseph Funk testified that there were no drainage controls on the coal pad and therefore water had a potential to flow off the minesite without passing through a sedimentation pond. He described the coal pad as a disturbed area, a coal loading facility with coal piles and coal trucks entering and leaving (Tr. 10). He indicated that the area of the coal pad was higher than the area immediately to the north of it and described the potential drainage as follows:

> A. Okay. On the east side is relatively flat. The drainage could potentially go anywhere. It could stay there, it could go west or it could go east off the permit line. * * * On the north side of the permit line it's a very very moderate slope, but there would be a flat area right in the permit – right on the – I'm sorry. There would be a flat area where the permit boundary right on the edge of disturbance and immediately north of it is a low spot between the permit line and the highway. So, once again water could go any way, but from a high point to a low point I would say it would have a more likely chance of flowing north into that low spot from the disturbed area.

(Tr. 14-15).

The inspector stated there were no diversions or berms to prevent the surface drainage from leaving this area without first passing through a sedimentation pond. Although he saw no drainage flowing off the site, the inspector explained his conclusion that such drainage could occur as follows: "By looking at the site out in the field I could see the low spot north of the permit boundary where water would obviously have a potential to flow to it" (Tr. 16).

The Judge concluded from Inspector Funk's testimony that OSMRE demonstrated surface drainage would flow north and off the permit area without first passing through a sedimentation pond.

A second area involving this violation was described as being the area west of sedimentation pond No. 2 on permit No. 84/86-4090. The inspector testified with reference to a topographical map (Exh. R-6) on which he entered approximate elevations and by means of arrows depicted potential drainage flow lines. He stated that although no berms or diversions were required by the permit, there was a disturbed area west of pond No. 2 which would result in some uncontrolled drainage downhill and behind the pond dam (Tr. 20). The inspector surmised that drainage had the potential of leaving the permit site without flowing through a sedimentation pond (Tr. 21-22).

TBI's mining engineer Gregory Govier testified that a north/south haul road in area 2 was constructed for the purpose of holding water in the permit area. He testified also that some areas on the downhill slope of the haul road were disturbed and unvegetated (Tr. 45).

Judge Miller found that the haul road was not a completed drainage retention structure because areas to the west of it would allow surface drainage to flow off the permit area without first passing through a sedimentation pond. As to area 2, he concluded that OSMRE had presented a prima facie case that was not overcome by contradictory evidence.

The third area involving this violation is an area labelled diversion No. 1 located south of pond No. 2 and west of pond No. 4 (Exh. R-6). The inspector testified that diversion No. 1 had not been constructed but that it was needed because the entire watershed to the east of it had been disturbed but not vegetated (Tr. 22). He indicated that without the diversion, water would run off the permit because it could not be directed either to pond No. 2 or pond No. 4. He cited this area as an area of violation because the watershed had been mined and disturbed, but drainage was not being directed to a sedimentation pond before leaving the permit area (Tr. 24). TBI presented no testimony in regard to diversion No. 1 and the Judge again concluded that OSMRE had presented a prima facie case of the existence of a violation in this area.

In his evaluation of the evidence, Judge Miller stated that the sedimentation pond requirement is a preventative measure which does not require a showing of the harm it is intended to prevent in order to establish a violation. He found also that an inspector need not see surface drainage leaving the permit area so long as he testifies that

drainage could flow off the permit without first passing through a sedimentation pond.

[2] In *Alpine Construction Co.* v. *OSMRE, supra*, we dealt with the situation in which the OSMRE inspector could not specifically testify that surface drainage had left the permit area. Nevertheless, based on the rationale that the sedimentation pond requirement is a preventative measure, we held that testimony that surface drainage would leave the permit are was sufficient to establish a prima facie case in support of a violation.

In the present case, the inspector did not see any surface drainage from disturbed areas at the time of his inspection nor did he find any evidence that any drainage had left the permit area. However, his testimony established for all three areas that there was a reasonable likelihood that there would be surface drainage from those areas, that it would not pass through a sedimentation pond, and that it would leave the permit area. Appellant did not rebut that testimony.

Thus, consistent with the rationale which formed the basis for our holding in *Alpine Construction Co.* v. *OSMRE, supra*, we conclude that evidence that there is a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area is sufficient to establish a prima facie case of a violation of the regulations.

Since our conclusion represents a clarification of the evidence necessary to establish a prima facie case, we expressly modify *Alpine Construction Co.* v. *OSMRE, supra*, to incorporate our holding in this case.

Based on our review of the record, we conclude that Judge Miller correctly found that OSMRE established a prima facie case that a violation existed in each of the three areas, and that TBI failed to meet its burden of persuasion that the violation did not occur. *See Turner Brothers, Inc.* v. *OSMRE*, 100 IBLA 365, 370 (1988); *Alpine Construction Co.* v. *OSMRE, supra.*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

GAIL M. FRAZIER
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

WM. PHILIP HORTON
Administrative Judge

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June 6, 1988

APPEAL OF BALL, BALL, & BROSAMER, INC., & BALL & BROSAMER (JV)

IBCA-2103 & 2350 Decided: *June 6, 1988*

Contract Nos. 1-07-3D-7477 & 5-CC-30-3560, Bureau of Reclamation.

Motions to dismiss granted.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction

Substantial compliance with the certification requirement of the Contract Disputes Act is jurisdictional, and the Board has no authority to waive it. Substantial compliance is not found (1) where the required certification of a corporation was executed by a person who was neither a general officer nor an onsite project manager of the corporation, and (2) in the case of a joint venture, where the required certification was signed by a person who was not formally established as an agent of the joint venture in an equivalent capacity.

APPEARANCES: John R. Little, Jr., Esq., Nancy E. VanBurgel, Esq., Duncan, Weinberg, Miller & Pembroke, P.C., Denver, Colorado, for Appellant; Daniel L. Jackson, Esq., Wayne C. Nordwall, Esq., Government Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

The above appeals were timely filed, respectively, by Ball, Ball, and Brosamer, Inc., and Ball and Brosamer (JV), a joint venture (hereinafter the Joint Venture) (IBCA-2103) and by Ball, Ball, and Brosamer, Inc. (hereinafter the Corporation) (IBCA-2350), from contracting officer decisions denying claims in connection with the construction of two aqueducts as part of the Central Arizona Project, under Bureau of Reclamation (Bureau) contract Nos. 1-07-3D-7477 (IBCA-2103) and 5-CC-30-3560. IBCA-2103 has been pending since November 18, 1985, and IBCA-2350 has been pending since June 30, 1987.

On January 22, 1988 (IBCA-2350), and on March 4, 1988 (IBCA-2103), Government counsel for the first time raised the issue of improper claim certification under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(1), in that the claims under both appeals had been signed by the same individual in his capacity as Chief Cost Engineer for the Corporation, without any indication that he was either a general officer of the corporation, a project manager at the work site, or a duly authorized agent of the Joint Venture in an equivalent capacity.

The Government moves to dismiss both appeals on the ground that the Board lacks jurisdiction to consider them in the absence of the

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required certification. For the reasons set forth below, the Board grants the Government's motions and dismisses the appeals.

Facts

1. CDA section 605(c)(1) provides, in pertinent part, that "[f]or claims of more than $50,000, the *contractor* shall certify that the claim is made in good faith," etc. (Italics added.) Thus, the issue raised by the Government's motion is who can validly certify a claim on behalf of a corporate contractor.

2. The regulatory requirement for claim certification is set forth in Federal Acquisition Regulation (FAR) 33.207, 48 CFR 33.207, which states in subsection (c)(2) that:

> If the contractor is not an individual, the certification shall be executed by–
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

3. The contracts with the Bureau were signed by Robert G. Brosamer as President of Ball, Ball and Brosamer, Inc., for the Corporation, and as Co-Joint Venturer for the Joint Venture. They contained, in Clause I.1.8, the above-quoted language, as part of Disputes Clause Alternate I (FAR 52.233-1, Apr. 1984).

4. The claim certifications were signed by Don Meek as Chief Cost Engineer for the Corporation, which is located in Alamo, California. (The project itself was located in Arizona.) According to Meek's affidavit, submitted as Exhibit A of Appellant's Opposition to the Motion (hereinafter, AOM-A), Meek's job is: "[T]o supervise and administer all cost and claim aspects of the performance and administration of [the Corporation's] contracts. I am responsible for preparing claims. After due consultation with my superior, [Corporation] President Robert Brosamer, I certify and submit claims to the contracting officer." Meek goes on to say (with respect to IBCA-2350):

> On February 18, 1987, I submitted what we intended to be a certified claim to the contracting officer. I included the certification language, required by the Contract Disputes Act, in my letter. I signed that certification with "Ball, Ball and Brosamer, Inc., By: Don Meek." * * * I intended, by that format, to sign on behalf of the contractor. I have the authority to sign claims on behalf of [the Corporation].

5. According to an affidavit submitted by Corporation President Robert G. Brosamer (AOM-B):

> 2. Mr. Don Meek has held the position of Chief Cost Engineer with Ball, Ball & Brosamer for approximately 8 years. The Chief Cost Engineer is a senior management level position and Mr. Meek reports directly to me. Mr. Meek is the senior official at [the Corporation] working on all *cost and claim aspects* of all corporate contracts. Mr. Meek is, in effect, Ball, Ball & Brosamer's director of contracts or contracts manager.

3. Mr. Meek's job entails overall supervision and administration of all *cost and claim aspects* of the performance and completion of all of the contracts that this firm has at any given time. * * *

* * * * * * *

5. Mr. Meek is directly responsible to me and essentially functions as our senior contracts *claims manager*. I provide him with general policy direction but he has the authority to proceed with claims within these general guidelines. Since *he is, therefore, directly responsible for preparation of all claims*, he also has sufficient background and knowledge and facts and costs contained in the claim to fully and truthfully certify to their completeness and accuracy. *I do provide Mr. Meek with specific decisions or instructions on important issues* that he brings to me for determination *and occasionally participate personally in important negotiations with owners on claims.* Otherwise, he is fully responsible and has full authority to handle claim matters within this management and policy framework.

* * * * * * *

7. Since Mr. Meek is a duly authorized agent of the corporation and has the authority to sign and certify claims on behalf of the corporation, *I also hereby ratify and confirm his authority* to act in this capacity. [Italics added.]

Arguments by the Parties

Counsel for the parties have adequately briefed the relevant authorities in this matter. Essentially, appellant argues that:

The authority or qualification to bind the contractor is, in the final analysis, the whole point. Section 605(c)(1) requires only that "the contractor shall certify" and Admiral Rickover [who was instrumental in the enactment of the CDA's certification requirement] defined this as a "senior, responsible contractor official." Thus, "bond claim attorneys," "general managers," "directors of contracts" and "project managers" have all signed acceptable certifications *provided* they had actual, in-fact authority to bind the corporation. In each case where a certification was rejected, the certifying party lacked the actual authority to bind the contractor. This distinction rationalizes all of the reported cases, including those that the government relies on here. [Italics added.]

(AOM at 16).

Government counsel, while in agreement with the statement of the issue as framed by appellant's counsel, argues that:

Appellant has succinctly stated the issue, but has failed to provide evidence that the purported certification signed by Don Meek was sufficient to bind the corporation.

As noted by the Claims Court in *Drake v. United States*, 12 Cl. Ct. 518 (1987), "Congress wanted to hold the contractor personally liable, and it considered the best way to do this would be to require contractors personally to certify their claims." *Drake*, 12 Cl. Ct. at 519.

Government counsel goes on to assert:

Corporations, like the Government, operate primarily through delegations of authority. If there is a common thread in the case law (discussed below) relied upon by Appellant which addresses the adequacy of corporate certifications, that thread is whether the person signing the certification had the delegated authority to act on behalf of and bind the corporation *at the time he executed the certificate*. Appellant asserts Mr. Meek had "the authority to certify the accuracy of [the Corporation's] claim." (Opposition, page 17) Authority to certify the accuracy of a claim is, however, insufficient to meet the requirement that the contractor be bound by the certification and personally liable

therefore [*sic*]. Appellant's belated effort to ratify the certification (Opposition, Exhibit B, paragraph 7) is likewise insufficient to now vest this board with jurisdiction to hear this claim. [Italics added.]

(Bureau Reponse at 2).

Legal Authorities

A. Cases Finding Certification Proper.

In *W. H. Moseley Co.* v. *United States*, 230 Ct. Cl. 405, 677 F.2d 850, *cert. denied*, 459 U.S. 836 (1982), the court emphasized that the adequacy of a certification was not a matter left to the discretion of the contracting officer. *A certification by an economist was found insufficient* to meet the certification requirement imposed by the CDA upon the contractor.

Three Board cases cited by appellant reach consistent results. In *Dawson Construction Co.*, VABCA No. 1967, 84-2 BCA par. 17,383, the Board held that the contractor's *project supervisor was authorized* to make the certification because he was a senior company official in charge at the location involved, as permitted by the Federal procurement policy then in effect. In *Christie-Williamette*, NASA BCA No. 1182-16, 85-1 BCA par. 17,930, the Board held that a *project manager*, who was expressly delegated "full authority to act in behalf of the Joint Venture on all matters involving the execution of [the] contract" and who was also a voting member of the Management Committee of the venture, *had authority* to certify a claim. In *Santa Fe, Inc.*, VABCA No. 1746, 85-2 BCA par. 18,069, the Board again accepted certification by a project manager with delegated authority, for the same reason as in *Dawson, supra.*

In *Tracor, Inc.*, ASBCA No. 29912, 87-2 BCA par. 19,808, the Government objected that the certifying official was neither responsible for the general management of the contractor's operation nor a senior corporate official in charge of the contractor's plant on location. The facts of the case are not clear; but the Board, in accepting the certification, found that the signer, who was the *corporation's director of contracts* (allegedly with overall responsibility for its contracting activities), *was in fact a "senior company official in charge* at the contractor's plant or location involved."

In *Eastern Car Construction Co.*, ASBCA No. 30955, 86-2 BCA par. 18,909, another joint venture case, the Board found a certification proper because the *signer was a vice president* of one of the corporate venturers *who had been duly authorized* to make the claim and certification on behalf of ECCC.

A similar case is *Transamerica Insurance Co.* v. *United States*, 6 Cl. Ct. 367 (1984), in which the certification was signed by a Bond Claim Attorney, who asserted in an affidavit that he was "*the senior company official in charge of all matters relating* to Transamerica Insurance Company involved with * * * [*the*] *Contract*," and that he "had overall supervision on behalf of Transamerica Insurance Co. of all

the completion work on the * * * project" (6 Cl. Ct. at 370). The court accepted the certification.

Finally, in *United States* v. *Turner Construction Co.*, 827 F.2d 1554 (Fed. Cir. 1987), involving a certification by a prime contractor on behalf of its subcontractor, the court, while stressing the importance placed by the Congress on the certification procedure, stated that it found nothing surprising or "hopelessly irreconcilable" in the fact that a prime contractor might "both certify the claims of its subcontractors and provide the government with facts and theories with which to defend those claims" (827 F.2d at 1559). The court went on to say:

> Thus, how the prime contractor itself would resolve the dispute should not be relevant to the certification issue; the prime contractor should not, through the requirement that it certify subcontractor claims, be used as a substitute for the contracting officer or the board in the determination of the merits of the submitted claims under the CDA.

827 F.2d at 1561.

B. Cases Finding Certification Improper.

Turner, supra, sets out at 827 F.2d 1560 various circumstances in which certification was found to be improper or inadequate, and we see no need to repeat here the various cases cited. However, some recent decisions by the Claims Court are worthy of note in the context of the Government's motion.

In *Todd Building Co.* v. *United States*, 13 Cl. Ct. 587 (1987), an Executive Assistant for the contractor, upon being challenged by the Government, stated in a letter that she had been "authorized, in the absence of any authorized signatories, to execute the Certification." The corporation's general manager signed and confirmed the letter. He also enclosed a photocopy of the original certification, on which he had placed his own signature alongside the Assistant's. Both parties agreed that the General Manager had general supervisory authority over the contractor's affairs, as well as full authority to represent and bind the company. Therefore, the court found that the certification, which was tendered before the contracting officer considered the claim, was valid from the point at which the general manager had affixed his own signature to it.

Although *Aeronetics Division, AAR Brooks & Perkins Corp.* v. *United States*, 12 Ct. Cl. 132 (1987), turns on deficiencies in the certification statement rather than on the person of the signer, it again points out the importance of strictly construing the certification requirement, citing *Moseley, supra*.

Similarly, in *Romala Corp.* v. *United States*, 12 Ct. Cl. 411 (1987), the court distinguishes *Transamerica, supra*, from the case before it, on the ground that, in *Romala*, there was no evidence that the signer of the certification was *either a senior company official or acting in any type of supervisory capacity* with regard to the performance of the contract,

citing the FAR provision already quoted (12 Ct. Cl. at 413). Thus, the certification was inadequate.

However, the most significant recent Claims Court case on certification appears to be *Donald M. Drake Co.* v. *United States*, 12 Cl. Ct. 518 (1987), in which the court summarily granted the Government's motion to dismiss even though the certification was signed by the project manager. In her discussion, Judge Nettesheim notes that the purpose of the certification requirement was to insure against inflated claims by triggering "a contractor's potential liability for a fraudulent claim under 604 of the [CDA]," quoting *Skelly & Loy* v. *United States*, 231 Ct. Cl. 370, 685 F.2d 414 (1982). Judge Nettesheim then points out that, at the time in question, Drake was owned by FMD Corp. "Thus, only a senior company official or an officer or general partner of the plaintiff contractor would have been able properly to certify the claim." 12 Cl. Ct. at 520. Moreover, the decision notes that the interrogatories between the parties had clearly established that primary claims authority resided in Drake's Executive Vice President and not in its project manager.

Some 4 years ago, this Board made clear that it would take a strict view of the certification requirement, insofar as the person of the signer is concerned. In *Whitesell-Green, Inc.*, IBCA No. 1927, 85-3 BCA par. 18,173, we seriously questioned a certification, even by a project manager, under circumstances where it was not sufficiently clear that he had authority from the contractor to sign it. We said:

> [W]e have doubts about the validity of the purported certification because it was not written or signed by an officer of the corporation. The letter of November 30, 1984, *did not enclose a copy of a resolution of the Board of Directors* of the appellant corporation *stating that the project manager*, Mr. Caldwell, *was authorized to act on behalf of the corporation with respect to the certification of claims*. Neither did the letter show him to be an officer of the corporation.
>
> The CDA requires that the *contractor* certify when certification is necessary. Thus, when the contractor is a corporation, the individual who acts for the corporation by executing the certification should have at least apparent authority to do so. Our holding here is that the certification itself is defective and therefore is not dependent upon the authority, or the lack thereof, of the certifier. Nevertheless, we believe that a careful and conscientious approach to proper certification by a corporate contractor dictates that a *clear showing* be made *that the individual certifying on its behalf has the authority to so certify as an act of the corporation*. [Italics added.]

(85-3 BCA at 91,259).

Discussion

In recent cases, relying primarily on *United States* v. *General Electric Corp.*, 727 F.2d 1567 (Fed. Cir. 1984), this Board has taken a fairly liberal position on the manner in which the substantive requirements of the CDA certification can be met. (*See, e.g., A&J Construction Co.*, IBCA-2269 and 2376-F, 94 I.D. 211, 87-3 BCA par. 19,965, and 25 IBCA 73, 88-1 BCA par _____.)

We do not, however, believe that the arguments for leniency that apply to the other formalities of the CDA certification requirement can

be applied equally--or, indeed, at all--to the representations upon which the Government must rely if the certification is to be binding upon a corporation or a joint venture as the actual contracting party.

It is our view, in fact, that just as a contractor should not have to guess at its peril upon whom it may rely, among the Government's many servants, when a contract is about to be signed or a change is about to be made or a claim is about to be filed; so too the Government should not be forced to guess whether the act of the private institutional signer in certifying a claim is, or is not, one for which the corporation, legally and without unnecessary litigation, can readily be held accountable. We think that it is the purpose of the FAR requirement to avoid such confusion and that, in the grand scheme of things, the corporate authority requirement makes considerable sense. Thus, we are not disposed to let corporate contractors off the hook easily.

Nor, on the whole, do we think the cases in which adequate certification has been found closely parallel the facts before us. Even in *Tracor, supra*, which arguably is the strongest case in appellant's favor, the Armed Services Board made a specific finding that the certification by the contractor's agent met the literal test of the FAR requirement because of his actual onsite management responsibilities.

The most analogous situations to those before us, in fact, were the ones in *Whitesell-Green, supra*, and *Drake, supra*, where the opinions noted that while the certifying individual may have been the onsite project manager, there was no indication that he had the authority to sign the certification involved. In the case before us, while the signer may have been a senior level official, he was clearly not an onsite manager, and there is no indication that he had the *general* corporate authority that the FAR clause contemplates as an alternative.

What is required is not complicated. Corporations delegate responsibilities every day; and they are commonly familiar with the fact that when someone other than a general corporate officer will be expected to act on their behalf, a board of directors' resolution is the proper means for authorizing the necessary action (*Whitesell-Green, supra*). Similarly, where the corporation undertakes to act as a partner in a joint venture, there must be an adequate legal basis for the apparent authority of the person who will serve as the corporate parties' legal agent (*Christie-Williamette, supra*).

For the Corporation's Chief Cost Engineer, in one of the two cases before us (IBCA-2103), to attempt to perform legal acts on behalf of the Joint Venture without any form of warrant, and then to argue that he was orally authorized to do so, strains credulity. If the purpose of the certification requirement is to bind the contractor to the elements of the certification, and the courts have said that it is, it is difficult to see how that purpose can be carried out by the Joint Venture certification before us.

It is also clear that, under the FAR clause, corporate contractors are permitted to choose between two reasonable certification alternatives: either they may provide their senior onsite project managers with the necessary express authority, or they may vest the claim certification responsibility in their general corporate officers. If the latter alternative is chosen, there is no reason to believe that the boards and courts would not be prepared to construe certifications by senior corporate officials reasonably, just as the Federal Circuit was prepared to treat a prime contractor's certification reasonably with respect to a subcontractor's claim (*Turner, supra*).

On the other hand, it could also be argued that if a general corporate officer does not have sufficient facts to make the necessary certification, then perhaps he should get them before making the certification, just as he should get the facts before signing away the corporation's rights in a claims release (*see, e.g., Mingus Constructors, Inc.* v. *United States*, 812 F.2d 1387 (Fed. Cir. 1987)). In this connection, we note that the President of the Corporation before us personally signed both of the contracts involved. If it was important for someone at his level to sign the original documents, it is not clear to us why it was not important for someone at the same level to sign any formal claims in excess of $50,000 that arose under those contracts.

Also, the appeals before us seem similar to *Romala, supra*, in that, if appellants' Chief Cost Engineer in fact had the authority to certify claims, then why did the Corporation President find it necessary (as he apparently did) to attempt to ratify the certification in the affidavit appended at AOM-B?

Since the purpose of the certification requirement is to prevent frivolous or fraudulent claims, it is this Board's position that the certification required by the statute ought to be signed by someone who *clearly* has the authority to bind the corporation or other legal entity involved. Otherwise, the certification requirement of the Act would be meaningless.

Decision

In summary, we hold that the claim certification signing requirements of the FAR must be strictly construed, and that consequently such certifications can be made only by general officers of corporations, or their equivalent with respect to other entities, or by senior onsite project managers. Since no such certifications were provided to the contracting officer in the cases before us, and since the certification requirement is jurisdictional, these appeals must be dismissed pending resubmission of the claims, with proper certification, to the contracting officer involved.

As a matter of convenience to the parties, the Board will retain the appeal documents on file for a reasonable time to facilitate any further

appeals that may be taken from any subsequent contracting officer's denials.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

BLACK BUTTE COAL CO.

103 IBLA 145 Decided *July 21, 1988*

Appeal from a decision of the Director, Minerals Management Service, disallowing certain deductions for transportation and processing expenses and ordering appellant to pay additional royalties on production from coal lease W-6266. MMS-84-0009-MIN.

Affirmed in part, affirmed in part as modified, and reversed in part.

1. Coal Leases and Permits: Royalties--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties

Where the language of a negotiated coal lease provides that the value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs incurred between the point of delivery from the pit and the point of sale, and it is clear from the record that all transportation costs from the pit to the processing plant were intended to be deductible, the point of delivery from the pit is properly held to be the point when the haul trucks have been loaded in the pit.

2. Coal Leases and Permits: Royalties--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties

Royalties, production and severance taxes, black lung taxes, and reclamation fees are properly considered to be elements of the costs of mining and, as such, no part of these expenses will be allowed to be deducted from value for royalty computation purposes as an indirect cost of transportation or processing.

APPEARANCES: Mary Anne Sullivan, Esq., George W. Miller, Esq., and Jonathan L. Abram, Esq., Washington, D.C., for appellant; Howard Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., U.S. Department of the Interior, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This appeal is brought by Black Butte Coal Co. from a November 27, 1985, decision of the Director, Minerals Management Service (MMS), ordering the appellant to pay additional royalties on coal mined on

Federal coal lease W-6266. The basis for the decision was the disallowance of credits claimed by appellant for certain expenses charged to the transportation and processing of coal mined from the lease and sold from February 1980 through December 1982.

The coal lease at issue in this case was entered into on April 1, 1976, by the United States and Rosebud Coal Sales Co., appellant's predecessor in interest. Section 5(a) of the lease provides a "production royalty shall be due on Coal extracted by the Lessee from the Leased Lands" in the amount of 10 percent of the gross value of coal produced by strip mining methods and 8 percent of the gross value of coal produced by underground mining. The essence of this dispute involves two provisions of section 5(b) of the lease critical to the calculation of royalties due thereunder. Section 5(b) provides in relevant part that:

(1) The gross value shall be considered to be the price received by the Lessee, adjusted for transportation and/or processing costs so that it is a measure of the value of the Coal at the mine mouth (or in the case of strip mining that point where the Coal is delivered from the pit) * * *.

(2) The Area Mining Supervisor may make deductions from gross values for costs of preparing and transporting Coal which are incurred by the Lessee between the mine mouth, or in the case of strip mining that point to which the Coal is first delivered from the pit, as designated by the Supervisor, and the point of sale. He will make such deductions only when, in his judgment and subject to his audit, the Lessee provides him with an accurate account of the costs so incurred.

The Director's decision acknowledged that the Black Butte Mine is a large strip mining operation in which coal is mined from several separate pits spread over a broad area.[1] Bruce M. McKay, an engineer employed by appellant, explained in an affidavit submitted with appellant's statement of reasons for appeal that the mine involves a total of 13 different pits connected by an "extensive transportation network for moving mined coal from the several outlying pits to the central plant for processing and shipment" (Exh. 5 at 3). McKay further stated:

[T]rucks transport the coal out of the pit and along the haul roads to a primary crusher, either at the central plant or at one of the two overland conveyor systems. The coal which is trucked to a primary crusher at an overland conveyor is then moved by the conveyor to the central plant. The "grizzly" is simply the iron bars that protect the opening to the primary crushers; thus, there are grizzlies at the primary crusher in the central plant and at the outlying primary crushers located at the beginning point of each overland conveyor.

Exh. 5 at 6.

The Director's decision explained that the Royalty Management Program (RMP) of the MMS had issued a demand letter dated March 15, 1984, to appellant following a 1983 royalty audit. Although the audit report found that the sale prices used to establish royalty value and the production volumes reported by the lessee were acceptable, payment of additional royalty in the amount of $3,875,189 and interest was demanded. The demand was based on unauthorized

[1] Lease W-6266 embraces almost 15,000 acres of public lands.

deductions by the lessee from the sale price for costs (direct and indirect) of transportation and processing of the coal prior to sale.[2] The Director's decision further explained that the RMP had determined that no deductions were allowable in the royalty calculation under section 5(b) of the lease because the point where the coal is delivered from the pit is the point of sale at the railroad line.

The Director in his decision did not accept the position taken by the RMP.[3] Rather, the Director concluded that the coal is "delivered from the pit" at the point where the mined material is dumped into the grizzly serving the pit. Hence, he determined that appellant was entitled to deduct transportation and processing costs incurred after that point. The Director elaborated on those expenses which are deductible and those which are not as follows:

> Black Butte may deduct from its sales price direct and indirect costs, as determined by generally accepted accounting principles, and approved by MMS, which are directly attributable to transportation, preparation, and processing activities between the point at which the coal enters the grizzly chute and the point of sale. All costs incurred prior to the coal entering the grizzly chute are not deductible. The following additional costs are not deductible: management fees (not attributable to transportation, preparation and processing activities), royalties, reclamation fees, and taxes.

Exh. 2 at 9. Refusing to uphold RMP's finding that all claimed deductions for transportation and processing costs should be disallowed because of appellant's failure to obtain prior approval of the Mining Supervisor (the deductions came to light in a subsequent royalty audit), the Director ordered appellant for future years commencing with 1986 to pay royalties on the basis of the full sales price subject to filing an application with MMS within 90 days after the close of the calendar year for deductions for costs of preparation and transportation of coal.

In the statement of reasons for appeal, Black Butte argues that the Director erred in holding that the point of delivery from the pit occurs at the grizzly, thus limiting its deduction for transportation costs to those occurring after that point. Appellant notes this would eliminate the deduction for roads and transportation of the coal by truck from the pit to the conveyor belt for that portion of the coal transported by conveyor and from the pit to the central processing plant for the coal which enters the grizzly at that point. Thus, the only transportation costs allowed would be for the conveyor system, a means of transportation which appellant asserts was not even contemplated at the time the lease was negotiated. Black Butte contends it is entitled to deduct all transportation expenses from the point at which the coal is severed from the pit to the point of delivery to the rail cars.

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[2] Of this amount demanded, $3,837,931.54 was identified as involving improper deductions for transportation and processing costs. The decision of the Director found that the balance of the sum demanded by the RMP letter, involving improper deductions against royalty for advance rental payments, was not at issue.

[3] The Director also expressly rejected appellant's contention that it is "entitled to deduct all expenses incurred after the overburden is removed and the coal is exposed."

Appellant also asserts error in the disallowance of certain indirect costs including royalties, reclamation fees, and taxes (including black lung and severance taxes) to the extent they may be allocated to the deductible activities (transportation and processing) which contribute to the value of the coal upon which the royalty is assessed. Appellant further argues that profit, as a cost of capital, is a deductible expense to the extent it may be allocated to deductible expenses.

Finally, Black Butte asserts error in the requirement imposed by the Director that it receive a credit for allowable expenses only after filing a claim for refund within 90 days after the close of each calendar year. Appellant contends there is no authority for this procedure either in the lease terms or the regulations.

In answer to appellant's statement of reasons, MMS contends that mining of coal involves not only severing it from the ground but also bringing it to the surface which would include removal to a point outside the pit. MMS asserts that the operation of frontend loaders to load coal into trucks in the mine is a part of the mining rather than the transportation process and hence such costs are not deductible. Further, MMS argues that the phrase in section 5(b) of the lease terms referring to the point where coal is "delivered *from* the pit" necessarily imports a location distinct from the mine pit itself. MMS contends this point is logically contrued to be the grizzly to which the coal is delivered as the Director held.

With respect to the issue of indirect costs, MMS notes that royalty is defined as a share of production free of the costs of production. MMS argues that reclamation fees, black lung tax, and state taxes have no relation to transportation and processing. Rather, they are costs of production based on tonnage of coal produced and/or sold which would be incurred even if there were no transportation and processing costs. Similarly, MMS asserts that any overriding royalty paid by the lessee is a component of the value of the coal at the mine and cannot be allocated to transportation and processing costs.

MMS further contends that allowable deductions are limited to *costs* of transportation and processing and thus no element of profit is properly included in such a deduction. Regarding the requirement to pay royalty on the full value and then make application for approval of deductions after the close of the calendar year, MMS asserts on appeal that once deductions are authorized for the first calendar year, this level of deductions could be taken as payments are made on a monthly basis during the succeeding year, subject to adjustment after the close of the year.

Accordingly, the issues raised by this appeal are twofold. The first controversy entails determining at what point in the process coal is "delivered from the pit" in order to ascertain what transportation and processing costs are incurred thereafter and, hence, are deductible from the sale price of the coal. The second issue is what indirect costs may properly be attributed to transportation and processing.

[1] The language of section 5(b)(1) of the lease clearly states that value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs to reflect the value of the coal at the point where coal is delivered from the pit. Section 5(b)(2) of the lease confirms that deductions from the gross value of the coal are authorized for costs of preparing and transporting the coal incurred by the lessee between the point where the coal is first delivered from the pit and the point of sale. Although MMS argues that the phrase delivery "from" the pit requires a finding that delivery must occur at some point remote from the pit, this is not the only logical construction of the phrase. In the case of *Hillard* v. *Big Horn Coal Co.*, 549 P.2d 293 (Wyo. 1976), the Supreme Court of Wyoming had occasion to examine the question of where mining stops in reviewing the assessment of the value of coal at a strip mine for tax purposes. The Court found that "[m]ining is not completed until the coal has been loaded for removal from the pit" on the rationale that loading of the coal must be completed before further stripping which is part of the mining process, may be accomplished. 549 P.2d at 302.

This construction of the lease term is consistent with the apparent intent of the parties to the lease. Donald Sturm, a director of Peter Kiewit Sons, Inc.,[4] and a member of the Black Butte management committee since formation of the joint venture, has stated in an affidavit submitted with the statement of reasons for appeal (Exh. 3) that this lease was carefully negotiated by the parties since it was issued at a time when the Department of the Interior had placed a moratorium on coal leasing (subject to limited exceptions) and was using no standard form lease. Sturm's affidavit relates that a preliminary mining plan was developed in 1974 (Exh. 3G) which detailed the plans for removal of the coal from the pits and transporting it to the central processing facility. He further states:

> In negotiating with the Department for a definition of gross value that excluded transportation and processing costs, I understood that the costs of the equipment and facilities described in the preliminary mining plan for removing the coal from each pit, delivering it to the processing facilities, processing it and finally, delivering it to the point of shipment at the Union Pacific Railroad line at the loadout building, shown as "G" on Figure 13, Exhibit 3G, would be excluded. It was clear to all involved that the lessee would be able to deduct its transportation and processing expenses.

Exh. 3 at 8. This understanding is corroborated in most respects by the affidavits of Hugh Garner (Exh. 4) who, as the Associate Solicitor for Energy and Resources at the time the lease was negotiated, was actively involved in lease issuance. Garner states in his affidavit:

> 7. It was my thought that, under the terms of Section 5(b)(1), Rosebud would be entitled to deduct all costs incurred from the point at which coal was extracted from the ground to the point of sale. This included both the costs of transporting coal from each

[4] Black Butte Coal Co. is a joint venture of Wytana, Inc., a Kiewit subsidiary, and Bitter Creek Coal Co., a subsidiary of Rocky Mountain Energy Co.

pit to the rail cars, which were to be the point of sale for the coal, and for processes such as crushing, washing and oil spraying, provided those costs were incurred prior to the point of sale.

This understanding is further supported by the fact that the preliminary mine plan called for virtually all transportation of coal from the pits to the central processing facility to be accomplished by trucks rather than conveyor facilities. *See* Exh. 3G (mine plan); Exh. 5 (McKay affidavit) at 3. Thus, the interpretation urged by MMS would, under the scenario envisioned at the time, have resulted in denying a deduction for virtually all of the transportation costs. When construing the language of contracts, it is fundamental that where the terms are susceptible to more than one meaning, the terms shall be construed in a manner which gives meaning to the intent of the parties. *See* 4 S. Williston, *A Treatise On The Law Of Contracts*, § 618 (3d ed. 1961). Accordingly, we find that the point of delivery from the pit occurs when the coal has been loaded into the trucks for transportation from the pits to grizzlies at the overland conveyor or at the processing plant. Applying this rationale, the cost of the loaders used to fill the trucks is a part of the costs of mining as opposed to transportation, but the costs of the trucks and the haul roads constitute transportation costs.

The remaining issue is whether the Director erred in not allowing as indirect costs of transportation and processing the pro rata share of royalties, reclamation fees, and taxes (including black lung and severance taxes). A subsidiary question raised by appellant is whether the allowance of indirect costs of transportation and processing includes an allocable share of profit.

[2] Appellant's argument proceeds as follows. Under standard accounting practices, certain indirect costs which cannot be directly attributable to any specific phase of an operation are treated as general overhead costs and are apportioned through all phases of the production process in the proportion that other costs at each particular phase contribute to the total value of the product. Appellant contends that since, under its contract, it is permitted to deduct certain transportation and processing costs, it should also be permitted to deduct so much of the general overhead costs as can be apportioned to the transportation and processing phase. It is appellant's position that included in these general overhead costs are the standard reclamation fee, the black lung tax, the State of Wyoming production tax, certain overriding royalties retained by Rosebud Coal Co. when it assigned the lease to appellant, and proportionate management fees and elements of profit.

In his decision, the Director, MMS, agreed that Black Butte could deduct those indirect costs "which are directly attributable to transportation, preparation, and processing activities," expressly disallowing those management fees not directly attributable to transportation, preparation, and processing activities, as well as royalties, reclamation fees, and taxes (MMS Decision at 9).

While we do not disagree with appellant's theoretical argument that, under the specific terms of its lease, it may deduct so much of general overhead expenses which are properly allocable to the transportation and processing phase, we substantially agree with the Director, MMS, that the deductions which appellant seeks for royalties, reclamation fees, and taxes are not properly allowable.

We believe that the general fallacy of appellant's argument lies in its assertion that the royalties, reclamation fees, and taxes are *not* specifically allocable to the mining phase. In its submissions, appellant argues that inasmuch as the *amount* of the reclamation fees, taxes, and overriding royalty may be dependent upon costs associated with the transportation and processing, such costs are properly allocable to general overhead rather than to mining. Thus, appellant notes that the reclamation tax is assessed at the rate of '0.35 per ton or 10 percent of the value at the point of sale, whichever is less, while the black lung tax is assessed at the rate of $0.55 per ton or 4.4 percent of the sales price, whichever is less. *See* Exh. 6 at 25. Appellant argues, in effect, that since these taxes *could* be based on costs associated with transportation and processing,[5] these fees are properly treated as general overhead costs rather than specifically attributable to the mining phase. We do not agree.

Appellant has confused the question of whether costs are directly attributable to a specific phase with the issue of how they are computed. The obligation to pay the reclamation fee and the black lung tax arises solely from appellant's mining of the coal. Or, to utilize appellant's terminology, the expenditure *is* directly "caused" by the mining phase. This is readily apparent if one assumes that, rather than transport and process the coal, appellant sold the freshly mined coal at the mine mouth to a third party. In such a situation appellant, as the operator, would be totally liable for the reclamation fee and the black lung tax. The individual who purchased the unprocessed coal would be assessed no costs therefor. Clearly, therefore, the costs of these assessments arise not from the general operations but from the specific act of mining. In this regard, the precedents are well settled: production, severance taxes, reclamation fees and the like, are properly considered to be a cost of production and may not be subtracted from the gross value for Federal royalty computation purposes. *See Peabody Coal Co.*, 72 IBLA 337 (1983); *Knife River Mining Co.*, 43 IBLA 104, 86 I.D. 472 (1979). Accordingly, we must reject appellant's assertion that it should be permitted to deduct any amounts for reclamation

[5] There is a certain disingenuousness to appellant's argument as it relates to the black lung tax and the reclamation fee. In point of fact, according to the audit report, the lowest selling price per ton for the period in question was $21.906 in June 1980. Thus, since both taxes are assessed at the *lower* of either a fixed rate or a percentage rate, appellant, in reality, never once tendered any payments which were dependent upon any of its production or processing costs. Rather, appellant, for every single month, paid the fixed rate provided in the statute which is determined independent of *any* transportation or processing costs.

fees, black lung tax, or the Wyoming severance and county ad valorem taxes.[6]

Appellant's assertions with respect to the overriding royalty which it pays to Rosebud Coal Co. suffers a similar infirmity. Thus, while the *amount* that it pays may be dependent upon allowable transportation and processing cost deductions, its *obligation* to pay any amount is directly attributable to the mining phase. Moreover, since royalty has generally been defined as a share of the production reserved to another party, free of the costs of production, royalty has been held to be a component of the value of the coal at the mine *not* to be apportioned between mining and processing. *Hillard* v. *Big Horn Coal Co., supra* at 301. Thus, we must agree with the Director, MMS, that no deduction may be allowed for the overriding royalty which appellant pays to Rosebud Coal Co.

Finally, with regard to the question of whether a share of profit may be allocated as an indirect cost of transportation and processing, we note, as counsel for MMS has pointed out, that deductions are limited to indirect *costs* attributable to transportation and processing. We also note that while the Director allowed indirect expenses with certain specific exceptions which we have affirmed, he did not purport to decide whether "profit" is a proper element of indirect expenses. While it would seem that costs of capital and costs of debt service may constitute an indirect cost of transportation and processing, we find it premature to rule on the broader question in the absence of an adverse ruling by the Director.

With regard to the question of the deferral of deductions for transportation and processing expenses until the filing of an application therefore within 90 days after the end of the calendar year for which the deductions are claimed, we note that counsel for MMS has modified this position on appeal. As indicated previously, counsel has stated that once deductions are authorized for the first calendar year, this level of deductions could be taken as payments are made during the succeeding year subject to adjustment after the close of the year. Appellant has indicated that it could accept this approach. Hence, the decision is modified in this respect.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, MMS, is affirmed in part, affirmed in part as modified, and reversed in part.

C. RANDALL GRANT, JR.
Administrative Judge

[6] Indeed, since appellant admits that both the severance tax and the ad valorem taxes are based on the value of the coal at the point where the coal "is removed from the pit * * * and prior to any beneficiation or further processing is placed in storage prior to transportation to market" (Exh. 6 at 26), it is difficult to even discern the theoretical basis for its assertion that part of this tax should be allocated to the transportation and processing phase.

July 25, 1988

WE CONCUR:

ANITA VOGT
Administrative Judge
Alternate Member

JAMES L. BURSKI
Administrative Judge

APPEAL OF ROUGH ROCK DEMONSTRATION SCHOOL BOARD, INC.

IBCA-2373 Decided: *July 25, 1988*

Contract No. N00 C1420 9692, Bureau of Indian Affairs.

Denied.

1. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law

Costs allowable under contracts entered into pursuant to the Indian Self- Determination and Education Assistance Act are only those authorized under the contract, regardless of the merits of the expenditures in other respects. Where the Government establishes a prima facie case that certain costs are unallowable under the literal terms of the contract, the burden is upon the contractor to prove allowability.

2. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law

Where a contract entered into under the Indian Self-Determination and Education Assistance Act was specific in providing for advertising expenses only if they were "solely" for the recruitment of personnel, and a preponderance of the evidence indicated that a disallowed color brochure and video tape were intended for both teacher and student recruitment, the Board will not overturn the contracting officer's determination that the costs were unallowable.

APPEARANCES: S. Bobo Dean, Esq., Carol L. Barbaro, Esq., Hobbs, Straus, Dean & Wilder, Washington, D.C., for Appellant; Thomas O'Hare, Esq., Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This case involves an appeal from the Rough Rock Demonstration School (school/contractor/appellant), a Navajo Indian tribal contractor with the Bureau of Indian Affairs (BIA/Government) under P.L. 93-

638, the Indian Self- Determination and Education Assistance Act ("638 cases"), from July 20, 1987, decision of the BIA contracting officer (CO) disallowing contractor expenses in the amount of $50,696.55 on the basis of an audit report, submitted in February 1986 and covering a 3-year period, that had questioned certain costs incurred by the contractor for FY 1985. The contractor appealed $49,043.45 of the disallowed costs.

The disallowed costs that were appealed were originally contained under the heading "Personnel Development" but were later labeled "Advertising" pursuant to a school board resolution in response to concerns raised by the audit report. They were paid for 30,000 copies of a color brochure and for a 12-minute video tape that were produced under contract between the school and a professional advertising firm, allegedly for the purpose of recruiting teachers for the school, but found by the auditors and by the CO to have been for general promotional purposes and for the purpose of recruiting students as well as teachers. For the reasons set forth below, the appeal is denied.

Facts

The contract involved, No. N00 C1420 9692, was for a term of 3 years, commencing on October 1, 1983. It was intended to provide educational services to eligible Navajo Indian students, including residential students. The contractor was to provide all necessary qualified personnel to operate the school, which included lower, middle, and secondary levels; and teachers were required to meet Arizona state certification standards.

In May 1985, BIA conducted an evaluation of the school and recommended that the secondary school be closed because of a shortage of certified teachers. As a result, the school board commenced efforts to recruit qualified teachers, employing its attorney to spearhead the campaign. At least two advertising agencies submitted bids to the school board; and the bid from Usher & Co., dated 1 July 1985, was accepted. Usher & Co. produced several products for the board, including teacher-recruitment advertisements for newspapers and a black and white brochure clearly addressed to potential teachers. The latter expenses were not disallowed by the CO.

However, the color brochure and the video tape, copies of which were provided to this Board, were of a more questionable nature. The color brochure, entitled "Growth Through Navajo Education (Dine' Bi' olta')," emphasizes the quality of existing facilities, instruction, and learning environment, and includes a business reply card whose text states in part, "Yes, I am interested in Rough Rock Demonstration School because of your unique bi-lingual, bi-cultural program," with blanks for the respondent's address and occupation and for the names and birthdates of his or her children. This brochure is characterized by Government counsel as "heavy on student recruitment and light on teacher recruitment" (Government "Points and Authorities" Memorandum (GPA) at 13). We agree with that characterization.

Similarly, although the video tape twice mentions the need for teachers, that need is not emphasized. Rather, the video stresses the integration of Navajo culture into the curriculum, student welfare, and the quality of the (existing?) teaching staff. It shows parents speaking the Navajo language, which is untranslated. Other evidence in the record, particularly statements by both contractor and Usher & Co. employees, obtained by the BIA auditor and further provided by Government counsel, support the conclusion that student recruitment was as much intended as teacher recruitment; and we so find.

Arguments by Counsel

Because the issues in the record were initially not clearly defined, the Board held a conference call with the parties on April 27, 1988, asking for an oral hearing, or else clarifying briefs with citations of authority, even though the case had been submitted for decision on the record.

In response, appellant's counsel primarily argues the equities of the situation. Her views, as set forth in the introduction of her resulting brief, can be summarized as follows (Appellant's Final Brief (AFB) at 12):

> In our view, this case is a classic example of the BIA making "much ado about nothing." Reduced to its essence, the BIA is complaining that a school board spent contract funds to attract children to come to school in a region where the high school drop-out rate is a shocking 56%. While we must emphasize that the School Board undertook the advertising efforts at issue primarily to recruit teachers in order to save its secondary school program, any byproduct of student attraction to school is neither voidable nor undesirable.
>
> Despite several lengthy, indepth conversation with BIA representatives about this issue, we still fail to understand why BIA would take the position that a school board, whose primary responsibility under its contract is to educate children (*see* Admision No. 11), should be prohibited from spending contract dollars on any activity whose byproduct might be that children are encouraged to come to school.

By contrast, Government counsel lists three specific contract clauses with which he contends there has not been contractor compliance: Clauses 308, 335, and 323. Clause 308, requiring Indian preference in connection with any contracts entered into by appellant, may have been raised tangentially by the BIA auditor in complaining about the school's lack of a procurement system (as Government counsel notes); but appellant has not previously been asked to address that issue in connection with this appeal and, in light of our disposition of this case on other grounds, we do not rely on that ground now.

Clause 335 is another story. That clause, entitled "Printing," expressly prohibits the contractor from engaging in, or subcontracting for, any printing in connection with the performance of work under the contract, except for single-color reproductions of under 5,000 1-page units under 25,000 multiple-page units. As Government counsel points out, the procurement of 30,000 copies of the multicolor brochure appears to be "in direct violation" of that clause of the contract (GPA

at 5). Moreover, he argues that if the school has 28 teachers on its staff, and

> [i]n the unlikely event that every teaching position is vacated every year * * * and that twenty brochures are sent out per position, Rough Rock has a 58 year supply of brochures for teacher recruitment. Based upon the large number of brochures printed, there is a logical inference that Rough Rock intended from the time of request for proposals that the brochure would be primarily for student recruitment.

(GPA at 12-13).

However, it is Clause 323 and its reference to Appendix A of 25 CFR 276 (also cited by appellant's counsel, but inaccurately quoted in her brief: AFB at 3) that is most relevant to the allowability of the video tape, which constitutes the major portion of the expenditure that the CO disallowed. Part II (Cost Standards), B (Allowable Costs), 2 (Advertising) states expressly that "[t]he advertising costs allowable are those which are *solely* for: a. Recruitment of personnel required for the * * * program." Government counsel, after quoting this provision verbatim, argues persuasively that since the school's expenditure for the video tape clearly had a dual purpose, it did not meet the requirement of Appendix A. We agree.

Discussion

The Board has spent considerably more time in the review of this case than the amount at stake would otherwise warrant, because we are sympathetic with the difficulties that must have been involved in attempting to operate a school, recruit new teachers and new students, correct past deficiencies, and upgrade and stabilize a curriculum, following a performance evaluation that urged a closing of the secondary school altogether. It cannot be easy to go back and re-read a BIA contract and its incorporated references in connection with each and every action the school board contemplated during the course of the school year.

And yet, that is what a Government contractor--not just a BIA contractor, but *any* Government contractor--is required to do. The appellant in this case can be no exception. Consequently, we cannot grant it the equitable relief it so obviously seeks.

There has been a gradual and logical progression of 638 cases decided by this and other boards, commencing primarily with the appeals of the *Papago Indian Tribe of Arizona*, IBCA-1962 & 1966, 93 I.D. 136, 86-2 BCA par. 18,859, in which the Board first held that such cases were unique and not subject to the Contract Disputes Act (CDA). In *Devil's Lake Sioux Tribe*, IBCA-1953, 94 I.D. 101, 88-1 BCA par. 20,320, we held that tribal contractors are nevertheless entitled to rely on formal decisions by BIA contracting officers--even if they are arguably in conflict with the agency's complex regulatory scheme--since the implementation of these regulations is primarily a BIA rather than a tribal responsibility.

In our reconsideration of *Navajo Community College*, IBCA-1834, 87-2 BCA par. 19,826, a case involving *amicus* intervention by the

Association of Navajo Community Controlled School Boards and by Metlakatla Indian Community, we decided that 638 contracts were to be regarded as self-contained documents, not subject to modification by the application of extrinsic CDA doctrines, such as the usual right of the Government to terminate a procurement contract for its convenience. That view was reinforced by *Alamo Navajo School Board, Inc.*, IBCA-2123-25, 88-2 BCA par. 20,563, in which the Board refused to recognize implied contractual modifications on the basis of evidence of either (1) oral consensus of the parties, (2) general Government policy statements contrary to provisions of the contract, or (3) the existence of alternate legal authority which could provide more generous contract funding but which was not the authority under which the contract was entered into.

Finally, in a decision by the Armed Services Board, *Puyallup Tribe of Indian*, ASBCA 29,802, 88-2 BCA par. 20,640, the board concluded that since 638 contracts are cost-reimbursement contracts, the burden of proving the allowability of expenditures is upon the contractor, once the Government has made a prima facie showing that the claimed costs are not allowable costs under the terms of the contract.

In the case before us, it matters not that the school board may have acted reasonably and in good faith in contracting for promotional materials to serve the dual purpose of attracting both students and teachers, because the language of the contract does not permit such an approach. If the school wanted its advertising expenses to be reimbursed by the Government, as it apparently did, it was incumbent upon the school board to bring its needs to the attention of the CO and to obtain the necessary contract modification to permit the expenditure. Since it did not do so, the CO was within his rights to disallow the costs involved, and this Board has no basis for overturning his decision.

Decision

Accordingly, the appeal is denied.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

WILLIAM F. MCGRAW
Administrative Judge

CLAYTON W. WILLIAMS, JR., EXXON CORP.

103 IBLA 192 Decided: *July 25, 1988*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, cancelling issuance of oil and gas lease W-88886 and reinstating and suspending oil and gas lease offer W-88886.

Reversed.

1. Oil and Gas Leases: Cancellation--Oil and Gas Leases: Lands Subject To--Withdrawals and Reservations: Generally

The Secretary of the Interior has authority to cancel an oil and gas lease issued for lands not subject to leasing at the time of lease issuance. However, where BLM cancels a lease on the basis that oil and gas leasing had been suspended for the lands described in the lease in a previous agreement between BLM and the Forest Service, and it is subsequently shown that the suspension agreement was an improper withdrawal of Federal lands because the agencies failed to follow statutory withdrawal procedures in 43 U.S.C. § 1714 (1982), and the lands described in the lease are otherwise subject to leasing, it is improper to cancel the lease on the grounds the lands were not subject to leasing.

2. Oil and Gas Leases: Bona Fide Purchaser

Where, at the time of lease issuance, BLM's records pertaining to the lease revealed no indication that the lease had been issued in violation of the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1982), but rather indicated that sufficient proper analysis of potential environmental impacts had been completed prior to lease issuance, reliance by an assignee of the lease on the BLM decision to issue the lease is not unreasonable and will support assignee's claim of bona fide purchaser status.

APPEARANCES: C. M. Peterson, Esq., Dwight I. Bliss, Esq., and Laura L. Lindley, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Clayton W. Willams, Jr., and Exxon Corp. have appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated February 24, 1986, cancelling oil and gas lease W-88886, which had been issued to Williams, effective December 1, 1985. This decision also reinstated and suspended Williams' over-the-counter noncompetitive oil and gas lease offer W-88886.

On June 7, 1984, Williams filed an over-the-counter lease offer pursuant to section 17(c) of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 226(c) (1982). The offer described lands within certain sections of T. 45 N., R. 113 W., sixth principal meridian, in Teton County, Wyoming, and within the boundaries of the Bridger-Teton National Forest. In a decision dated July 19, 1984, BLM rejected the lease offer, advising Williams that the described lands had been withheld from oil and gas leasing pursuant to a memorandum from Secretary Krug to the Directors of BLM and Geological Survey (Krug Memorandum), dated August 15, 1947, and published in the *Federal*

Register (12 FR 5859) that same date. *See James Donoghue*, 24 IBLA 210 (1976).

Upon receipt of the decision rejecting Williams' lease offer, counsel for Williams wrote to BLM, explaining that, in his memorandum, Secretary Krug had provided an exception for those lands within T. 45 N., R. 113 W., which were outside the Jackson Hole National Monument (now Teton National Park) and the Teton Wilderness Area, providing that such lands could be leased if they were "deemed necessary to establish or complete a logical unit area." 12 FR 5860.[1] Counsel then noted that certain lands described in Williams' lease offer fell within this exception, and further explained that Exxon Corp. was in the process of forming the Leidy Creek Unit Agreement which included lands in the lease offer. On August 17, 1984, after receiving this additional information, BLM reinstated Williams' oil and gas lease offer with its original priority date.

A review of various events occurring and actions taken between the time of the initial reinstatement of the lease offer and the issuance of the lease and its subsequent cancellation by BLM is important to an understanding of the issues raised in this appeal. Shortly before BLM's August 17, 1984, reinstatement of the lease offer, Exxon's Leidy Creek Unit Agreement, Unit No. 14-08-0001-21145, dated June 16, 1984, was approved by BLM upon recommendation of the Forest Service. The approval of the unit agreement included the notation that the unleased tracts, including the lands within the unit described in Williams' lease offer, were uncommitted but considered to be controlled acreage because, prior to issuance of leases for these tracts, the lessees would be required to commit to the unit agreement. An application for a permit to drill (APD) for the initial unit well was approved by BLM on September 7, 1984; the well was spudded on October 30, 1984, and plugged as a dry hole on January 18, 1985.[2]

BLM began processing Williams' lease offer soon after its reinstatement. On August 17, 1984, BLM forwarded a copy of the lease offer to the Forest Service for review and recommendations. By letter dated October 31, 1984, the Regional Forester advised the BLM Wyoming State Director that the Forest Service had "no objection to the issuance of oil and gas lease W-88886 for lands within the Bridger-

[1] Specifically, this memorandun provided:
"The lands north of the [11th standard parallel] shall continue to be temporarily withheld from leasing under the oil and gas provisions of the Mineral Leasing Act, unless the lands in T. 45 N., R. 113 W. 6th P.M., Wyoming outside the Jackson Hole National Monument and outside the Teton Wilderness Area are deemed necessary to establish or complete a logical unit area."

[2] In their statement of reasons (SOR) for appeal, appellants state that data from the test well demonstrated a need for additional geophysical work prior to determination of the location of the second unit test well. Accordingly, further seismic work was performed during Aug. and Sept. 1985. In Mar. 1986, Exxon filed a Notice of Intent to stake the second unit well, a 12,000-foot test in the NE 1/4 of sec. 2, T. 44 N., R. 113 W., sixth principal meridian, with the test to commence on Sept. 1, 1986, and to be completed in Feb. 1987. However, because the preferred drillsite was a south offset to lands within lease offer W-88886, Exxon requested on Apr. 2, 1986, a further suspension of the unit obligation and lease term, until a final decision in the present appeal. No further information on this request is available in the record on appeal.

Teton National Forest" provided the lease included certain standard and site-specific stipulations described in the letter. The Forest Service also stated that its recommendations were "based on environmental analysis reports for the Bridger-Teton National Forest," and that it did not believe an environmental impact statement was needed at that time. On January 7, 1985, BLM forwarded the stipulations recommended by the Forest Service to Williams, requiring their execution. The stipulations were signed by Williams on January 14, 1985, and returned to BLM.

On the same date that BLM forwarded the stipulations to Williams, it also sent him a notice requiring him to furnish either evidence of commitment of the lease to the Leidy Creek Unit Agreement or a letter from the unit operator stating that he had no objections to lease issuance without unit joinder. On January 17, 1985, Williams executed the Ratification and Joinder to the Leidy Creek Unit Agreement and forwarded the forms to Exxon, the unit operator. By letters dated February 12 and March 8, 1985, Exxon forwarded to BLM the necessary copies of the ratification and joinder, together with signed consent of the working interest owners. Upon receipt of these documents, BLM advised Exxon in a letter dated March 11, 1985, that "Lease W-88886, Unit Tract 15, is to be considered fully committed to the unit, effective as of the date of lease issuance, provided that the lease is issued to Clayton W. Williams, Jr. who has executed a joinder to the unit agreement and unit operating agreement." A copy of this letter was sent to the Forest Service.

BLM took no further action with respect to the lease offer until November 12, 1985, at which time the Rock Springs District Office, in a memorandum to the Wyoming State Office, stated that the lands included in the lease offer did not lie within any known geologic structure of a producing oil or gas field (KGS). Accordingly, the lands were clearlisted for lease issuance.[3] On November 18, 1985, the chief, Oil and Gas Section, of the BLM Wyoming State Office executed oil and gas lease W-88886 to Williams effective December 1, 1985. A copy of the executed lease was forwarded to the Forest Service. The lease as issued covered the following described lands within the Leidy Creek Unit Area:

T. 45 N., R. 113 W., 6th principal meridian

Sec. 26: Lots 1, 2, 3, 4, 5, E 1/2 NE 1/4

[3] Appellants document that a delay in issuing the lease was occasioned by the contention of the Rock Springs District Office that

"leasing within the unit should be delayed until it is determined whether or not the unit is productive. If the unit is productive, and the unleased lands are determined to be part of a KGS [known geologic structure], the minerals should then be leased competitively. In the event drilling for oil and gas fails and the unit is non-productive, then we believe that the intent of the Krug memorandum is not to lease the minerals."

(Memorandum to the State Director from the District Manager dated Sept. 16, 1985). The State Office disagreed, stating:

"[P]arcel W-88886 can no longer be 'held' pending Exxon's *possible* future activities in the area. As your memo indicates, since the lands underlying the referenced parcel are necessary to complete the logical unit area, the Krug memorandum allows leasing of the unleased Federal minerals in T. 45 N., R. 113 W."

(Memorandum to the District Manager from the State Director dated (Oct. 8, 1985 (italics in original).)

27: Lots 1, 2, 3, 4, 5
28: Lot 1
33: S 1/2 SE 1/4
34: S 1/2 S 1/2
35: E 1/2 E 1/2 SW 1/4 NE 1/4, SE 1/4 NE 1/4,
E 1/2 NW 1/4 SW 1/4, SW 1/4 NW 1/4 SW 1/4,
SW 1/4 SW 1/4, E 1/2 SW 1/4, SE 1/4
36: S 1/2 N 1/2, S 1/2

By letter dated December 4, 1985, the Regional Forester complained to BLM concerning issuance of the lease. The letter contained copies of previous correspondence between BLM and the Forest Service. These letters essentially set forth an agreement between the two agencies that noncompetitive oil and gas leasing within the Bridger-Teton National Forest would be suspended by BLM. In the first of these, dated May 29, 1985, the Regional Forester requested, based on "the environmental sensitivity of the Bridger-Teton National Forest, the intense public concern regarding its management, and the anticipated completion of further environmental assessments and/or Forest Plan in the near future" that "further processing oil and gas leases involving the Bridger-Teton National Forest should be delayed until these are completed and we submit new reports."

By letter dated June 10, 1985, the State Director informed the Regional Forester that, pursuant to his request, BLM was returning various letters of recommendation which it had received in January and March 1985. This letter also stated "We will suspend oil and gas lease issuance within the Bridger-Teton National Forest until further advised by you." In a subsequent letter, dated July 25, 1985, the Regional Forester advised the Wyoming State Director that, where drainage of Federal lands was occurring, the Forest Service would, under certain conditions, provide recommendations with respect to competitive leasing.

Despite this exchange of letters, however, Williams' noncompetitive lease offer "was inadvertently overlooked" and a lease ultimately issued on November 18, 1985, with an effective date of December 1, 1985.

When the Regional Forester discovered that BLM had issued the lease to Williams, he requested that it be cancelled as issued in error:

> We realize that the lease was issued through an oversight based on an out-of-date Forest Service report. [4] We, therefore, request that the lease be cancelled as being issued in error and the application be held in suspension. We are basing this request on the following reasons:
>
> 1. NEPA [National Environmental Policy Act] documentation had not been completed prior to lease issuance; therefore, full compliance with the National Environmental Policy Act of 1969 has not be achieved.
>
> 2. The issuance of the lease is inconsistent with your decision as authorized officer to suspend leasing within the Bridger-Teton National Forest.

[4] This reference is to the report dated Oct. 31, 1984, in which the Forest Service had originally notified BLM that it agreed to lease issuance subject to the imposition of a number of stringent stipulations. See note 7, *infra*.

(Letter dated Dec. 4, 1985, from the Regional Forester to the Wyoming State Director).

On December 31, 1985, BLM advised the Forest Service that it was prepared to initiate action to cancel the lease and requested documentation to support the requested cancellation. The Forest Service provided the following documentation on February 10, 1986:

> We requested that you initiate cancellation of W-88886 primarily because NEPA requirements were not fully complied with prior to lease issuance.
>
> Personnel on the Bridger-Teton National Forest are currently working on the Forest-wide Environmental Impact Statement (EIS) and Land and Resource Management Plan. The draft EIS and Plan should be available for public review from April through July 1986. The final documents are not anticipated until mid-1987.
>
> A preliminary environmental review conducted as part of the planning/EIS process indicates that the lands included in W-88886 are within an area of high environmental sensitivity and there is potential for significant environmental impacts.
>
> The lease area is within a grizzly bear habitat area. The grizzly is classified as a threatened species under the Endangered Species Act. Goals for the area are to maintain or improve essential habitat for recovered (viable) populations of grizzly bear and to minimize the potential for and resolve bear/human conflicts. Mineral leasing exploration and development may not be allowed if upon final analysis the grizzly bear may be adversely affected. The management area also contains high visual quality values. This visual sensitivity is due to the lease area being adjacent to the grand Teton National Park and in close proximity to the Teton Wilderness area. It is also located within the greater Yellowstone Ecosystem, an area of significant environmental concern and controversy.

Upon receipt of this information, BLM issued its February 24, 1986, decision cancelling the lease and reinstating and suspending the lease offer. In reaching its decision, BLM found:

> It is apparent from documents received from the Regional Forester that there are significant environmental values in the area: that preliminary environmental and planning assessments to comply with requirements of NEPA and the Endangered Species lease was premature, illegal, and contrary to the express request of the Regional Forester. Further analyses will identify the degree and manner of mitigation necessary in order to meet statutory obligations.
>
> Inasmuch as Lease W-88886 was issued prematurely, in error, and contrary to law, it is hereby cancelled. 43 CFR 3108.3(b). Lease *offer* W-88886 is reinstated and is hereby placed in a pending status until the Regional Forester sends us a final recommendation regarding stipulations or issuance, based on full compliance with NEPA and the Endangered Species Act. 43 CFR 3101.74(c). [Italics in original.]

Appellants then timely filed an appeal from the decision cancelling the lease.

In addition to the above review of the facts relating to the issuance and cancellation of lease W-88886, a review of the circumstances surrounding the assignment of the lease from Williams to Exxon is also important to an understanding of the legal issues raised by this action. Appellants state that by Letter Agreement dated February 25, 1985, Williams agreed to sell and Exxon agreed to purchase certain oil and gas leases, including Federal oil and gas lease application W-88886. The agreement provided for an initial payment upon execution of the Letter Agreement and payment of the balance of the purchase price " 'at such time as the resultant lease is assigned to Exxon' " (SOR at 14). According to appellants, on December 3, 1985, Williams executed and

delivered to Exxon an assignment of the issued oil and gas lease W-88886 and received payment for the balance of the consideration due upon lease issuance and delivery of the assignment. *Id.* This assignment was filed with the Wyoming State Office on December 16, 1985.

Appellants assert on appeal that there is no legal support for BLM's decision to cancel the lease. They argue that the reasons for cancelling the lease submitted by the Forest Service and accepted by BLM do not establish that the lease was improperly issued or subject to cancellation. They further assert that Exxon was a bona fide purchaser of the lease and, as such, should be afforded the appropriate statutory protection as provided in 30 U.S.C. § 184(h)(2) and (i) (1982).

Initially, we note that it is beyond dispute that the authorized officer, pursuant to the delegated authority of the Secretary of the Interior, has broad discretion in determining whether to issue an oil and gas lease pursuant to the MLA. *Geosearch, Inc.* v. *Andrus*, 508 F. Supp. 839 (D. Wyo. 1981). However, once this authority has been exercised and a lease has been formally issued, it can then be cancelled only under certain circumstances. *See David Burr*, 56 IBLA 225 (1981). *Cf. Exxon Corp.*, 97 IBLA 330 (1987) (once the authorized officer has communicated acceptance of a high bid he is thereafter estopped from rejecting the bid for a perceived inadequacy in the amount tendered).

It is, of course, axiomatic that the Secretary has the authority to cancel any lease issued contrary to law because of the inadvertence of his subordinates. *Boesche* v. *Udall*, 373 U.S. 472 (1963); *D. M. Yates*, 74 IBLA 159 (1983); *Fortune Oil Co.*, 69 IBLA 13 (1982). In *Boesche* v. *Udall, supra*, the Supreme Court noted that section 31 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 188(a) and (b) (1982), which provides procedures for cancellation and forfeiture of leases for failure to comply with the conditions thereof, "reaches only cancellations based on *post-lease* events and leaves unaffected the Secretary's traditional authority to cancel on the basis of pre-lease factors." *Id.* at 478-79 (italics in original).

[1] Thus, it is well established that the Department has authority to cancel a lease where the lands described in the lease were not subject to leasing at the time of lease issuance. *See, e.g., Richard H. Clark*, 92 IBLA 353 (1986). Where Federally owned lands that have been legislatively or administratively withdrawn from leasing under the MLA are inadvertently included within a lease, the Department must cancel the lease to the extent it embraces such lands, since, as to those lands, the lease is a legal nullity. *See Hanes M. Dawson*, 101 IBLA 315 (1988). Similarly, where a lease has issued to someone other than the first-qualified applicant, or has been issued in violation of established procedures, it is properly subject to cancellation. *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955); *United States* v. *Alexander*,

41 IBLA 1 (1979), *aff'd sub nom. Alexander* v. *Andrus*, No. 79-603-B (D.N.M. July 7, 1980). In this second instance, however, the lease is considered voidable rather than void. *See Raymond G. Albrecht*, 92 IBLA 235, 242, 93 I.D. 258, 262 (1986). As we shall discuss, *infra*, this distinction is of critical importance with respect to the applicability of the bona fide purchaser protection afforded by 30 U.S.C. § 184(h)(2) (1982).

In the present case, one of the reasons cited by the Forest Service in its December 4 letter as grounds for cancelling the lease was that it had been issued "contrary to our agreement to suspend oil and gas leasing within the Forest until the forest plan and/or further environmental assessments were completed." In its decision cancelling the lease, BLM noted that "issuance of the lease was premature, illegal, and contrary to the express request of the Regional Forester" (Decision at 3). It is unclear whether or not BLM was holding that the mere fact that the Regional Forester objected to lease issuance deprived the State Office of the authority to issue it. If so, BLM is simply wrong.

Under the law prevailing when the lease issued, it is clear that BLM, not the Forest Service, had the ultimate responsibility in determining whether or not an oil or gas lease for public domain land should issue.[5] *See, e.g., Natural Gas Corp. of California*, 59 IBLA 348 (1981); *Earl R. Wilson*, 21 IBLA 392 (1975). Thus, the mere fact that the Regional Forester objected to issuance of the lease could not make issuance improper. Indeed, this Board had repeatedly held in similar circumstances that even where the surface management agency objected to issuance of a public domain lease, it was the responsibility of BLM to independently determine whether or not leasing was in the public interest. *See, e.g., Western Interstate Energy, Inc.*, 71 IBLA 19 (1983); *Esdras K. Hartley*, 54 IBLA 38, 88 I.D. 437 (1981).

It is also possible, however, that BLM was arguing that the effect of the agreement between the Regional Forester and the Wyoming State Director suspending oil and gas leasing in the Bridger-Teton National Forest was to prevent any authorized leasing of the lands in question and could thus serve as a basis for cancelling the lease as having been issued in error. Appellants, in response to such a contention, argue at length that there was nothing precluding the authorized leasing of these lands, and specifically contend that the interagency agreement suspending leasing in the area was an improper withdrawal unauthorized by law and therefore invalid. Thus, appellants assert, the lease cannot be cancelled on the grounds the lands were not available for oil and gas leasing at the time that the lease issued.

[5] We recognize, of course, that sec. 5102 of the Federal Onshore Oil & Gas Leasing Reform Act of 1987, 101 Stat. 1330-256, codified at 30 U.S.C. § 226(h) (1982), *amended* sec. 17 of the MLA by adding, *inter alia*, the following subsec.: "(h) The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture." 101 Stat. 1330-258. But, at the time that the lease issued in the instant case, no such general authority was vested in the Secretary of Agriculture.

It is uncontroverted that the Secretary has general authority to refuse to issue oil and gas leases under section 17 of the MLA, *as amended*, 30 U.S.C. § 226 (1982). *See James M. Chudnow*, 68 IBLA 128 (1982); *David A. Province*, 49 IBLA 134 (1980). The Secretary has traditionally exercised this authority both on an ad hoc basis, in response to specific lease offers, or more formally through his general authority to withdraw land from mineral leasing. *See* 43 U.S.C. § 141 (1970) (repealed by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792); *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). Appellants argue that, since the passage of FLPMA, the Secretary's authority to withdraw lands from leasing is governed by section 204 of that Act, 43 U.S.C. § 1714 (1982), which provides that withdrawal authority can be delegated only to "individuals in the Office of the Secretary who have been appointed by the President," 43 U.S.C. § 1714(a) (1982), and outlines the steps to be taken by authorized individuals in effectuating withdrawals, including the requirement that the Department must notify both Houses of Congress where the withdrawal is larger than 5,000 acres. 43 U.S.C. § 1714(c) (1982). They contend that the indefinite suspension of oil and gas leasing by BLM in the Bridger-Teton National Forest constituted a "defacto withdrawal made by an authorized officer" (SOR at 31). In support of their argument, appellants cite two Federal District Court cases directly on point.

In the first case, *Mountain States Legal Foundation* v. *Andrus*, 499 F. Supp. 383 (D. Wyo. 1980), the Forest Service and BLM, as in the present case, had agreed to a suspension of oil and gas leasing on certain Forest Service lands. In considering the allegation that the "Secretary of the Interior's failure to act on the oil and gas lease applications" was an unauthorized withdrawal under FLPMA, the court first referenced the statutory definition of "withdrawal" found in FLPMA, which states in pertinent part:

> The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purposes of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; * * *.

43 U.S.C. § 1702(j) (1982); *see* 499 F. Supp. at 391. The court then found that

> the combined actions of the Department of the Interior and the Department of Agriculture fit squarely within the foregoing definition of a withdrawal found in 43 U.S.C. § 1702(j). The combined actions of the Secretaries have (1) effectively removed large areas of federal land from oil and gas leasing and the operation of the Mineral Leasing Act of 1920, (2) in order to maintain other public values in the area * * *.

Id. Thus, the court reasoned, since the agencies' moratorium on leasing "fit squarely" within the definition of withdrawal as found in FLPMA, it could only be implemented by proper compliance with the procedural requirements found in 43 U.S.C. § 1714 (1982). Since that

had not occurred, the Court ordered the Secretary to comply with the requirements or "cease withholding said lands from oil and gas leasing."

Appellants also cite the decision in *Mountain States Legal Foundation* v. *Hodel*, 668 F. Supp. 1466 (D. Wyo. 1987), a case of particular relevance to the present appeal. In that case, the Mountain States Legal Foundation (Foundation) filed suit against the Secretaries of the Department of the Interior and the Department of Agriculture challenging BLM's suspension of mineral leasing in the Bridger-Teton National Forest. The Foundation alleged that the suspension was improper, essentially for the same reasons cited by appellants herein, and requested that the Court permanently enjoin the defendents from pursuing the alleged unlawful policies and procedures with respect to processing mineral lease applications.

Consistent with the analysis in *Mountain States Legal Foundation* v. *Andrus, supra*, the court found that "the acts of suspension of mineral leasing and the unreasonable delay in mineral leasing in * * * Bridger-Teton National [Forest] fall squarely within the definition of withdrawal for purposes of [FLPMA]." 668 F. Supp. at 1474. Thus, the Court noted: "The action of the Secretaries is more than mere delay in the leasing process; rather, it involves affirmative action to withhold these forest lands from mineral leasing, thereby limiting leasing activities in order to maintain basic environmental values for an indefinite period of time." *Id.*

In response to arguments by the United States that mineral leasing does not come within the purview of the FLPMA withdrawal provisions, the court turned to the case of *Pacific Legal Foundation* v. *Watt*, 529 F. Supp. 982 (D. Mont. 1981):

> In contrast to arguments asserted by the defendants here, the Montana District Court in the case of *Pacific Legal Foundation v. Watt*, 529 F. Supp. at 995-997, concluded that mineral leasing is included in the definition of a withdrawal based on several factors. First, the term "mineral leasing" appears in several subsections of 43 U.S.C. § 1714. Second, the legislative history's reference to retaining the "traditional meaning" of a withdrawal does not support the conclusion that Congress intended to exclude mineral leasing from the procedural provisions regarding withdrawals of Federal land. Third, the district court distinguished the case of *Udall v. Tallman*, 280 U.S. 1, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965) as applying the use of "withdrawal" only to the specific public land order in question. Fourth, the district court noted that other Secretaries have withdrawn land from mineral leasing under the authority in 43 U.S.C. § 1714 [FLPMA]. For all of these reasons, the district court held that the definition of a withdrawal includes mineral activities under the Mineral Leasing Act.

668 F. Supp. at 1474. The court then found that the "actions taken by the Secretaries in delaying and suspending mineral leasing in the [Bridger-Teton National Forest] is an impermissible withdrawal of land by failure to comply with the requirements of 43 U.S.C. § 1714, and that such action is unlawful as an abuse of discretion and not in accordance with the law." *Id.* at 1475.

In light of the above holdings, particularly that of the District Court in *Mountain States Legal Foundation* v. *Hodel, supra*, it is clear that

the agreement between the Regional Forester and the Wyoming State Director, BLM, cannot properly serve as a basis for the conclusion that issuance of lease W-88886 was contrary to law and thus the lease was a nullity from its inception. Moreover, since, under the court's analysis, the interagency agreement suspending oil and gas leasing in the Bridger-Teton National Forest could not effectuate a withdrawal of the lands in question from leasing, neither could it serve as a basis for cancelling the lease.

[2] Having reached the above conclusion, we must next examine the alternate basis cited by BLM for cancelling the lease; namely, that the requirements of NEPA had not been fully met prior to lease issuance. The Forest Service, in its February 10, 1986, letter documenting its belief that the lease should be cancelled, cited this as the primary reason for cancellation. Agreeing with the Forest Service, BLM in its decision stated:

> It is apparent from documents received from the Regional Forester that * * * preliminary environmental and planning assessments have identified the need for more comprehensive analyses in order to comply with requirements of NEPA and the Endangered Species Act; that these efforts are ongoing; and that issuance of the lease was premature, illegal, and contrary to the express request of the Regional Forester. * * *
>
> Inasmuch as Lease W-88886 was issued prematurely, in error, and contrary to law, it is hereby cancelled.

In essence, BLM is contending that issuance of the lease prior to the preparation of further environmental studies[6] violated the applicable provisions of NEPA. *See* 42 U.S.C. § 4332 (1982). It is impossible for this Board to determine from the record presently before us whether or not the Forest Service and BLM are correct in their assertion that prior Forest Service environmental studies were inadequate. Inasmuch as the decision below involved cancellation of an issued lease, we would have expected that BLM and the Forest Service would have, at a minimum, attempted to document exactly what the deficiencies were in the original Forest Service analyses, since cancellation of this lease was, to a large extent, premised on the existence of such deficiencies. Rather than providing such documentation, however, both the Forest Service and BLM have submitted essentially conclusory statements that further studies are needed, generally referencing the "high environmental sensitivity" of the area.[7] Such generalized statements

[6] While the Forest Service justification mentioned preparation of a Forest-wide EIS, it is unclear whether or not the Forest Service felt that preparation of this document was absolutely necessary *prior* to lease issuance. Thus, its letter of July 15, 1985, informing the Wyoming State Director that it would provide recommendations with respect to competitive leasing of Federal lands where drainage was occurring is inconsistent with the argument that any leasing was impossible until such time as an EIS was prepared.

[7] That the lease involved land in an environmentally sensitive area was certainly known to the Forest Service when it initially recommended lease issuance on Oct. 31, 1984. Indeed, a review of the many restrictive stipulations which were placed on the lease at the request of the Forest Service discloses that the Forest Service was duly attentive to a vast array of possible environmental problems. Thus, one stipulation expressly advised the lessee that the presence of any threatened or endangered species "may result in some restrictions to the operator's plans *or even disallowing any use or occupancy that would detrimentally affect any of the species.*" Surface Disturbance Stipulations at 6 (italics supplied).

do not provide sufficient support for cancellation of the lease in the instant case.

In any event, however, it is important to note that NEPA is essentially a procedural rather than action-forcing statute. *See Strycker's Bay Neighborhood Council* v. *Karlin*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 591, 558 (1978); *Park City Resource Council, Inc.* v. *U.S. Department of Agriculture*, 817 F.2d 609, 616 (10th Cir. 1987). In other words, nothing in NEPA, in and of itself, requires the selection of one course of action. What NEPA does require, however, is that "the Government officials determining whether those actions should go forward have a full and complete grasp of the possible consequences of the activity in order that they may take steps to ameliorate adverse impacts to the extent possible, and, if certain impacts cannot be avoided, decide the advisability of proceeding and thereby accepting such impacts." *State of Wyoming Game & Fish Commission*, 91 IBLA 364, 367 (1986).

The importance of the foregoing is that, since NEPA is primarily procedural, even if a lease were issued in violation thereof, such a lease would be merely voidable rather than void. And this distinction becomes of critical relevance with respect to Exxon which asserts that it is entitled to the bona fide purchaser protection afforded by 30 U.S.C. § 184(h) (1982).

Thus, 30 U.S.C. § 184(h)(2) (1982) provides, in pertinent part:

> The right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease or interest therein * * * which * * * lease [or] interest * * * was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, [or] interest * * * was acquired * * * may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation.

The regulation implementing this statutory mandate, 43 CFR 3108.4, further provides:

> A lease or interest threrein shall not be cancelled to the extent that such action adversely affects the title or interest of a bona fide purchaser even though such lease or interest, when held by a predecessor in title, may have been subject to cancellation. All purchasers shall be charged with constructive notice as to all pertinent regulations and all Bureau records pertaining to the lease and the lands covered by the lease.

There are two discrete questions which must be answered in order to determine whether a party qualifies for bona fide purchaser protection. First, was the land embraced in the lease properly subject to leasing in conformity with the statute under which the offer was made? Second, if the answer to this first question is in the affirmative, is the assignee a bona fide purchaser for value?

The first question is relevant since, as the Board has long held, bona fide purchaser protection applies only where the land was, in fact, available for leasing at the time that the lease issued. Thus, where the United States has reserved no mineral interest in patented lands, a lease issued therefor is a nullity and, regardless whether an innocent

third-party has purchased the lease, 30 U.S.C. § 184(h)(2) (1982), can afford the individual no protection against cancellation of such an erroneously issued lease. A similar result has obtained where a noncompetitive lease was issued for lands subject only to competitive leasing (*Lee Oil Properties*, 85 IBLA 287 (1985)), where land was leased under the MLA when it was only subject to leasing under the Right-of-Way Leasing Act of 1930 (*William L. Ahls*, 85 IBLA 66 (1985)), and where the lands were located within a wildlife refuge not subject to leasing (*Oil Resources, Inc.*, 14 IBLA 333 (1974)). The important point here, and the fact which distinguishes the instant case from those cases in which we have held that bona fide purchaser protection was not available, is that bona fide purchaser protection is only available where the issuance of the lease involved a procedural defect; it is not available where no lease could properly issue for the land.

In the present case, even were we to assume that the Forest Service and BLM were correct in their assertions that an inadequate NEPA review had been conducted prior to lease issuance, this would not render the lease void. Rather, inasmuch as a lease might still issue after the completion of the environmental review, premature issuance of a lease renders the lease voidable. As such, the protection afforded by 30 U.S.C. § 184(h)(2) (1982), is available if an assignee can show that he is otherwise qualified under the Act.

Whether or not a party qualifies as a bona fide purchaser within 30 U.S.C. § 184(h)(2) (1982), depends on common law standards. Thus, a bona fide purchaser has been defined as one who acquires his interest in good faith, for valuable consideration, and without notice, actual or constructive, of any violation of the statute or regulations in the issuance of the lease. *Southwestern Petroleum Corp.* v. *Udall*, 361 F.2d 650, 656 (10th Cir. 1966); *See Winkler* v. *Andrus*, 614 F.2d 707 (1980); *Oil Resources, Inc., supra*. The above standards are controlling in ascertaining whether Exxon qualifies as a bona fide purchaser.

We note initially that there are no allegations of bad faith on the part of the parties to the assignment. Rather, the record before the Board indicates that the assignment was the direct result of Exxon's interest in the unit to which this lease had been joined. Also, the payment of valuable consideration is not an issue in this case. In a recent decision, the Board stated the rule that bona fide purchaser protection applies only where consideration has actually been paid prior to actual or constructive notice of an outstanding interest or defect in title. *Robert L. True*, 101 IBLA 320, 324 (1988), and cases cited therein. In their statement of reasons, appellants explain that Exxon committed to purchase lease W-88886 from Williams upon lease issuance under an agreement dated February 25, 1985, and paid Williams a portion of the consideration at that time. On December 3, 1985, 9 days before receipt by BLM of the Forest Service's objections to lease issuance, Williams delivered the assignment of the issued lease to

Exxon, also dated December 3, 1985, and Exxon paid the balance of the purchase price due (SOR at 21). As explained below, Exxon had no notice of any purported defect in lease issuance until after the transfer of the lease and payment of the purchase price of the lease.

To determine whether an assignee is a bona fide purchaser, it is necessary to examine the state of his knowledge, both actual and constructive, at the time of the assignment. *Jack Zuckerman*, 56 IBLA 193, 201 (1981). *Winkler* v. *Andrus, supra*; *O'Kane* v. *Walker*, 561 F.2d 207 (10th Cir. 1977). Assignees of Federal oil and gas leases who seek to qualify as bona fide purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment. *Winkler* v. *Andrus, supra*. An assignee is not, however, required to go outside those BLM records relating to the particular parcel of land assigned. *Id.* We further note that it is the responsibility of BLM to adjudicate lease offers, and the bona fide purchaser has a right to presume that BLM has properly discharged this duty. *David Burr, supra* at 230.

It appears from the information provided by appellants, unrefuted by BLM, that they had no actual knowledge of any defects in the lease at the time of the assignment. As noted above, assignment occurred 9 days before BLM received the Forest Service letter. BLM has provided no information that would indicate the parties to this appeal had requisite actual knowledge of the Forest Service's position made known in its December 4, 1985, letter.

Further, nothing contained in the record at the time of assignment could have served to put appellants on notice that there was a problem with lease issuance.[8] The Board has held that constructive knowledge will be imputed where the facts are sufficient to cause an ordinarily prudent person to make further inquiry which, if followed with reasonable diligence, would lead to discovery of the defects in lease issuance. *David Burr, supra; Winkler* v. *Andrus, supra* at 712; *Southwest Petroleum Corp.* v. *Udall, supra* at 657. Appellants herein note:

> At the time the assignment was made and the final consideration paid, there was nothing in the casefile which would have put Exxon on notice that lease W-88886 may have been improperly issued. It contained the application; the recommendations of the U.S. Forest Service relative to issuance and stipulations; evidence of unit joinder; the clearlisting; and had been reviewed all the way to the State Director's office prior to lease issuance.

(SOR at 21).

with specific reference to the second reason given by the Forest Service and BLM for cancelling the lease, we note that nothing in the record at the time of assignment indicated any lack of compliance with

[8] In response to a request by counsel for appellants, the Wyoming State office, in a letter dated Apr. 9, 1986, verified that copies of the correspondence between the Regional Forester and the State Director (dated May 29, June 10, and July 25, 1985) relating to the suspension of oil and gas leasing in the Bridger-Teton National Forest were not placed in the casefile until "on or about December 15, 1985." The letter explained: "The subject exhibits were placed in casefile W-88886 * * * because of the comments made by [the Regional Forester] dated December 4, 1985 (received December 12, 1985 * * *."

the NEPA requirements. Rather, on record was the October 31, 1984, Forest Service report stating it had "no objection" to lease issuance provided certain stipulations were executed by Williams. The Regional Forester concluded the report by stating: "Our recommendations are based on environmental analysis reports for the Bridger-Teton National Forest. We do not believe an environmental statement is needed at this time." This is the last statement by the Forest Service relating to environmental compliance found in the record up to the December 4, 1985, letter objecting to lease issuance placed in the casefile on December 12, 1985.

In the present case, the October 31, 1984, report, which was the only Forest Service statement in reference to the Williams' lease offer on record at the time of lease issuance, effectively averred that sufficient environmental analysis of lease impacts had occurred. Further, stringent stipulations designed specifically to protect the land from environmental impacts and requiring its restoration after the completion of any surface-disturbing activities had been agreed to by Williams. These stipulations were formulated by the Forest Service in conjunction with its review of potential environmental impacts from oil and gas leasing. Thus, there was nothing to indicate to Exxon the purported lack of NEPA compliance upon which BLM relied to cancel the lease. We further agree with appellants that the documents in the record gave every indication that the lease had been properly issued. In particular, we note that the Wyoming State Director, in a memorandum dated October 8, 1985, expressed the opinion that the lease offer should "no longer be 'held' " but should be processed for clearlisting and lease issuance.[9] *See also* Memorandum to the State Director from the District Manager dated November 12, 1985. In light of the fact there was no indication in the record or elsewhere that Exxon was or could have been aware of any impropriety in lease issuance, and the fact Exxon meets the other qualifications of a bona fide purchaser, we hold that the protection provided under 30 U.S.C. § 184(h)(2) (1982), precludes BLM from cancelling lease W-88886 as to Exxon. *Cf. Champlin Petroleum Co.*, 99 IBLA 278 (1978).[10]

[9] This memorandum also undercuts BLM's assertion that lease issuance was unauthorized. This memorandum, which is dated after the correspondence between the Regional Forester and the State Director with reference to the suspension of oil and gas lease issuance in the Bridger-Teton National Forest, would certainly give rise to the conclusion that issuance of this lease was not forestalled by the agreement.

[10] The record also reflects that prior to the lease assignment to Exxon, Williams had conveyed a 2-percent overriding royalty interest to various individuals. This assignment is dated Dec. 2, 1985, and is noted on the Exxon assignment. There is nothing to show that this assignment was not done in good faith, without consideration, or with any knowledge of the grounds cited by BLM for cancelling the lease. Accordingly, it is proper to extend bona fide purchaser protection to these assignees as well.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision cancelling noncompetitive oil and gas lease W-88886 is reversed.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

APPEAL OF RHC CONSTRUCTION

IBCA-2083 Decided: *July 26, 1988*

Contract No. 5-CC-20-02770, U.S. Bureau of Reclamation.

Sustained in part.

Contracts: Disputes and Remedies: Termination for Convenience

Where a construction contractor, to assure compliance with the contract completion period, engages in planning and organizational activities prior to the actual performance period, the settlement process, under a subsequent termination for the convenience of the Government, requires reimbursement of the reasonable costs incurred by such contractor for such activities, as well as reimbursement of the reasonable costs incurred in preparing and supporting his settlement proposal. The contrary result would penalize the conscientious contractor and be out of harmony with contract clauses and regulations pertaining to terminations for the convenience of the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

A solicitation for bids was issued by the Bureau of Reclamation (BOR) on September 28, 1984, entitled, Rock Barrier Outlet Works Stilling Basin, Trinity Dam, Trinity River Division, Central Valley Project, California. The scope of the work consisted of drilling submerged holes for support pipes; furnishing, fabricating, and placing support pipes and rock barrier panels; grouting the support pipes permanently in place; and removal of debris from the stilling basin. The subject fixed-price contract was awarded to RHC Construction (appellant or RHC or contractor) in the amount of $197,150 pursuant to a letter dated December 21, 1984.

RHC is a small, one-man construction company, normally just doing one job at a time, with the owner himself acting as field supervisor, performing common labor on most of the contracts, and handling the

typing, bookkeeping, and other necessary office work, including drafting and charting (Tr. 14-16). On January 15, 1985, by telegram, the contract was terminated for the convenience of the Government and the contractor notified that all work was to cease immediately. The explanation for the termination was given at the hearing (Tr. 95-98), in substance, as follows:

> At Trinity Dam, there is an auxiliary outlet works, a main outlet works, and a main power plant. Those three diversions are capable of taking water out of Trinity Lake. Around the time of the bid opening for the subject contract, the BOR was in the midst of a rewind of one of the power units, so the power plant was down and water could not be put through that diversion. The auxiliary outlet works was under construction and that contract was almost completed, but, after award of the subject contract, the BOR engineers felt that the auxiliary outlet works construction should be tested before proceeding with the subject contract, to be sure that while the subject contract was being performed, flood flows could be controlled. The auxiliary outlet works diversion was tested on January 10, 1985, and the gates were found to be defective. Therefore, it was decided that the subject contract should be postponed and the termination for the convenience of the Government issued.

Mr. Richard E. Crepeau, the owner of RHC, was notified by telephone on November 17, 1984, that he was the successful bidder for the project. Upon being advised that he was the successful bidder, Mr. Chapeau immediately began working on the project, particularly, by lining up the required steel pipe, which was not easily obtainable and which had to be fabricated. Some pipe manufacturers would have required longer to supply the pipe than the Government allowed to complete the whole job. He did manage to find a firm with steel pipe in stock and another firm which could fabricate it within 4-1/2 weeks. The Government had allowed only 8-1/2 weeks for the entire contract performance. Mr. Crepeau also felt it necessary to, and did, locate a qualified underwater drilling firm to do the highly technical underwater work, so that it would be ready to perform in a timely fashion. The following chronology of correspondence highlights, in substance, the setting from which this dispute developed:

1. Letter dated 1/17/85 from the United States Bureau of Reclamation (USBR) to RHC confirmed telegraphic termination for the convenience of the Government under Clause I.2.17, "Termination For Convenience of the Government" (Fixed-Price Construction) (Apr. 1984) Alternate I (Apr. 1984)," contained detailed instructions to contractor and offered to provide the necessary settlement forms upon request.

2. Letter dated 1/23/85 from USBR to RHC acknowledged request for and transmitted Standard Forms (SF) 1436 and 1438. The CO included the following, as the last sentence of the letter: "Although SF 1436 is sent to you as per your request, it is suggested you first consider using SF 1438, short form, assuming your proposal will be less than $10,000."

3. Letter dated 1/31/85 from RHC to USBR transmitted Settlement Proposal Form 1436 requesting payment in the amount of $15,417.57,

together with Schedule of Accounting Information Form 1439, and advising that if the bonds are returned to RHC, their cost may be deducted from the settlement proposal.

4. Letter, dated 2/7/85 from the contracting officer (CO) to RHC, in response to settlement proposal, requested extensive backup documentation for proper evaluation of proposal.

5. Letter, dated 2/11/85 for RHC to USBR, wherein Mr. Crepeau stated that, under Section 49.201 of the Federal Acquisition Regulations (FAR), he felt the demands of the letter of 2/7/85 were "totally unwarranted," and that enough information had been given to permit final negotiation of the settlement proposal.

6. Letter, dated 2/14/85 from the CO to RHC, responded by construing the contractor's letter of 2/11/85 as a refusal to verify costs, denied all of the claimed costs, and returned the contractor's performance and payment bonds, as he had previously requested.

7. Letter, dated 2/19/85 from Mr. Crepeau to CO, stated that CO had misconstrued the letter of 2/11/85; that he would provide the information requested, but that it would simply add to the costs to assemble it; that if the CO would reconsider his position he, the owner of RHC, would be happy to meet and negotiate a settlement–as contemplated by the regulations.

8. Letter, 2/25/85 from CO to Mr. Crepeau, disagreed with Mr. Crepeau's interpretation of the regulations, but did agree to meet and discuss the amount of the claim provided the backup data previously requested was furnished at the meeting or beforehand.

9. Letter, dated 3/3/85 from Mr. Crepeau to CO, stated that he was convinced that further arguing about the regulations was fruitless; that it would not be easy to prepare and submit the documentation the CO was demanding and to do so, he would be engaging the services of his attorney and accountant, whose fees would be added to the original proposal.

10. Letter, dated 4/15/85 from RHC to CO, answered questions asked in CO's letter of 2/9/85, requested reconsideration of the determination previously made denying all of the claimed costs, and enclosed Exhibits A through G which included backup documentation and a revised Settlement Proposal Form 1436, requesting $16,091.42.

11. Letter, dated 7/19/85, was the transmittal of the CO's determination of RHC's Revised Settlement Proposal wherein the CO allowed only $3,411.87 of the $16,091.42 claimed. The general breakdown of the categories shown in the determination are as follows:

Schedule from Form 1436	*Claimed*	*Allowed*
Schedule A - Indirect Factory Expense	None	None
Schedule B - Other Costs	$9,743.12	$1,676.22
Schedule C - G & A Expense	487.16	83.81
Schedule D - Profit	974.31	176.00
Schedule E - Settlement Expense	4,633.02	1,475.84
Schedule F - Settlement with Subcontractors	253.81	0.00
Total	$16,091.42	$3,411.87

The CO's determination was based primarily on two premises: (1) That the contractor's alleged expenses for *performance* of the contract were only allowable if incurred between the date of receipt by the contractor of the notice of award, December 22,1984, and the date of the notice of termination on January 15, 1985; and (2) that the contractor's alleged settlement expenses were allowable only if they, in kind and amount, "would have been incurred by a reasonable and prudent businessman in settling with subcontractors, suppliers, and the Government" (AF-28).

The major single item difference between the contractor's proposal and the CO's determination was with regard to Mr. Crepeau's salary. The appellant claimed 7 weeks at $1,240 per week or $8,680 for contract performance salary and 2 weeks at the same rate, or $2,480, for his salary as part of the settlement expenses.

Having received the Government's allowance of $3,411.87, Mr. Crepeau on appeal to this Board requests the balance of his revised settlement proposal, or $12,679.55.

Discussion

RHC contends that its settlement proposal was prepared in conformance with the contract specifications and the Federal Acquisition Regulations (FAR) regarding settlements arising out of terminations for the convenience of the Government, while the CO's determination was not. RHC also alleges generally that the Government did not attempt to abide by the intent and spirit of the regulations, that is: to negotiate reasonably and avoid hair splitting.

The terminated contract involved here contained the standard Termination for Convenience of the Government (Fixed-Price Construction) clause (Alternate I, April 1984). This clause provided, in substance, that if the contractor and the CO fail to agree on the whole amount to be paid the contractor because of the termination of work, the CO shall pay the contractor the amounts determined as follows:

> (1) For the cost of contract work performed before the effective date of termination, including the cost of settling and paying terminated subcontracts and a sum as a profit on the cost of the contract work, as determined under 49.202 of the Federal Acquisition Regulation (FAR); and
>
> (2) For the reasonable costs of settlement of the work terminated, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data.

This clause also provided that the cost principles and procedures under Part 31 of FAR, in effect on the date of the contract, shall govern all costs claimed, agreed to, or determined under this clause.

Significant FAR provisions applicable here are 31.205.42, pertaining to Termination Costs under Contract Cost Principles and Procedures, and Subpart 49.2--Additional Principles for Fixed-Price Contracts Terminated for Convenience. Section 31.205.42(c) provides that, under

termination situations, initial costs, including starting load and preparatory costs are allowable, and that preparatory costs incurred in preparing to perform the terminated contract include such costs incurred for initial plant rearrangements and alterations, management and personnel organization and product planning. The *general* principles to be applied in determining the costs to be allowed a contractor where his fixed-price contract is terminated for convenience are delineated in 49.201 FAR as follows:

(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgement and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgement, as distinguished from strict accounting principles, is the heart of a settlement.

(b) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs and profit comprising this amount.

(c) Cost and accounting data may provide guides, but not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting related to settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

Other regulations relevant to this appeal include 31.205-32 FAR relating to precontract costs and 31.109 FAR pertaining to advance agreements. Read together, these two regulations provide: (1) That precontract costs, those incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award and necessary to comply with the proposed contract delivery (completion) date, are allowable to the extent they would have been allowable if incurred after the effective date of the contract; and (2) that to avoid possible subsequent disallowance or dispute, contracting officers and contractors should seek advance agreement on treatment of special or unusual costs; nevertheless, an advance agreement is not an absolute requirement and the absence of an advance agreement on any costs will not, in itself, affect the reasonableness or allowability of that cost.

For case authority dealing with the foregoing contract clause and FAR regulations, *see Superior Asphalt & Concrete Co.*, AGBCA 7542 (Nov. 16, 1977), 77-2 BCA par. 12,851; *Codex Corp.*, Court of Claims Order, No. 371-77 (Feb. 14, 1981), 226 Ct. Cl. 693, 23 G.C. par. 239; *Building Maintenance Specialists, Inc.*, DOT CAB 71-4 (June 28, 1971), 71-2 BCA par. 8954; *Kassler Electric Co.*, DOT CAB 1425 (May 21, 1984), 84-2 BCA par. 17,374, 26 G.C. par. 17,326; *Cellesco Industries, Inc.*, ASBCA 22,460 (Mar. 30, 1984), 84-2 BCA par. 17,295; and *General Electric Co.*, ASBCA 24,111 (Mar. 30, 1982), 82-1 BCA par. 15,725.

In his letter to RHC, dated February 14, 1985, the CO stated the Government's position to be: (1) That the intent of FAR 49.201 was "to allow for flexibility in negotiating a settlement of a termination for

convenience, not to relieve the terminated contractor from all obligations to verify his alleged costs"; (2) that it should be emphasized that FAR 49.201(c) requires the minimum amount of recordkeeping and accounting to be *compatible with the reasonable protection of the public interest*; and (3) that "the public interest is not protected or served by honoring unsubstantiated claims for payment."

The record here clearly shows that the CO made no reasonable attempt to negotiate a settlement amount with Mr. Crepeau. Instead, the CO remained aloof, directed his representatives to meet with appellant, and took no initiative to ascertain what documentary support appellant might have, but which had not yet been furnished. Also, nowhere in this record do we find any citation of authority for the Government position, taken in it July 19, 1985, settlement determination, that the contractor's costs were unallowable if incurred prior to the contract award. In fact, that position appears to be contrary to the provisions of FAR 31.205-32 discussed above. Finally, although we appreciate the CO's concern for the public interest, its application as a *generality* is inappropriate where the regulations *specifically* require flexible negotiation.

We observe that the evidence produced by RHC in this appeal consisted of appellant's exhibits 1-16A supplementing the Appeal File, the testimony of Mr. Crepeau at the hearing (Tr. 7-93), and appellant's hearing exhibits A-H. Appellant's hearing exhibit H is a detailed recapitulation of the activities of Mr. Crepeau from November 29, 1984, through April 15, 1985. This exhibit shows that he spent a minimum of 285 hours on the subject project, including the preparation and support of his settlement proposal. The other documentation and his testimony corroborate the claim of time spent, and the documentary evidence includes receipts and vouchers showing that out-of-pocket expense was incurred for such things as telephone communications, travel, lodging, rental of diving gear, preparation of a critical path chart, and negotiating and preparing subcontracts.

The Government's evidence, on the other hand, is conspicuous by its sparsity. Other than the Appeal File, it consisted of one hearing exhibit (GX-1) and one witness. The hearing exhibit was a copy of Mr. Crepeau's calendar appointment book, by which, under cross-examination, the Government unsuccessfully attempted to discredit Mr. Crepeau's testimony. The one Government witness was Mr. Matthew Rubmoltz, Chief of the Civil Engineering and Repayment Division in Shasta Dam. His relationship with the subject contract was that he was the representative of the designated Administrative CO. His testimony consisted of an explanation of the rationale for the termination, summarized above and his communications, or lack thereof, with Mr. Crepeau (Tr. 93-100). Although appellant's accounting system was unorthodox and incomplete in many respects,

the Government failed to contradict appellant's evidence of time spent and expenses incurred.

Appellant's evidence clearly preponderated over that adduced by the Government, and on the basis of the entire evidentiary record, and our analysis thereof, we make the following ultimate findings of fact.

Findings of Fact

1. In order to assure timely performance of the subject contract, appellant spent a minimum of 157 hours, prior to termination, in planning and organizing by preparing work schedule charts, lining up materials and subcontractors, and making site visits to determine working conditions.

2. The work performed and time spent by appellant on the subject contract before termination would likewise have been performed and spent by any conscientious and prudent contractor, under similar circumstances, and would have been necessary to perform the contract in the time allowed had there been no termination.

3. Because of the rigid requirements imposed by the CO for backup documentation and detailed proof of work hours and costs in support of appellant's settlement proposals, appellant after termination, was required to, and did, spend a minimum of 128 hours, and incurred costs, with respect to the preparation of, and furnishing documentary support for, his settlement proposals.

4. Contrary to the intent and purpose of the FAR regulations pertaining to terminations for the convenience of the Government, the CO and his representatives failed to negotiate and attempt settlement with appellant on a business judgment approach, but instead, attempted settlement by strict accounting procedure.

Although we conclude appellant's evidence adduced in this appeal is sufficient, on a business judgment basis, to support entitlement to substantially all he has claimed in his final settlement proposal, we find that his accounting system and cost records do not permit precise calculation of his actual costs. Therefore, we further conclude that a jury verdict approach is in order for our decision.

Decision

We hold that when a construction contractor undertakes a course of action to assure compliance with a contract completion period by engaging in planning and organizational activities in advance of the actual performance period, the settlement process, pursuant to a subsequent termination for the convenience of the Government, requires reimbursement of the reasonable costs incurred by such contractor for such advance planning and preparation, as well as reimbursement of the reasonable costs he incurred in preparing and supporting his settlement proposal. The contrary result would penalize the conscientious contractor and be out of harmony with the purpose

and intent of the contract clauses and regulations pertaining to terminations for the convenience of the Government.

Accordingly, based on the preceding findings and conclusions and on a jury verdict approach, it is our decision that appellant is entitled to recover from the Government the total sum of $11,000, plus interest as allowed by law from April 15, 1985, the date of the final settlement proposal.

DAVID DOANE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1988 O - 219-188 : QL 3

August 8, 1988

APPEAL OF QUALITY SEEDING, INC.

IBCA-2297 Decided: *August 8, 1988*

Contract No. 5-CS-5D-04180, Bureau of Reclamation.

Sustained.

1. Contracts: Disputes and Remedies: Appeals--Evidence: Admissibility

A document gathering, compiling and restating items in evidence as supplemented by items not in evidence and developed through the use of assumptions based on items not in evidence or on faulty interpretations of items in evidence was ordered struck from the Government's post hearing brief, because the record was closed and because the document presented additional matter which was not subject to cross-examination and rebuttal by the appellant.

2. Contracts: Disputes and Remedies: Damages: Generally--Contracts: Disputes and Remedies: Termination for Convenience

In a termination for convenience case, where the contractor proved its cost to complete the terminated portion of the work, the record provided all of the figures necessary to determine the proper amount of profit to be included in the quantum; when the Board considered the profit factors set out in FAR 49.202 as the contract required in a termination for convenience, it found that the amounts proved entitled the contractor to an amount of profit consistent with the quantum amount requested and granted the appeal in that amount.

APPEARANCES: Peter N. Ralston, Oles, Morrison, Rinker, Stanislaw & Ashbaugh, Seattle, Washington, for Appellant; Emmett M. Rice, Department Counsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal by the contractor from a final decision of the Contracting Officer (CO), dated January 6, 1987, following a partial termination for the convenience of the Government. Because the parties were unable to settle the claim, the Government, through the final decision, undertook to settle the dispute by determination. The decision resulted in a payment to appellant, Quality Seeding, Inc. (QSI), of $31,119.55 above payments already made during the performance period. QSI now contends that it is entitled to $70,345 above the determination amount, but has waived its right to any amount in excess of $50,000.

Background

The Bureau of Reclamation (BOR) was in charge of the development and construction of various water conveyance channels as part of a larger water project in Colorado known as the San Luis Valley Project (Tr. 152). As the channels were completed, there arose a need to reclaim the areas contiguous to the channel that had been disturbed

during construction. To that end, BOR contracted with QSI to accomplish that reclamation on 198 acres of land, that we now refer to as Reach B, contiguous to such a channel near Alamosa, Colorado. The contract called for QSI to seed, fertilize, mulch, and water the area during a period beginning May 1, 1985. As originally planned, QSI was to complete the seeding, fertilizing, and mulching portions of the work by June 15, 1985, and then under a separate pay item to continue irrigating the areas until the first killing frost after September 1, 1985, using a temporary irrigation system which it was to furnish, install, operate, and then remove (Appeal File (hereinafter referred to as "AF"), Tab 48).

As QSI prepared to mobilize, BOR contacted QSI to notify the latter of a deferral, to mid-May, of the start date for the work. As the middle of May approached, BOR notified QSI that the delay would be longer. The reason for the delays was that the contractor constructing the channel found it necessary to work beyond its expected completion date (albeit still within the performance period allowed by its contract) (Tr. 26-28).

At that time BOR suggested a modification to the contract which would have QSI doing similar work along a 62-½-acre area contiguous to another channel in the project, some 8 to 10 miles away from Reach B. QSI agreed to the suggestion, and Modification 1 to the contract added the work in an area we refer to herein as Reach A (Tr. 27-28, 30). Although the work, seeding, fertilizing, mulching, and irrigating, was similar for Reach A to that contemplated for Reach B, there were differences for the Reach A work which resulted in its being considerably more difficult on a proportional basis than the contemplated work on Reach B. These differences included different soil and grading conditions which required changes in the materials specifications and the methods for performing the work, proportionately greater numbers of physical obstacles in and adjacent to the Reach A channel interfering with operating efficiency, and other differences which required the modification of some contractor equipment and the mobilization of additional specialized equipment to be used only on Reach A (Tr. 29-32). Also, there were two construction contractors on Reach A at the same time QSI was there, and their presence obstructed and delayed QSI's work on a regular basis. QSI contends that it did not expect to have such problems with other contractors and that BOR had not notified it that they would be present (Tr. 34-36).

By the middle of June 1985, the Reach A non-irrigation work was close enough to completion that QSI was beginning to think about transferring its efforts to Reach B. It appeared, however, that the construction contractor still had work to complete there so that entry by QSI to perform its contract at that time was extremely problematic (Tr. 38-42). BOR's solution was to terminate for its convenience "all remaining work on Reach B" (AF, Tab 7).

There followed a lengthy period of efforts by the parties to settle the claim arising from the partial termination for convenience. Because the parties were unable to agree, the CO settled the claim by determination in a decision dated January 6, 1987. The decision, after taking prior payments of $180,580 into account, directed additional payment of $31,120 to QSI. (The contract amount for completed work was $297,893, including the Modification 1 (Reach A) work and an additional purchase order in the amount of $4,410 (AF, Tab 42, at 44; Tab 32, at 1; Tab 45). It is because QSI believes it is entitled to substantially more than the $31,120 found due by the CO that it has taken the current appeal.

Discussion

Much hearing time and briefing have been expended on a great number of issues that we find unnecessary to decide because of the peculiar circumstances of this case, namely that QSI has reduced its claimed entitlement to $50,000. [1] Our view of the case is that we may decide it by referring only to a profit analysis using as a basis certain cost figures conceded by both parties to be proper.

The CO directed that the total cost approach be used as QSI presented its settlement proposal (Tr. 49; AF 13; QSI Br. at 11). BOR in fact appears to contend that the "total cost approach would be the most equitable to both parties because of the lump sum items" (BOR Br. at 2). Normally the total cost approach is used only to determine the proper recovery for an extra or additional work or quantities where the circumstances make a delineation between the original work and the added work difficult or it is otherwise impractical or impossible to segregate the costs of the two components. *See J.D. Hedin Construction Co.* v. *United States*, 347 F.2d 235 (Ct. Cl. 1965); *Rondo Electric*, IBCA-2020 (June 29, 1987), 87-3 BCA par. 19,966, 24 IBCA 157; *Robert McMullan & Sons, Inc.*, ASBCA No. 19120 (Aug. 10, 1976), 76-2 BCA par. 12,072. In this instance, the total cost approach avoids the necessity of dividing costs between the Reach B and Reach A components. The allocation process is always difficult and the total cost approach avoids the need for allocation of particularly troublesome overlapping items, especially mobilization and demobilization costs. Insofar as the parties agree on applicability of the total cost approach, we use it as an aid in our decision of the case.

Accepting the allowable costs proposed by BOR for direct cost items and G&A expenses about which issue was joined but which we have declined to consider (see note 1 and the first paragraph of this Discussion section) and adding to that figure the amount of costs that QSI would have incurred if it had completed the project, we may reach

[1] We note that our determination of quantum using the total cost approach including the calculation of profit as a percentage based on the work accomplished precludes the necessity of detailed consideration of many specific cost items on which the parties differed. All the specific cost items are subsumed in our determination of quantum.

a sum that provides a total projected cost. By deducting that sum from the total contract price, QSI provides a basis for what it contemplated would be its "profit" (in the Government cost accounting sense). Using this information, we can reach a profit allowance to be added to the allowable costs and the settlement expenses and from that total deduct payments already made to reach the proper quantum in this case. There are six figures involved in this analysis; four of them are already known. The first is the total contract price, $297,893. The second is the amount already paid to QSI, $211,700. The third is the amount of allowable costs expended during the period "before" the partial termination, as determined by the CO, $173,825 (AF, Exhibit 45 at 15). (Some costs, being associated with QSI's effort on Reach A, were incurred *after* the date of partial termination but are properly allowed, the only performance costs cut off at the termination date being those associated with Reach B. Also, we have not forgotten that QSI claims costs in excess of that amount by $9,831 (*see* QSI's analysis of internal errors in BOR's analysis, at pages 25-26 of QSI's brief), but we have assumed that QSI would agree with the BOR figure as the minimum allowable costs for purposes of this exercise.) The fourth amount (which is not in dispute) is settlement costs in the amount $17,015 (AF, Exhibit 45, at 14). Therefore, to complete the numbers necessary to determine the quantum we need find but two amounts, the amount of the costs to complete the project as originally intended and the proper profit allowance.

The contract requires that the CO make an allowance for profit as part of the termination settlement. It also requires the use of FAR 49.202 as the background for the CO's determination of a fair and reasonable profit allowance (Contract, AF, Tab 48, at 19). Apparently, both parties expect that the guidelines presented in that regulation control the determination of allowable profit here (QSI Br. at 35; BOR Br. at 11), and, following the path of authority cited here, we agree. The regulation directs consideration of nine factors in determining the proper profit allowance, and one of those is the "rate of profit that the contractor would have earned had the contract been completed" (FAR 49.202(b)(7)). The need to consider that factor requires a determination of the expected costs to complete the project.

It is the contractor's burden to prove the expected cost to complete the contract. Here it attempted to do so by referring to an appeal file exhibit (Exh. B) which was part of its settlement proposal to BOR (AF, Tab 21, at 25-32; AF, Tab 42, at 35-39). QSI's general manager explained the nature of the exhibit generally and related the method he used in preparing it (Tr. 51-55). A principal portion of the document is Exhibit B-2 which presents a calculation of the actual production costs necessary to complete the work on Reach B. It breaks down the total work uncompleted into separate component activities necessary to be performed and calculates the costs for each. It further segregates the activities according to whether they are to be performed in the north end or the south end of Reach B, because the expected amount

of difficulty in performing the work on these separate sections of the Reach differed by reason of differences in terrain, frequency of obstacles encountered, the nature of the obstacles, and similar factors (AF, Tab 21, at 25-32; Tr. 53). Another important portion of the document is Exhibit B-3 which complements the actual productions costs analysis of Exhibit B-2 by presenting a calculation of variable supply and repair costs, overhead, and G&A costs contemplated by and associated with the production efforts the costs of which are presented in Exhibit B-2 (AF, Tab 42, at 40-42). (We relate the details of these exhibits in order to facilitate our analysis of BOR's position thereon.)

We believe that QSI's presentation establishes a prima facie showing that its expected cost to complete is $29,642 (AF 42, at 42). That shifted the burden of overcoming that showing to BOR. BOR did not present any case of its own as to the cost to complete, but it need not do so to prevail. It may prevail by showing any factual and logical invalidities there are in QSI's case using any evidence in the record and any argument and legal authority available to it. Essentially, BOR presents three points in an attempt to undermine the validity of QSI's presentation of the projected cost to complete. The first is that QSI's presentation is "based on the contractor's bidding procedure and not actual cost" (BOR Br. at 13). QSI responds that insofar as the work for which the projection was presented was not completed, there are no actual costs and that only an estimate using its normal bidding procedures as a reasonable basis therefor may be given (QSI Rep. Br. at 21-22). We agree with QSI. When the circumstances make actual costs unavailable, estimated costs must serve as a basis for a projection. To the extent that an estimate is reasonable, it will be accepted for the purpose of establishing a cost to complete in a termination for convenience case. Here, QSI's detailed "estimate" is considered to be reasonable. Moreover, as QSI notes (QSI Rep. Br. at 21), there are at least 11 factors in the projection which are patently not estimates, including the length and acreage of the contract area, the varying nature of the terrain in the area, various capacities of the equipment including size, speed, production quantity capabilities, and fuel usage, the distance to materials source, contractual time requirements, and labor rates. We also note that the "estimates" contained in QSI's Exhibit B-2 (AF, Tab 21, at 25-32) are not only very detailed but also consistently make apparently reasonable allowances for inefficiencies, *i.e.*, "20% loss for moves," "30% loss for calibration and moves," "time required to bypass obstacles," etc. Finally, BOR has not attacked any of these projections of inefficiency, or any of the individual components of the QSI projection; its only criticism is that actual costs were not used in favor of an "estimate * * * based on the contractor's bidding procedures." We find in this position no reason for rejecting QSI's projected costs.

The second point BOR raises in attempting to undermine QSI's projection is that a "thorough review [of Exh. B-2] shows that the contractor included only costs for labor; materials; and fuel, oil, and gas [sic]" and that the QSI "estimate did not include any costs for equipment, either rented or company owned, nor did QSI include any costs for supplies and repairs which always occur" (BOR Br. at 13).

QSI responds that it always represented its Exhibit B-2 as reflecting nothing more than costs for labor, materials, and equipment fuel. Its "estimate" of cost to complete, however, consisted of figures drawn not only from Exhibit B-2. On its Exhibit B-3 (AF, Tab 42, at 40-42), QSI takes the Exhibit B-2 figures and adds to them amounts for supplies and repairs, project overhead, and G&A. Of BOR's complaints regarding the inadequacies of QSI's approach, only equipment costs remain. Citing AF 42 at 29, QSI states that it did not include any additional costs for equipment for the terminated portion of the work as all of the equipment was rented or available for the work and the costs already incurred. As QSI points out, BOR has not shown that QSI needed additional equipment beyond that already available nor that the equipment actually available, the costs of which have already been accounted for, was inadequate to do the Reach B work if it were required (QSI Rep. Br. at 23-25). We find in BOR's position no reason for rejecting QSI's projection.

The third point BOR raises is that QSI's estimate of the cost to complete Reach A was put at $37,663 while its consultant at the hearing put the figure at $65,000, thus raising a question over the accuracy of the Reach B cost-to-complete projection (BOR Br. at 13). QSI replies by pointing out that BOR is mistaken as to the record evidence. QSI contends that BOR has taken the $37,663 from the former's Exhibit B-2, which seems apparent (AF, Tab 21, at 32). The problem with using that figure taken from Exhibit B-2 is that it represents only the material, labor, and fuel costs (as has already been determined) while the consultant-witness's $65,000 figure was an estimate for *all* of the costs to do the work on Reach A absent the prorated allocation of home office overhead. Given a figure of $37,663 of direct costs, a total of $65,000 for such costs, plus allocated equipment costs, mobilization, and demobilization costs, and other one-time costs seems not unreasonable, and BOR has presented no sound reason to question that estimate. We find in this position no reason for rejecting QSI's cost to complete.

[1] BOR asks that we consider Attachment B to its brief as the "most viable method" for projecting the cost to complete to the exclusion of QSI's method which should be discarded based on BOR's challenges thereto just discussed (BOR Br. at 13). We have determined that BOR's challenges do not provide any reason to reject QSI's cost-to-complete program. Moreover, QSI has moved that Attachment B be stricken. It points out that BOR contends that Attachment B presents the "most viable method," because it is based on actual allowable costs incurred "with some judgement of how to apply those costs to Reach B" (QSI

Rep. Br. at 26, quoting from BOR Br. at 13). It is the "judgments" used to apply those costs to which QSI objects because they amount "to an attempt to insert new evidence and material into this proceeding which was not testified to at the hearing and which is not supported by any documents contained in the Appeal File or which are evidence before this Board" (QSI Br. at 26). To measure the accuracy of QSI's description of Attachment B in order to respond to the motion to strike, it was necessary to review Attachment B.

We note that Attachment B makes use of a number of information items that are indeed in evidence. It also, however, makes use of a number of assumptions of questionable reliability. We agree with QSI's criticisms regarding the validity of a number of these assumptions. For instance, BOR in reaching a per-acre cost for Reach B as compared to the same cost for Reach A used a purportedly reasonable assumed factor of 2.5, being the factor by which Reach A cost per acre exceeded Reach B cost per acre (BOR Br. at 14). The assumption was based on two pieces of testimony, one by QSI espousing a 3:1 ratio of costs and one by BOR (using two witnesses) espousing a 2:1 ratio of costs. The problem with the assumption is that the BOR witnesses never testified to costs but to "effort" (Tr. 162, 176) and "difficulty" (Tr. 170, 176) and for that matter these witnesses' testimony was based only on their observations of the physical differences between the two sites and did not take into account the fact that, according to the specifications, the work to be performed on Reach A was to be different in some respects from the Reach B work (Tr. 170). It seems that this assumption affecting the figures in Attachment B is not reasonably based. In another instance, BOR attempts to prove the reasonableness of Attachment B's labor costs for the terminated work, which it derived using the 2.5 factor, by comparing the per acre labor costs of a follow-on contract let to another contractor the following year. In making this comparison BOR cites its hearing Exhibit A. There was no testimony adduced as to that exhibit's content, however, and QSI had no opportunity for meaningful cross-examination or rebuttal. On that basis (and others), QSI wants the Board to ignore the exhibit. This is a sufficient basis for us to do so.

Also there was considerable testimony to the effect that there were significant differences between the follow-on contract and the terminated work (Tr. 59-69, 144-48, 199-200). That suggests that there is not a reasonable basis for comparing the costs of the follow-on project with the costs of the terminated work, and BOR has dealt with that suggestion only by acknowledging that "there was some testimony related to the difference between what QSI planned and what [the follow-on contractor] actually did" (BOR Br. at 15). BOR has not acknowledged many of the differences and has insufficiently treated the differences it does acknowledge for its Exhibit A to serve as proof of the reasonableness of its per acre costs conclusions in its

Attachment B; nor does Exhibit A itself explain how its information is useful in light of the differences between the two contracts.

We now return to consideration of appellant's motion to strike Attachment B to BOR's posthearing brief. As is reflected in the above discussion, Attachment B is predicated in part upon assumptions for which there is no supporting evidence. On a number of occasions the various boards of contract appeals have been confronted with the question of what effect, if any, should be given to evidence proffered for the first time with a post-hearing brief. See, for example, *K Square Corp.*, IBCA-959-3-72 (July 19, 1973), 73-2 BCA par. 10,146, and cases cited including, *Araco Co.*, VACAB No. 532 (June 27, 1967), 67-2 BCA par. 6439 from which the following is quoted:

> This board has never regarded statements of counsel made in their posthearing briefs as evidence of facts in issue, and where counsel has attempted to present additional evidence in such manner, it has consistently been disregarded. Similarly, we do not accept counsel's personal allegations of fact except to the extent we find they derive from or are supported by the evidence of record * * *.

In this case we have found that some of the assumptions upon which Attachment B is based are assumptions for which there is no evidence of record and concerning which appellant's counsel was afforded no opportunity to cross-examine. For these reasons and upon the basis of the authorities cited, appellant's motion is granted and BOR's Attachment B is hereby stricken from the record.

BOR's challenge to QSI's cost-to-complete estimate uses assumptions and other evidence not of record, which makes its principal vehicle for attempting to establish the doubtful validity of the QSI estimate susceptible to a motion to strike. As noted, QSI presented a prima facie case of its projected cost to complete, and BOR has thus failed to counter it, so we find that the cost to complete the terminated portion of the contract is $29,642 (AF, Exhibit 42, at 41).

[2] Having determined the cost to complete, we have determined the last numerical item necessary to utilize the FAR guidance for profit the contractor would have earned had the contract been completed. Thus, we now turn to the nine factors in the FAR provision, using the parties' discussions on the factors in our deliberations.

Two of the factors have no application to this case. The factor at FAR 49.202(b)(8) reads, "The rate of profit both parties contemplated at the time the contract was negotiated." The contract here was not negotiated but awarded after competitive bidding, so there would be no occasion for both of the parties to have a rate of profit in contemplation. The factor at FAR 49.202(b)(9) reads, "Character and difficulty of subcontracting," etc. There were no subcontracts on this contract, so this factor is also irrelevant.

We discuss the remaining seven factors, in the order of their appearance in the FAR provision, as follows:

> "(1) Extent and difficulty of the work done by the contractor as compared with the total work required by the contract * * *" (FAR 49.202(b)(1)).

BOR's analysis of the case as related to this factor is as follows:

(1) Extent and difficulty of work.--The contract did not require difficult work in either Reach A or Reach B. The work consisted of preparing the area by plowing, planting seed using a Government-owned seeder, applying mulch for protection, applying fertilizer, and watering the area during the growing season. The task was not difficult on either Reach A or Reach B.

(BOR Br. at 11).

We note first that BOR does not cite any record evidence to support its conclusions on the difficulty of the work, nor are we able to find any. While thus apparently attempting to introduce evidence in its brief, BOR appears to have failed to grasp the significance of the FAR factor. The difficulty and extent of work spoken of in the FAR provision are to be used in a comparison--the difficulty and quantity of work done compared with the difficulty and quantity of work that would be done if the contract were completed.

QSI on the other hand approaches the question as the FAR factor seems to contemplate. The record is clear enough that the principal amount of the effort for this contract consisted of the set-up. Once the materials delivery program was established, the planning of the work accomplished, the specialized engineering of the equipment and its mobilization completed, and the labor scheduled, the more difficult part of the entire project was over. The production efforts might take a longer time to accomplish, but they were nevertheless less difficult. In this case, as QSI points out (QSI Br. at 36-37), all of the pre-production efforts had already taken place, and, for that matter some of the production efforts were virtually complete. Also, the work on Reach A was complete and, according to all accounts as discussed above, it was significantly more difficult than the Reach B unfinished work (albeit on a smaller acreage). Thus, it is reasonably clear that the work remaining, being only production efforts on Reach B, was relatively less difficult compared to the total of the pre-production efforts plus Reach A production efforts. The implication of the FAR provision is that as the extent and difficulty of the completed work becomes greater as compared to the terminated work then the profit determined should also be greater. As the contractor comes closer to finishing the work and the difficult parts of it, its profit should come correspondingly close to the full profit contemplated.

"(2) Engineering work, production scheduling, planning, technical study and supervision, and other necessary services" (FAR 49.202(b)(2)).

Regarding this factor, QSI points out that it had completed all engineering work to design and develop the specialized equipment to be used, had scheduled its work, and arranged for the labor and equipment to do the job and had completed the technical study on the seeding and irrigation portions of the project, thus addressing all of the technical elements mentioned in FAR profit factor 2, except technical supervision, which apparently refers to the production stage which was not reached because of the termination. (QSI Br. at 37; Tr. 16, 28-9; AF,

Tab 3, at 7-10; AF, Tab 4; AF, Tab 5; AF, Tab 6, at 2, 4, 12). The BOR reply is as follows: "(2) Engineering work, scheduling, planning, etc.–The contract specified the planting dates and the length of time for watering. The contractor was responsible only for acquiring materials and equipment and completing the work. Complex scheduling, planning, and supervision were minimal" (BOR Br. at 11).

We agree with QSI's response that the BOR position is unsupported by any evidence cited or presented and that it is contrary to the evidence that was presented, as detailed above (QSI Rep. Br. at 17-18);

"(3) Efficiency of the contractor with particular regard to–(i) Attainment of quantity and quality production; (ii) Reduction of costs; (iii) Economic use of materials, facilities and manpower; and (iv) Disposition of termination inventory" (FAR 49.202(b)(3)).

QSI, in analyzing the facts pertinent to this factor, emphasizes the completion of mobilization and construction of specialized equipment, the successful, completed results on Reach A, and its "unique and imaginative approach to the irrigation portions of the contract" as manifested in a substantially lower price for the irrigation portions of the contract than that of any of the other bidders (AF, Tab 2). The BOR reply is as follows: "(3) Efficiency of contractor.–The contractor efficiency is considered to be average for the work involved and there is no dispute that work would have been completed within the times required by the contract" (BOR Br. at 11).

Again, QSI responds that the BOR statement is an attempt to present evidence in its brief, and we agree. There is sufficient evidence in the record about QSI's efficiency, in particular with regard to its plans for irrigation (Tr. 19-20, 194-200), for us to conclude that QSI's relative efficiency, if anything, would have a positive effect on its expected profit.

"(4) Amount and source of capital and extent of risk assumed" (FAR 49.202(b)(4)).

QSI's position on this factor emphasizes the highly leveraged nature of the project from its point of view–that it financed the project largely through borrowed capital–and also emphasizes that the high materials and equipment costs on the project meant that its out-of-pocket cost and risk were substantial. QSI thus interprets the factor's use of "risk" to have reference to the degree of financial burden. BOR, on the other hand, while acknowledging the importance of financial costs to the factor, interprets "risk" differently, stating:

> The contractor apparently relied heavily on borrowed capital as evidenced by the $9,456 in interest. However, the contractor's risk was limited because the contractor was not required to warrant his work (TR 73, ln 25 to TR 74, ln 6), (*i.e.*, he did not have to guarantee that planted seed would grow).

(BOR Br. at 11). (The $9,456 interest figure is claimed but is subsumed under one of the issues we declined to decide. *See* note 1.)

QSI's responds that the hearing evidence BOR cites as proof that QSI was not required to warrant its work in fact establishes only that QSI

was not responsible for germination of the seed. The contract makes it liable for rework or reduction in price if the work performed did not conform to the specifications and other requirements of the contract (AF, Tab 48, at 11-12). QSI also notes that the CO believed that the risk factor was fairly substantial (AF 45 at 13) (QSI Rep. Br. at 18-19).

In light of the evidence and argument just reviewed, we agree with BOR that QSI relied heavily on borrowed capital, but, to the extent that "risk" has the meaning BOR appears to believe it does, we conclude that QSI did not assume appreciably less risk than any contractor in a contract where the design and specifications are the Government's and the contractor's performance is measured only against that design and those specifications and not against an expectation of the result of performance.

"(5) Inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance" (FAR 49.202(b)(5)).

QSI emphasizes the inventiveness it displayed, in particular with regard to the irrigation program, as it analyzes the evidence on this factor, and it points out the future availability to the Government of its "inventions," as proved by the fact that the follow-on contractor used a variation of QSI's irrigation program (QSI Br. at 38; Tr. 26). BOR's statement on this factor is as follows:

> (5) Inventive contributions and cooperation with Government.–QSI brought a boat to the contract area to use in the watering operation. The boat was essentially a small version of boats used to fight fires in harbor areas; however, the boat was not used under the contract, and its effectiveness and efficiency is unproven. The portable pumping units were little more than pumps and nozzles mounted on a trailer. These units were merely larger versions of traveling sprinklers used to water lawns. QSI's cooperation with Government was average.

(BOR Br. at 12).

We note first those portions of the BOR analysis that are demonstrable: that QSI brought the irrigation barge to the project and that it was not used on the project. The rest of the statement references no record evidence and appears to be totally unsupported by the record. As QSI points out, the effectiveness and efficiency of the barge were tested in the follow-on contract, the disparaging characterizations of the QSI equipment do not undermine QSI's inventiveness in developing them, and the existence of that inventiveness is supported by the fact that QSI expended over $3,500 (an expense allowed by the Government auditor) for the assistance of a consultant in the design and development of its irrigation plan (QSI Rep. Br. at 19; Tr. 24-26, 194-200; App. Hrg. Exh. E; AF, Tab 45, at 8). We discussed the virtues and benefits of QSI's irrigation plan in connection with our analysis of factor 3 above, and BOR has presented nothing to dissuade us from concluding that QSI's irrigation plan was characterized by more than pedestrian inventiveness.

"(6) Character of the business, including the source and nature of materials and the complexity of manufacturing techniques" (FAR 49.202(b)(6)).

QSI notes that it is "a seasonal and specialty contractor," meaning that it must cover year-round specialized equipment costs, overhead expenses, and profit during an abbreviated working period usually consisting of the spring and fall. This means that its "profits" on the projects it is able to do must be higher on a proportional basis than those of a year-round contractor or a manufacturer in order to cover the burden expenses that continue year round despite the lack of contracts for most of the year to which they might otherwise be charged. To support its position on this, QSI references testimony that indicated that its profit rate on other contracts in the year in question was 29 percent of allowable costs (QSI Br. at 38-39; Tr. 14-15, 123-25, 132). BOR's response is as follows:

> (6) Character of business.–The character of the contract was seasonal as are other contracts in San Luis Valley, Colorado, because of the winters at the construction site (Tr 163, ln 12). QSI's witness testified that QSI worked in the spring and fall; however, in 1985, QSI also worked during the summer because of the irrigation involved in the contract.

BOR has not addressed the specialty and seasonal characterizations of QSI's business as they relate to profit and has thus provided no basis to reject QSI's reasoning and proof on this matter.

"(7) The rate of profit that the contractor would have earned had the contract been completed" (FAR 49.202(b)(7)).

We have already discussed the issue which forms the essence of the dispute under this factor, and found the cost-to-complete amount to be $29,642. Using the BOR figure of $173,825 for allowed costs to the point of termination, we calculate the total projected cost of the contract by adding the pre-termination allowed costs ($173,825) to the cost-to-complete figure ($29,642) and arrive at $203,467 for total costs. Deducting that amount from the total contract price, which is conceded to be $297,893, we find that the profit QSI would have earned if it had completed the work would have been $94,426 ($297,893 less $203,467). There remains the question of how much profit should be allowed for this termination, and we undertake to answer that question using the FAR profit factors as a matrix.

Regarding the FAR provisions they are meant to be guidelines only and not rigid rules. They provide, for instance, that in negotiating or determining profit, the CO "may use any reasonable method to arrive at a fair profit" (FAR 49.202(a)), Also, there are no explicit directions on how to use the information developed in addressing the individual factors. Despite the lack of clear directions on how to use that information, we make certain inferences from the language used and the circumstances to conclude that the aim of the guidelines is to reward the contractor by allowing profit in a convenience termination in an amount that is reasonably commensurate with the contractor's expectations based on the amount of work done or an amount

otherwise appropriate because of certain economic realities or some excellence or other positive conduct or characteristic of the contractor. We see then that factors (1) (extent and difficulty of work done before termination compared to the total contract work), (2) (engineering work, production scheduling, planning, technical study, etc.), and (7) (rate of profit to be earned for full contract performance) all relate to actual work accomplished. It follows that the closer the contractor is to full performance at the time of termination the greater should be its share of the full profit contemplated.

Factors (3) (efficiency of the contractor), (4) (amount and source of capital and extent of risk assumed), (5) (inventive and developmental contributions, etc.), and (6) (character of the business) all pertain to economic realities. These suggest how a particular contractor may program its profit expectation. Thus an efficient or inventive contractor (factors 3 and 5) may have a proportionately higher expectation of profit than one less efficient or inventive while still submitting a competitive bid. Similarly, a contractor who borrows heavily to finance the project (factor 4) may be expected to have a proportionately greater amount of profit (in the Government procurement accounting sense) in mind than one that need not borrow heavily. One that assumes a relatively great risk will likely have a greater profit contemplated to compensate for contingencies or to assure a healthy economic picture over several contracts when bearing high risk on all those contracts may result in a loss on one or more. When the character of the business (factor 6) mandates that a contractor cover a full year's burden expenses during a part year operation period, it is reasonable to expect that its profit as a percentage of allowable costs will be greater than for a contractor who can charge allowable burden costs for a greater part of the year.

All of the factors can be related to a contractor's excellence but particularly (2) (engineering and other pre-production work) (3) (efficiency), and (5) (inventiveness). The underlying presumption is that the excellence and competence of the contractor, which promises a good result for the Government, should be rewarded even when the work is not completed as a result of the termination for convenience.

The record makes clear, as discussed above, that the great bulk of the work, whether pre-performance planning and scheduling, mobilization, or Reach A performance, had already been done. Consistent with the total cost approach, we measure the proper profit to be allowed by comparing the pre-termination allowed costs to the total costs of the entire project. The percentage of the total cost of $203,467 represented by the assumed pre-termination allowed costs of $173,825 is approximately 85.4 percent. If we take 85.4 percent of the $94,426 profit contemplated for the whole project, we arrive at $80,640.

Conclusion

We now calculate the quantum to include the presumed costs of $173,825, profit of $80,640, and agreed settlement costs of $17,015 for a total of $271,480. Because this amount exceeds the $211,700 QSI has already received by more than $50,000, and QSI has waived its right to any greater amount, we sustain the appeal in the amount of $50,000 plus interest calculated in accordance with the provisions of the Contract Disputes Act of 1978 from February 13, 1987 (AF, Exhibit 46, at 2).

WILLIAM F. MCGRAW
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

RUSSELL C. LYNCH
Chief Administrative Judge

ESTATE OF AARON FRANCIS WALTER

16 IBIA 192 Decided: *August 17, 1988*

Appeal from an order after reopening issued by Administrative Law Judge Keith L. Burrowes in Indian Probate No. IP BI 26A 83-1.

Affirmed; recommended decision adopted.

1. Indian Probate: Inventory: Property Erroneously Excluded or Included

In order to be successful in a legal challenge to the inventory of a deceased Indian's trust or restricted estate prepared by the Bureau of Indian Affairs, it is necessary to establish by a preponderance of the evidence that Bureau employees either did something they should not have done, or did not do something they should have done, and that such error or omission was responsible for the transaction not being completed during the life of the decedent.

APPEARANCES: Ross W. Cannon, Esq., Helena, Montana, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF INDIAN APPEALS

On March 21, 1988, the Board of Indian Appeals (Board) received a notice of appeal and brief on appeal from the Estate of John Walter (appellant).[1] Appellant seeks review of a February 18, 1988, order

[1] John Walter originally brought this suit, but died before it was concluded. His estate was substituted as appellant. The term "appellant" is used to apply both to John Walter personally and to his estate.

after reopening issued by Administrative Law Judge Keith L. Burrowes in the estate of Aaron Francis Walter (decedent).[2] For the reasons discussed below, the Board affirms that order, and adopts Judge Burrowes' recommended decision.

Background

Decedent, Allottee 3410 of the Blackfeet Indian Reservation, Montana, was born on September 12, 1912, and died intestate on June 8, 1982. Judge Burrowes held a hearing to probate decedent's trust and/or restricted estate on May 26, 1983. The evidence adduced at the hearing showed that decedent's heirs included 4 brothers and sisters and 19 nieces and nephews.

Appellant, who was one of decedent's brothers, filed a claim against the estate for $11,000. Appellant alleged he had paid that amount to decedent in exchange for a gift deed to part of decedent's trust estate, namely, Lots 1 and 2, W½ NE¼, E½ NW¼, N½ N½ NE¼ SW¼, E½ NE¼, of sec. 7, T. 36 N., R. 11 W., principal meridian, Montana, containing 315.5 acres, more or less. Appellant's attorney made an offer of proof to the effect that decedent had agreed to sell the property to appellant; a purchase price of $11,000 had been agreed upon; the money was paid to decedent; decedent filed a gift deed application with the Superintendent, Blackfeet Agency, Bureau of Indian Affairs (Superintendent; BIA); decedent's brother,Thomas, visited the agency and inquired about the adequacy of the purchase price for the property;[3] BIA interpreted this inquiry as a question concerning decedent's competence; BIA began an investigation of decedent's competence; the investigation was not completed when decedent died; the property was never conveyed to appellant, but was included in decedent's estate at the time of his death.

At the close of the hearing, Judge Burrowes granted a continuance of the proceeding in order to allow the family members an opportunity to discuss the situation and perhaps reach an agreement in regard to the disposition of the disputed tract. No settlement was reached. During the time the proceeding was continued, however, appellant obtained additional information from BIA concerning the processing of decedent's gift deed application. This information was included in the probate record.

Judge Burrowes issued an order in decedent's estate on January 14, 1985. He found the evidence showed decedent and appellant agreed upon a purchase price of $11,000 for the property; on May 21, 1981, this amount was paid by appellant to decedent and was deposited into decedent's account in the First National Bank of Browning; and also on May 21, 1981, an application for a gift deed was filed with the

[2] Decedent was apparently also known as Bill Walter.

[3] The record indicates that $11,000 was considerably below the estimated value of the property which BIA provided to Judge Burrowes for probate purposes.

Superintendent. The Judge further found decedent was residing in a nursing home when the transaction was discussed, and left the nursing home to prepare the gift deed application and present it to BIA. Decedent then returned to the nursing home, where he remained for only a few days before moving to the home of his brother, Thomas. He remained with Thomas until returning to the nursing home shortly before his death.

In his order, Judge Burrowes held he did not have authority to review BIA's inventory of a deceased Indian's trust or restricted estate. He granted appellant's claim against decedent's estate for $11,000, the amount paid to decedent for the property. The disputed property remained in decedent's estate, and was distributed to his heirs, including appellant.[4]

On March 11, 1985, appellant filed a petition for rehearing, alleging that the gift deed should have been retroactively approved in accordance with the Board's decision in *Wishkeno* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982), because BIA had negligently failed to process the application. Appellant noted decedent lived for over a year after the gift deed application was filed.

By order dated May 30, 1985, Judge Burrowes denied appellant's motion, stating that this same argument was raised and decided against appellant in the original proceeding. Appellant did not appeal this order to the Board, but on July 3, 1985, filed a motion to reconsider with Judge Burrowes. This motion was based upon the Board's decision in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169, 92 I.D. 247, decided on May 31, 1985.[5] *Ducheneaux* held that Departmental regulations in 25 CFR Part 2 and 43 CFR Part 4, Subpart D, were adequate to give Administrative Law Judges hearing Indian probate cases the authority during the probate proceeding to take evidence concerning alleged erroneous inclusions or omissions of property from BIA's inventory of a deceased Indian's trust or restricted estate and to issue a recommended decision concerning the property that should be included in the decedent's estate.

By order dated August 9, 1985, Judge Burrowes reopened decedent's estate. An additional hearing was held on August 28, 1985. Evidence was taken at that hearing concerning BIA's usual practice in reviewing gift deed applications and the particular circumstances surrounding the gift deed at issue here. Conflicting evidence was also presented concerning decedent's competency during the last years of his life.

On February 18, 1988, Judge Burrowes issued an order reaffirming his original order and holding there was insufficient evidence to allow

[4] Appellant received an undivided 1/8 interest in all of decedent's trust or restricted property, including the tract at issue here.

[5] *Ducheneaux* was appealed to Federal court on another issue. The Board's standing order, considered in the present case, was not addressed on appeal. *See Ducheneaux* v. *Secretary of the Interior*, 645 F. Supp. 930 (D.S.D. 1986) (rev'g the Board on other grounds); *rev'd*, No. 87-5024 (8th Cir. Jan. 26, 1988); *cert. denied*, ____ U.S. ____, 56 U.S.L.W. 3848 (June 13, 1988).

him to recommend that the property at issue be removed from decedent's estate and transferred to appellant.

Discussion and Conclusions

The proceeding allowed under the Board's standing order in *Ducheneaux* provides an opportunity for a Departmental judicial officer to consider a legal challenge to the inventory of a deceased Indian's trust or restricted estate at an early point in the proceedings.[6] This inventory is prepared by BIA and provided to the Administrative Law Judge for use in the probate proceeding. The procedure contemplated in *Ducheneaux* is, admittedly, a hybrid, allowing consideration of a BIA administrative action within the context of a probate case. Consideration of BIA administrative actions would normally follow the procedures set out in 25 CFR Part 2 and 43 CFR 4.330-4.340. Consequently, *Ducheneaux* requires the Administrative Law Judge to inform the BIA officials who would normally be involved in a proceeding under 25 CFR Part 2, of the challenge to the inventory. In cases raising a *Ducheneaux* challenge, the Judge's final order in the estate will include a recommended decision on whether or not the inventory should be altered. That recommended decision is final unless appealed to the Board.[7]

[1] Judge Burrowes here properly determined that the challenge presented to him fell within the standing order in *Ducheneaux*, and allowed full presentation of evidence concerning the transaction at issue. He stated his understanding of what Ducheneaux required at page 2 of his February 18, 1988, order:

> In order to be successful in a challenge to an inventory it is necessary to establish that agency employees either did something they should not have done or did not do something that they should have done, and that such error or omission was responsible for the property not being taken care of during the life of the supposed grantor.

The Board agrees with this statement of the required proof, but with the modification that such error or omission was responsible for the

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[6] Provisions for administrative corrections to the inventory are found in 25 CFR 150.7 and 43 CFR 4.272-4.273. Administrative corrections most frequently result from errors in the description of property or errors or backlogs in recordkeeping, such as the failure to note that a decedent owned trust or restricted property under the jurisdiction of a second or third agency or to record transactions occurring during the decedent's lifetime.

In distinction, legal challenges to the inventory result from an allegation that BIA either took or failed to take some action with respect to trust or restricted property that either resulted in property being in the decedent's estate that should have been transferred to another person, or in property not being in the decedent's estate that should have been transferred to the estate.

[7] As discussed in detail in *Ducheneaux*, in the absence of the Board's standing referral order, cases raising legal challenges to the estate inventory would proceed as follows: The challenge would be raised to the Administrative Law Judge during the probate proceeding. Because the Judge would not have authority to consider the challenge at that point, the issue would remain unaddressed, both in the evidence taken at the hearing and in the Judge's order. Any petition for rehearing on the inventory question would have to be denied. On appeal to the Board, it is almost certain that factual issues would need to be addressed. Therefore, the Board would have to refer the matter to an Administrative Law Judge for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a). Following an additional hearing and order, it is still conceivable that the matter would have to be referred to the Assistant Secretary–Indian Affairs under 43 CFR 4.337(b), if the discretionary approval of a deed remained at issue. *See Estate of Arthur Wishkeno*, 8 IBIA 147 (1980). This cumbersome procedure is not conducive to the efficient and effective use of judicial time, is excessively burdensome to parties and witnesses, and ensures that probate will not be concluded for several years.

transaction not being completed during the life of the decedent. The decedent may have been either the grantee or the grantor in the transaction. The Board adds that the proper standard of proof in these cases is a preponderance of the evidence.

Here, Judge Burrowes found BIA records indicated a question of decedent's competency arose a few days after the gift deed application was filed, and a competency evaluation was requested. That evaluation was not completed. He further found there was a backlog of gift deed applications on file at the agency and no evidence was presented indicating there was anything unusual about the length of time for processing decedent's application, or that decedent's application was treated differently from other similar applications. Accordingly, he concluded there was insufficient evidence for him to recommend that the property at issue be transferred from decedent's estate to appellant. In terms of the required proof, Judge Burrowes held appellant had not shown by a preponderance of the evidence that BIA officials failed to take actions they should have taken in order for the transaction to have been completed during decedent's lifetime.[8]

Based on its review of the record, the Board agrees with Judge Burrowes' conclusion and hereby adopts his recommended decision.[9]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 18, 1988, order of Judge Burrowes is affirmed, and his recommended decision adopted.

KATHRYN A. LYNN
Chief Administrative Judge

I CONCUR:

ANITA VOGT
Administrative Judge

ROBERT LIMBERT, OTIS SCHOOLCRAFT

104 IBLA 154 Decided: *September 6, 1988*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, rejecting an application to open lands to mineral entry pursuant to the Act of April 23, 1932, 43 U.S.C. § 154 (1982). I-20938.

Affirmed.

[8] This holding does not condone the length of time this application was pending. It does recognize that BIA agencies have a large workload, are frequently short-staffed, and backlogs occur. Without a showing that this delay was significantly longer than those occurring with other similar cases, the Board cannot say the transaction should have been completed earlier.

[9] Assuming *arguendo* that BIA should have completed the processing of decedent's gift deed application sooner, such a conclusion would not result in the Board's approving the deed retroactively, as appellant argues. If this conclusion had been reached, the Board would be required under 43 CFR 4.337(b) to refer this matter to BIA for the exercise of its discretion in determining whether or not the deed should be approved retroactively. *See Estate of Arthur Wishkeno, supra; Wishkeno* v. *Deputy Assistant Secretary, supra.*

September 6, 1988

1. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

2. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable for minerals. It is neither necessary nor desirable to require a determination whether the lands are known to contain valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

3. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

APPEARANCES: Robert Limbert, *pro se,* and on behalf of Otis Schoolcraft, partner.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Robert Limbert and Otis Schoolcraft have appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated July 30, 1986, rejecting their application to open lot 8, sec. 4, T. 4 N., R. 7 E., Boise Meridian, Idaho, to mineral entry. These lands are a part of the Payette Boise Reclamation Project, and subject to a first-form withdrawal dated October 7, 1904.

The application was originally filed on June 22, 1984, under the Act of April 23, 1932, 43 U.S.C. § 154 (1982). In 1984 the Bureau of Reclamation (BOR) submitted a memorandum to BLM recommending that the lands not be opened to entry, and BLM rejected the application pursuant to 43 CFR 3816.3. On appeal of that decision, we reviewed the applicants' proposed plan of operations and the BOR recommendations. The BLM decision was set aside and the case was remanded to BLM for a determination of whether the land was valuable for minerals and for further consideration of the applicants' proposal by BOR. *Robert Limbert*, 85 IBLA 131, 133 (1985).

In the *Limbert* opinion, the Board noted there was no indication whether the lands were considered to contain valuable minerals and directed BLM to examine this question during its further consideration. As a means of making this determination, on October 8, 1985, several BLM and Forest Service geologists conducted a field examination.

During the examination four mineral samples were taken on the site. All four samples were processed and concentrated with the "Denver Gold Saver" and were assayed for free gold by amalgamation. In the mineral report of the field examination, the examiners concluded that the tract could not support a mining operation. The report specifically stated:

> [A] mining operation would lose $3.49 per cubic yard or a total of $29,665, if the entire deposit were mined from Bench #2. Both an analysis of the early mining activity and our sampling program indicate that there is a low probability that a profitable operation can be sustained on Lot 8.

(Mineral Report at 7).

BLM transmitted the mineral report to BOR for its further consideration and recommendations. By memorandum dated July 10, 1986, BOR responded, recommending that the first-form withdrawal be retained on these lands and that mining operations be prohibited. The reasons for the determination were similar to those outlined in its original June 21, 1985, memorandum. BOR adhered to its earlier recommendations citing its previous bad experiences when withdrawn lands had been opened along critical drainways to project reservoirs, and lack of support for opening the land to mineral entry by other local agencies, stating:

> The Bureau of Reclamation has reconsidered opening the tract as directed in the IBLA opinion and has considered the impacts upon the project facilities from the loss of the withdrawal along the river. As we proposed in our April 25, 1985, memorandum to you, we requested comments from other agencies to aid us in determining impacts and mitigative measures that might be required if lands were opened. We sent out 17 letters and as of this date received 10 responses. The replies indicate that opening the withdrawn lands to mineral entry would also have a very significant impact on other agencies' programs in that area. Formal National Environmental Policy Act (NEPA) compliance, probably an environmental impact statement (EIS), appears necessary.

(BOR Memorandum of June 21, 1985, at 2.)

Appellants again object to BLM's refusal to open the land to mineral entry, contending that their estimates indicate the gravel at the site "runs about 10 to 17 dollars a cubic yard in gold and silver" (Statement of Reasons (SOR) at 1). Appellants assert that BOR has continually ignored their plan of operation and willingness to conduct their operation in a manner which would protect the interests of the United States. They also object to not having been given an opportunity to observe the sampling or participate in the selection of sample sites. Appellants further allege that, accepting the Government's sampling, at $4.50 a cubic yard they could "still make a good living at $250 to $350 a day" (SOR at 6).

[1] Sections 1 and 2 of the Act of April 23, 1932, provide the Secretary of the Interior with discretionary authority to restore land subject to a first-form reclamation withdrawal to mineral entry "when in his opinion the rights of the United States will not be prejudiced thereby" and to take certain other action. 43 U.S.C. § 154 (1982). The statute provides that the Secretary may

> [reserve] such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate * * * and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests.

When BOR recommends against restoration of land to mineral entry, BLM is required to reject an application for restoration under 43 CFR 3816.3.[1] As we noted in *Robert Limbert, supra*, there is no such limitation on the Board. However, we will affirm BLM's rejection of an application for restoration when that decision is based on cogent reasons indicating that restoration is contrary to the public interest. *Id.* at 133, and cases cited therein.

In the initial decision of the Board, we directed BOR to reconsider its decision because the record contained nothing that indicated that BOR had considered the restrictions afforded by existing law and imposition of limitations that would protect the interests of the United States. We have adhered to this same course of action in recent cases when we determined the records were not adequate to support the denial of a restoration application. *Kenneth Carter*, 98 IBLA 100 (1987); *John Yule*, 96 IBLA 379 (1987).

The BOR recommendation on remand restates its previous objections without addressing the issue of whether the interests of the United States could be protected by limiting mining and related activities on the lands.[2] In many cases, these interests can be protected by a

[1] The regulation provides:
"When the application is received in the Bureau of Land Management, if found satisfactory, the duplicate will be transmitted to the Bureau of Reclamation with request for report and recommendation. In case the Bureau of Reclamation makes an adverse report on the application, it will be rejected subject to right of appeal."

[2] On numerous occasions we have rejected arguments similar to those advanced by BOR when presented by individuals and public interest groups. The question raised by an application is whether the lands described in the

Continued

limitation on use set forth in the order opening the lands, by restrictive covenants and bonding requirements contained in a contract to be executed by the party desiring to conduct mineral exploration, development, or extraction activities on the land, and enforcement of existing state and Federal law.[3] Thus, a determination that the land should not be opened to mineral entry should be based on a site-specific determination, and take into consideration such mitigating measures as may be legally imposed to protect the irrigation interests.

On the other hand, there are sites which are so critical to the operations conducted by BOR that the imposition of necessary restrictions would under any mining operation infeasible. A BOR recommendation that the land not be opened to mineral entry will be affirmed by this Board if it addresses protective measures necessary to carry out the purpose of the withdrawal and makes a reasoned and supportable determination that the lands under consideration cannot be adequately protected or that the necessary protective measures would render a mining operation patently infeasible.

[2] In the previous decision the Board directed BLM to conduct a mineral examination, if needed, and determine whether the lands are valuable for minerals. *Robert Limbert, supra* at 133. BLM interpreted this statement as a directive to make a determination whether the lands are of such mineral character as to support a discovery. In our prior decision, we were apparently less precise than intended. It was not our intent to require an onsite physical examination sufficient to determine whether a discovery of a valuable mineral deposit existed within the land described in the application. Such examination is both unnecessary under 43 U.S.C. § 154 (1982), and inadvisable. Rather, it was our intent to have BLM determine whether the lands were "known or believed to be valuable for minerals."

The importance of this distinction becomes apparent upon examination of the purpose for opening lands for mineral entry and, conversely, the prohibitions placed upon the use of such lands until such time as they are opened to mineral entry. For example, a determination that lands are "believed" to contain valuable minerals could be made by geologic inference. There need not be a physical exposure of mineral in place in sufficient quality and quantity to support a discovery. Thus, if BLM is able to reach a conclusion that the lands are known or believed to be valuable for minerals through geologic inference, the conclusion would support a decision that the lands may be opened to mineral entry, if the other conditions set forth in the Act are met.

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application can be opened, not whether the opening of the specific lands might lead to further applications, or whether there is a possibility that if this and other future applications are granted an EIS may be required. *See Glacier-Two Medicine Alliance*, 88 IBLA 133, 146-47 (1985). An EIS is required only if the specific activity has significant environmental impact or if the cumulative impact of the contemplated activity, prior permitted activities, and planned future activities have significant environmental impact. Further, the determination that an EIS is required is made only after considering mitigating measures which may be imposed. *See Glacier-Two Medicine Alliance, supra* at 148, and cases cited.

[3] We note that the State of Idaho has a very strict dredge mining act which would be applicable to appellants' operations.

On the other hand, if a showing of valuable mineral in place is a prerequisite for a determination that the lands should be opened to mineral entry, a person may be tempted to go on the lands and conduct sufficient prospecting activities to disclose mineral of sufficient quality and quantity to support a discovery *prior to an application.*[4] Such a standard would virtually invite trespass on the public land by prospective claimants. Absent a physical exposure of a mineral deposit, they would otherwise be unable to show that the land was, in fact, valuable for minerals, even though there was a strong basis for a reasonable belief that the land was valuable for minerals. All such prelocation activities would, of course, proceed without any of the restrictions and reservations which might be made a part of the restoration order. Moreover, such an approach might have the anomalous effect of rewarding those who proceed in trespass while penalizing those who comport themselves with the dictates of the law.

[3] As noted above, the mineral examination conducted by BLM need only disclose sufficient mineral to support a finding that the lands are "believed to be valuable for minerals." *See Surprise Ventures Associates*, 7 IBLA 44 (1972). In the case before us, BLM conducted a more extensive mineral examination than was necessary for its determination. However, the fact that the examination was more extensive than necessary does not, of itself, invalidate the results, and the arguments on appeal are not sufficient to cause us to overturn the BLM decision based on that examination. Appellants' allegation that the lands are known or believed to be mineral in character must be supported by sufficient evidence to overcome the actual findings in the field, and the evidence submitted by appellants is not sufficient to overcome those findings.

Appellants freely admit they had prospected the land prior to submitting their application. *See* Statement of Reasons at 5. Yet nothing has been submitted to support the allegation that the land is believed to be mineral in character. For example, appellants assert that they took samples in 1983 which ran "as high as 45 dollars a yard," but have submitted nothing in support of that assertion. Likewise, appellants state that, based on the BLM assay results, they would be able to conduct operations making $250 to $350 a day. There is nothing in the record to show how this would be done or that this amount could be earned in an operation of the nature proposed by appellants, taking into consideration the extra cost resulting from taking those additional measures necessary to protect the public interest. The volume of minable material calculated by the mineral examiners is not contested by appellants, and this factor would have a

[4] In addition, if BLM were required to make a mineral examination sufficient to determine the existence of a "discovery" prior to considering opening the lands, the mere fact that the lands were being opened would lead to the conclusion that the lands contained mineral of sufficient quantity and quality to support a discovery. As no rights could accrue until after the land was opened, a land rush would ensue. As can be seen from reading *Scott Burnham*, 100 IBLA 94, 94 I.D. 429 (1987), this result is best avoided.

direct bearing on the profitability of any proposed mining operation. Appellants have failed to establish by a preponderance of the evidence that the BLM determination was incorrect.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. MULLEN
Administrative Judge

I CONCUR:

JAMES L. BURSKI
Administrative Judge

CSX OIL & GAS CORP., G. J. MORGAN

104 IBLA 188 Decided: *September 9, 1988*

Appeals from a decision of the Colorado State Office, Bureau of Land Management, upholding a prior decision which found that drainage had occurred from lands within oil and gas lease C-22214A and assessed compensatory royalties.

Vacated and remanded.

1. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Compensatory royalties for failure to protect against drainage commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. Such notice may be given by BLM or by a third party. If BLM can show that a lessee knew or a reasonably prudent operator would have known that drainage was occurring, the requirement of notice is satisfied.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for CSX Oil & Gas Corp.; G. J. Morgan, *pro se*; Mary Katherine Ishee, Esq., William R. Murray, Esq., Office of the Solicitor, Washington, D.C., and Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

CSX Oil and Gas Corp. (CSX) and G. J. Morgan appeal from a decision of the Colorado State Director, Bureau of Land Management (BLM), dated December 8, 1986, upholding a prior decision which found that drainage had occurred from lands within oil and gas lease C-2214A and assessed compensatory royalties. Appellants each held a 50-percent record title interest in lease C-22214A when this lease expired some 14 months prior to the State Director's decision.

BLM found that lands within lease C-22214A, specifically, the S½ SW¼ NW¼ sec. 13, T. 8 N., R. 93 W., sixth principal meridian, Moffat County, Colorado, had been drained by the Damson Oil North Lay Creek well in the NW¼ SE¼ sec. 13. Drainage was found to have occurred between April 1, 1976, and September 30, 1985, the date of lease expiration.

After conducting a technical and procedural review of a decision of the Deputy State Director for Minerals, dated November 5, 1986, the Colorado State Director found that substantial drainage had occurred from the Almond Sand formation lying under the lands formerly leased to appellants. This finding was based upon his determination that 0.70 percent of production of the Damson well came from lands which had been subject to lease C-22214A.[1] Using the production and cost figures generated by CSX, the State Director also found that an economic protective well could have been drilled.

Oil and gas lease C-22214A was issued noncompetitively to Howell Spear effective October 1, 1975. At the time of lease issuance, the nearby Damson well was already producing gas. That well was completed in March 1969 and obtained first production in June 1972. Lease C-2214A was assigned to CSX[2] in November 1975. By decision of March 19, 1982, a portion of the land in lease C-22214A was designated as being within an undefined addition to an undefined known geologic structure (KGS). Appellant Morgan held a 50-percent interest in lease C-22214A from February 1984 to September 30, 1985.

CSX contends that the State Director erred in assessing compensatory royalty because BLM failed to notify lessees during the life of the lease that BLM believed drainage was occurring. It argues that such notice is a prerequisite to BLM's requiring an offset well or assessing compensatory royalty. In support of its position, CSX quotes from this Board's decision in *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982):

> The obligation to protect a leasehold from drainage arises not upon completion of the draining well, but only after the passage of a reasonable time subsequent to *notification by the lessor* that an adjoining well is draining the leasehold. *See U.V. Industries* v. *Danielson*, [602 P.2d] at 585. Thus, had appellant herein proceeded to complete an offset well *within a reasonable time after notice, there would have been no assessment for intervening drainage.* If compensatory royalty is designed to compensate the lessor for drainage occurring *because of a failure to complete a protective well*, it is difficult to understand why the lessor should be compensated for the period of time during which the lessee *was under no obligation to drill, viz.*, from completion of the offending well to a reasonable time *after notification.* [Italics added; footnote omitted.]

63 IBLA at 256-57, 89 I.D. at 217-18. The first notice from BLM that lease C-22214A was subject to drainage was received on June 9, 1986, some 8 months after lease expiration. CSX argues that when notice

[1] This figure, referred to as the drainage factor, represents a change from the Nov. 5 decision which held that the drainage factor was 4.675 percent.

[2] Appellant CSX was known as Texas Gas Exploration Co. at the time of assignment.

was given it was no longer the Government's lessee, and the Government cannot assess compensatory royalty after the expiration date. CSX contends that BLM's issuance of noncompetitive lease C-2214A, some 6 years after completion of the Damson well, and BLM's subsequent acceptance of rentals substantiate a reasonable belief that no drainage was occurring.

In the alternative, CSX contends that if the BLM notice that drainage was occurring had been tendered in a timely manner, CSX would not have been required to either drill an offset well or pay compensatory royalty because of the prudent operator rule. That rule, which *Ptasynski* describes as a limitation on a lessee's implied obligation to protect against drainage, states that "there is no obligation upon the lessee to drill offset wells unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well." *Olsen* v. *Sinclair Oil & Gas Co.*, 212 F. Supp. 332, 333 (D. Wyo. 1963). CSX calculates that it would have incurred a $158,026 loss had it drilled a protective well. Finally, CSX states that all production from the Damson well can be attributed to the 320-acre spacing unit on which that well is located, no part of which is within C-22214A.

Appellant Morgan objects to the decision on appeal because BLM has assessed him for 9½ years of compensatory royalty despite the fact that he held a 50-percent interest in lease C-22214A for only 20 months. He contends that the decision disproportionately impacts him and ignores the fact that "the federal lands from which drainage allegedly occurred were covered by at least two different Federal leases in the period from 1972 to 1985, and record title to said Federal leases was held by at least seven separate individuals or entities during the period."[3] Morgan complains that only he and CSX have been assessed for drainage from lease C-22214A.

Appellant Morgan also contends that BLM has the burden of proving that an economic well could have been drilled, and BLM wrongly placed the burden of proof in this area on the appellants. Morgan joins with CSX in reciting that *Ptasynski* requires notification from BLM before the duty to protect against drainage arises. Morgan notes that by giving notice of substantial drainage from the leased lands after the lease expired, BLM has deprived him of any ability to perform his contractual duties by drilling an offset well. He contends that BLM could have known of potential drainage as early as 1972 and did in fact know of such potential drainage in March 1982 when designating part of C-22214A as within a KGS. He similarly agrees with CSX that no drainage has in fact occurred from lease C-22214A, citing the drilling and spacing orders of the Colorado Oil and Gas Commission. Morgan contends that BLM's assessment of royalty for drainage commencing in April 1976 is barred by the applicable Colorado statutes of limitation.

[3] Our review of casefile C-22214A reveals that record title was in the names of six different entities between November 1975 and the date of expiration.

In response, BLM defends the State Director's decision, arguing that the Board erred in *Ptasynski* when holding that a lessee's obligation to protect a leasehold from drainage arises only after a reasonable time subsequent to notification by the lessor that an adjoining well is draining the leasehold. BLM contends that numerous courts and authorities have held that notice to the lessee of drainage is not ordinarily a prerequisite to a lessor's recovery of compensatory damages. BLM advances its position that in *Ptasynski* the Board's reliance on *U.V. Industries* v. *Danielson*, 184 Mont. 203, 602 P.2d 571 (Mont. 1979), was misplaced. BLM notes that *U.V. Industries* was a *damages* action, but all of the cases cited by the Montana Supreme Court as its basis for requiring notice in a *damages* action were cases involving *forfeiture*. BLM explains that a judicial declaration of forfeiture is an equitable decree that is regarded as a harsh and extraordinary remedy. Before a court will declare a forfeiture based on a lessee's failure to satisfy the implied covenant to protect against drainage, the lessor must notify the lessee, indicate that the breach was substantial, and allow a reasonable period for the lessee to drill, BLM states. Only after these events had occurred and the lessee still refused to drill, BLM notes, would a court terminate the lease contract by judicial decree.[4] BLM maintains its position that no such procedures are applicable in the present case.

In addition to the implied covenant to protect against drainage, BLM observes that express lease provisions and applicable regulations require the lessee to protect against drainage. According to BLM, these lease terms and regulations place the burden of protection, and indirectly the initial burden of drainage detection, on the lessee. It is BLM's position that the specific lease terms and Department regulations are consistent with the theory of implied covenant, which recognizes certain implicit duties owed by a lessee by virtue of his holding operating rights to the lease. BLM acknowledges that it did not detect drainage from lease C-22214A until after the lease expired, but charges that CSX was long aware of the offending Damson well and had even sought to purchase it. BLM contends that it is not required to detect drainage and, therefore, its issuance of lease C-22214A noncompetitively and its subsequent acceptance of rental should not preclude it from recovering compensatory royalties.

The lease provision that BLM refers to is section 2(c)(1) of the standard noncompetitive oil and gas lease (Form 3110-2 (Sept. 1973)). This section states:

[4] In support of this position, BLM cites 4 H.R. Williams, *Oil & Gas Law* § 682 (1985), wherein it is stated:
"The reason for requiring that notice and demand precede a suit for cancellation of the lease for breach of covenant is easy enough to discover. Whether the action be considered as one for extraordinary relief in equity or as one to enforce a right of entry for breach of a condition subsequent, forfeiture is the relief sought and accordingly the action is cognizable in equity. Since equity dislikes forfeiture and since one seeking equity must do equity, notice, demand and an opportunity to cure the breach are required."

Sec. 2. The lessee agrees:

* * * * * * *

(c) *Wells.* – (1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director.

Applicable regulations are 43 CFR 3100.3-2 (1982),[5] which virtually replicates the lease provision quoted above, and 30 CFR 221.21(c) (1982),[6] which states:

(c) The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor.

In *Ptasynski*, the Board held that the prudent operator rule was not extinguished by the express obligations imposed upon a Federal lessee by 30 CFR 221.21(c). The Board also held, relying on *U.V. Industries* v. *Danielson*, that royalties lost by a lessee's failure to drill an offset well do not commence on completion of the offending well, but upon the lessee's failure to drill a protective offset well within a reasonable time after notice.

BLM correctly points out that the Supreme Court of Montana relied on lease forfeiture cases when holding in *U.V. Industries* that notice was a prerequisite to an action for damages. However, BLM also points out the past practice of the Department to give such notice and the past policy to discourage collection of compensatory royalties for drainage which had occurred prior to such notice. We believe that a notice requirement is consistent with the prudent operator rule and with longstanding Departmental practice. We, therefore, decline to adopt the position urged upon us by BLM that no notice is necessary. Though we so conclude, we must also acknowledge the need to clarify *Ptasynski* to permit recovery of compensatory royalty if BLM can show that a lessee knew or a reasonably prudent operator would have known that drainage was occurring, regardless of BLM's failure to give formal notice of that occurrence.

In testing a lessee's performance of an implied covenant, such as the covenant to protect against drainage, the great majority of oil and gas producing jurisdictions apply the prudent operator standard. 5 Williams & Meyers, *Oil & Gas Law* § 806.3 (1986). This standard is described by Judge Van Devanter in *Brewster* v. *Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905), as one calling for the exercise of reasonable diligence: "Whatever, in the circumstances, would be reasonably

[5] This regulation was in effect from June 13, 1970, to Aug. 22, 1983, when it was changed slightly and renumbered as 43 CFR 3100.2-2. 48 FR 33662 (July 22, 1983); 35 FR 9670 (June 13, 1970). Minor changes have since occurred. 53 FR 17351 (May 16, 1988).

[6] This regulation was replaced by 30 CFR 221.22 on Nov. 26, 1982. 47 FR 47769. On Aug. 12, 1983, 30 CFR 221.22 was redesignated as 43 CFR 3162.2. 48 FR 36583. Minor changes have since occurred. 53 FR 17351 (May 16, 1988).

expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required." *Id.* at 814. The prudent operator standard is distinguishable from an absolute standard, whereby a lessee is liable without fault for nonperformance of an implied covenant, and it is also distinguishable from a standard based on a lessee's subjective good faith. Williams & Meyers, *supra* at § 806.

If we were to adopt the position urged by BLM and hold that notice of drainage is immaterial to an action for compensatory royalty, our holding would effectively erode the prudent operator standard and replace that standard with an absolute standard requiring an operator to warrant against any loss as a result of drainage. We expressly decline to do so.

Moreover, at least since 1932 the Department has provided a lessee with notice of drainage and has discouraged collection of compensatory royalties prior to such notice.[7] In a letter dated August 25, 1932, to the Director, Geological Survey, Acting Secretary Dixon wrote:

> It has always been the practice of the Department in land and mining cases, where certain acts are required to be done or payments to be made to serve notice upon the parties in interest of the requirements, or allow them to show cause why certain action should not be taken. A similar practice should be followed in these cases of oil and gas leases; when the Department ascertains that offset wells are necessary the parties should be advised in *writing* that they must drill the necessary offsets diligently, or in lieu thereof pay compensatory royalty to the Government.
>
> Hereafter in all such cases *written notice should be given to the lessees* and other parties in interest of the Department's requirements. In all pending cases, where such notice was not given in the past, the demand for "back royalties" should be dropped. [Italics in original.]

This practice was likely changed, BLM states, as a result of the dramatic increase in oil and gas activity during the 1970's, when the resources and personnel of Geological Survey were stretched to accommodate new volumes.[8]

BLM also acknowledges that it continues to provide a lessee with notice of drainage when it identifies such drainage within 1 year of completion of the offending well. BLM Manual 3160-2.11C provides that the authorized officer will notify a lessee by certified mail that a potential drainage situation exists and will request that the lessee submit plans within 60 days for protecting the lease. If compensatory royalty is thereafter assessed, it will be due from the day next following expiration of the reasonable period of time stated in the notice.[9] *Id.*

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[7] *See* BLM Answer brief at page 30, filed May 6, 1987, in IBLA 86-1572, an appeal by Chevron USA, Inc., involving Tribal lease No. 0258-2198. BLM has specifically incorporated by reference pages 12-35 of this pleading in its Answer.

[8] Id. at 31 n.7.

[9] This policy applies to "current drainage cases," *i.e.*, those in which BLM has identified drainage with 1 year of completion of the offending well. A distinct policy is applied to "older drainage cases." *See* BLM Drainage Protection Handbook at H-3160-2 IIB.

BLM's action in the instant case appears to be contrary to a longstanding Departmental policy in favor of granting notice to a lessee. This fact and the well-established principle requiring that a lessee act prudently in protecting the leasehold from drainage are the basis for our holding here. If BLM seeks to recover compensatory royalty without the need for notice, it may effect such change by rulemaking. *Bruce Anderson*, 80 IBLA 286, 301 n.7 (1984).

[1] Our review of *Ptasynski* prompts us to clarify that case in one regard. If BLM has not notified a lessee of drainage, but can prove that such lessee knew or that a reasonably prudent operator would have known that drainage was occurring, BLM may recover compensatory royalties. In such instance, the compensatory royalties would begin to accrue after the passage of a reasonable time following the date of the lessee's knowledge. This clarification is consistent with a prudent operator's duty to exercise reasonable care and diligence in protecting the lessor against drainage. *U.V. Industries* v. *Danielson*, 602 P.2d at 578.[10] If formal notice is given by BLM, that notice is a basis for a subsequent assessment of compensatory royalties. However, if BLM is to assess compensatory royalties for any period prior to the time it gives formal notice, the burden of proving that a lessee knew or that a reasonably prudent operator would have known of drainage rests with BLM. *See Lafitte Co.* v. *United Fuel Gas Co.*, 177 F. Supp. 52, 59 (E.D. Ky. 1959). Our clarification of *Ptasynski* in this respect allows BLM to assess compensatory royalties if BLM is able to prove that a lessee actually knew or a reasonably prudent operator would have known that drainage was occurring.

BLM never gave appellants notice of drainage during the life of lease C-22214A and has not attempted to prove that appellants knew or that a reasonably prudent operator would have known of such drainage. Therefore, the State Director's decision must be vacated. If, upon remand, BLM should issue a decision assessing compensatory royalties, that decision should set forth the facts necessary to demonstrate appellant's knowledge of drainage. The decision should also set forth the legal basis for assessing appellant Morgan for drainage during periods when he was a stranger to the lease and the legal basis for not joining all parties who held an interest in the lease during the period that drainage was occurring. Any such decision should also set forth the legal basis for assessing compensatory royalty for periods that appear to be beyond the reach of applicable statutes of limitations. *Indian Territory Illuminating Oil Co.* v. *Rosamond*, 190 Okla. 46, 120 P.2d 349 (1941).[11]

[10] "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it." *Wood* v. *Carpenter*, 101 U.S. 135 (1879), quoting from *Kennedy* v. *Green*, 3 Myl. & K. 722. "It will not do to remain willfully ignorant of a thing readily ascertainable." *Williams* v. *Woodruff*, 35 Colo. 28, 85 P. 90, 95 (1905), quoting from *McQuiddy* v. *Ware*, 87 U.S. (20 Wall.) 14, 22 L.Ed. 311 (1874).
See also Comments to Article 136, Title 31, Louisiana Revised Statutes (1980).

[11] We do not reach the question of whether an offset well is commercially practical. If it can be shown that lessees knew or that a reasonably prudent operator would have known that drainage was actually occurring, the determination that an offsetting well was commercially feasible (and the calculation of compensatory royalties due) must be based on conditions existing after the expiration of a reasonable time from the date of notice.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Director is vacated and remanded.

R. W. MULLEN
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

UNITED STATES FOREST SERVICE *v.* WALTER D. MILENDER

104 IBLA 207 Decided: *September 12, 1988*

Appeal from an Administrative Law Judge's decision permitting placer mining operations within a powersite.

Affirmed in part, reversed in part, modified in part.

***United States Forest Service* v. *Walter D. Milender*, 86 IBLA 181, 91 I.D. 175 (1985), modified.**

1. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

2. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

3. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

4. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

5. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

6. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

In June 1982, Walter D. Milender located the Agate One and Red Rock placer mining claims, each consisting of 20 acres. These claims, with the exception of the southeastern portion of the Red Rock, are situated within Powersite Classification No. 179 in the Plumas National Forest. After Milender filed location notices with the Bureau of Land Management (BLM), BLM inquired of the United States Forest Service (FS) if it had objections to the conduct of placer mining operations on the claims pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1982). FS objected to the proposed placer mining operations, asserting that the claims would substantially interfere with other uses of the land. Following a hearing on the issues thus raised, Administrative Law Judge L. K. Luoma prohibited placer mining on the Red Rock and Agate One claims, and on three other claims which are no longer an issue in this case, those three having been subsequently relinquished. The testimony at the original hearing is summarized in *United States Forest Service* v. *Milender*, 86 IBLA 181, 183-89, 92 I.D. 175, 177-81 (1985).

Milender appealed. In the subsequent Board decision, *United States Forest Service* v. *Milender, supra*, the Board examined the standard used to determine whether or not placer mining operations should be prohibited on powersite lands. The Board focused on the term "unrestricted mining" as used in *United States* v. *Bennewitz*, 72 I.D.

183, 187-88 (1965). *Bennewitz* employed this term to describe the Secretary's perceived inability under the Act to limit or condition the claimant's right to mine following commencement of mining operations; this approach had become the criterion for subsequent decisions which followed the *Bennewitz* reasoning.

In the *Milender* decision, we rejected this rationale. Therein, the Board held that it is error to prohibit placer mining on powersite lands pursuant to the Act merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on mining claims, and (2) all land has some other use or value which would be affected by mining, so that prohibiting mining for that reason would foreclose mining on all powersite lands and effectively nullify the Act. The Board stated that whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation. The Board held that the proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal operations, subject to regulatory restraint, might interfere with such uses. The Board also expressly overruled *United States* v. *Cohan*, 70 I.D. 178 (1963), to the extent that case precluded consideration of the effect other law, regulations, precedent, police powers, and remedies may have upon the Department's ability to regulate mining.

Because the Board had enunciated a new standard, it set aside Judge Luoma's finding that "unrestricted placer mining on the claims will substantially interfere with timber management." The Board found that there must be an objective evaluation of the value of timber management use and the reasonable and realistic extent to which such use might be impaired by lawful placer mining operations which are subject to such constraints as may be imposed for the protection of other resource values. The Board remanded the case to the Hearings Division with instructions to reopen the hearing for the limited purpose of determining, consistent with the opinion, whether the potential interference with the use of the land for timber management is sufficient to warrant issuance of an order prohibiting mining.

The Administrative Law Judge found on remand that Milender's plans for exploring his claims would have little or no effect on timber management, but that a large scale open pit mining operation such as he would conduct "would effectively take the disturbed acreage out of timber production for the foreseeable future, in spite of best efforts to restore the surface to its present conditions" (Decision on Remand, dated Sept. 27, 1985, at 11). He concluded, however, that placer mining operations on the two remaining claims here involved, the Agate One and Red Rock, would not substantially interfere with other uses of the

land and that such placer mining should be permitted on the condition that, following operations, the surface of the claims should be restored to the condition in which it was immediately prior to these operations. *Id.* at 11-12. FS filed a timely appeal.

On January 9, 1986, FS also filed a request for reconsideration of our earlier decision, *U.S. Forest Service* v. *Milender, supra*, and for consideration of this pending appeal en banc. FS argued, correctly, that the Board in the *Milender* case discarded the "unrestricted placer mining test" postulated by the decision in *United States* v. *Bennewitz, supra*.[1] FS pointed out that the *Milender* Board was not unanimous in regard to the "balancing test" described by that opinion and asks that the Board set aside this holding or clarify it. Good cause appearing, this appeal is therefore considered by the entire Board. All prior proceedings before the Department concerning the two claims which remain at issue are presently before us for review. We will consider the issues on appeal separately as they apply to each claim, and will not limit our review to the Administrative Law Judge's decision on remand, but will consider the entire dispute insofar as concerns the two remaining claims open to review.[2]

The purpose of the Mining Claims Rights Restoration Act of 1955 was to open the approximately 7 million acres of public lands then withdrawn or reserved for power development or powersites to entry under the Federal mining laws.[3] Section 2 of the Act, now 30 U.S.C. § 621 (1982), "limit[ed] the effect of entry in four respects."[4] The fourth of these, now contained in 30 U.S.C. § 621(b) (1982), "gives the Secretary of the Interior authority to hold public hearings to determine whether placer mining operations would be detrimental to other uses of the lands involved."[5]

Section 621(b) provides, in part:

> The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of 60 days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining

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[1] The rationale of the *Bennewitz* decision was twice rejected by our *Milender* opinion. It was generally disapproved in a note approving *United States* v. *Mineral Economics Corp.*, 34 IBLA 258 (1978), as the sole viable precedent remaining from prior Departmental decisionmaking on this subject. Later, use of the *Bennewitz* rationale was denounced as "unwarranted and conceptually improper." *U.S. Forest Service* v. *Milender*, 86 IBLA at 194, 92 I.D. at 183. *Milender* rejects the thesis, expressed by *Bennewitz*, that the Department can "act only once" to control placer mining. The *Milender* opinion is wholly predicated upon the fact that current regulation of mining has become continuous, whatever may have been the practice when *Bennewitz* was decided. The dissent mistakenly assumes that *any* interference with another use is "substantial." If other uses than powersite use are insubstantial, there cannot be a substantial interference with such uses.

[2] References to the 1983 transcript of hearing will be cited: 1983 Tr. References to the remand hearing held in 1985 will be cited: 1985 Tr.

[3] S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S. Code Cong. and Ad. News at 3006. This purpose is realized in 30 U.S.C. § 621(a) (1982), which provides:

"All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes * * *."

[4] S. Rep. No. 1150, *supra*, note 1, at 3006. Significantly first among the limitations was the retention of "all power rights" by the United States. Obviously interference with those rights is not allowed. Powersite use remains the primary use of this land.

[5] Id. at 3007.

operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining.

[1] It is at once apparent that there is no statutory requirement that there be a hearing before placer mining operations are allowed.[6] The Secretary may, in his discretion, allow the 60-day period established by the Act to expire, thus enabling the placer miner to conduct operations despite their effect upon other uses. In the event a hearing is held, however, the Secretary's order must provide for one of three stated alternatives, although nothing in the Act links any available alternative to a particular finding, and any limitations placed upon the proper exercise of Secretarial discretion exist only to the extent legal constraints require reasonableness in actions affecting the public lands. Since the Act does not require any particular result, the third, and most liberal alternative to the miner, a "general permission" to engage in placer operations, is always a possibility. A "general permission" to engage in placer mining means that "mining, development, beneficiation, removal, and utilization of the mineral resources of such lands * * * [are] all to be carried out under existing laws regulating such activities."[7]

Our first *Milender* opinion was concerned with the definition of the statutory term "substantially interfere," or rather with the redefinition of that term following a series of decisions which the Board found to have been wrongly decided, based upon a misconception originating in *United States* v. *Cohan, supra.* So as to give effect to the apparent purpose of the Act, which was to restore mining to powersite areas where it had been prohibited, we proposed, by way of example, an approach to decisionmaking in these cases, which required the use of a balancing test:

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[6] It is noted that FS provided evidence at the remand hearing through a member of the staff of the Regional Office, Pacific Southwest Region, to the effect that in FY 1985 in 6 out of 44 placer mining applications made in the Region, it was determined that a hearing should be conducted; in the 38 cases in which no hearing was sought, a finding was made that placer mining would not substantially interfere with other uses of the land affected without conducting a hearing (1985 Tr. 18-19).

[7] S. Rep. No. 1150, *supra*, note 2, at 3006.

The decision in each specific case, then, must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operation,[1] with due regard for the extent to which such operations might be controlled, inhibited and/or mitigated by existing law and regulations.

[1] Since [*United States* v.] *Cohan*, [70 I.D. 178 (1963)] only one Departmental decision has authorized placer mining on powersite land, and that was the only decision which correctly evaluated the value of the "other use" of the land against placer mining and concluded that even though the other use might be substantially impaired, mining could proceed anyway. In *United States* v. *Mineral Economics Corp.*, 34 IBLA 258 (1978), the Board affirmed the finding of the administrative law judge that the "likely destruction" of a dove nesting and breeding site was insufficient cause to prohibit mining where the number of doves which would be lost was negligible when compared to the annual number harvested annually by hunting.

86 IBLA at 204, 92 I.D. at 188.

[2] The note to our holding in *Milender*, quoted above, is essential to an understanding of the *Milender* opinion, first because it disapproves *all* our prior decisionmaking in this area, including the *Bennewitz* decision, and, more importantly, because it provides us with an example of a case in which the restoration statute was correctly applied by the Board - *Mineral Economics*. In *Mineral Economics* it was presumed, as it now is presumed with Milender's claims, that mining would remove vegetation which was being managed for another purpose. In the *Mineral Economics* case, the competing use was wild dove production. As in this appeal, the vegetation present on the claims was not of uniform quality, nor was the vegetation of a unique type. Weighing the diminution of the dove population which total removal of the vegetation would cause against the potential benefits of mining, the Board found that the United States had failed to "sufficiently establish such a substantial use of the land for uses other than mining which warrants a prohibition of mining." *Id.* at 262. The use of this sort of balancing test is at the center of our *Milender* decision. And central to the balancing test to be applied is the concept that competing uses must be substantial if they are to be used to prohibit placer mining.

[3] Under the Act the Secretary may hold a hearing to determine whether placer mining operations would substantially interfere with other uses of land included within a placer claim, although he need not do so. Admittedly, all land has other uses which would necessarily be interfered with if extensive, lawful placer mining is conducted. However, the purpose of the Act cannot be effectuated if mining is prohibited in every instance where any impairment of another use is identified at a hearing. Obviously, Congress intended that placer mining should, in general, be permitted, and that some interference with other uses must be tolerated. Congress, however, provided that mining could be prohibited if the Secretary determined that mining would substantially interfere with other uses. But even should the Secretary find there to be substantial interference with other uses, nothing in the Act or in the legislative history of the Act prevents the Secretary from granting "general permission to engage in placer

mining," provided that such an order be "appropriate." Such an order would be "appropriate," we find, when the competing surface use has less significance than a proposed placer mining operation. This requires that the importance of the competing interests be compared and judged on whatever grounds are relevant in the individual case.

As we stated in our first *Milender* decision, the proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal operations, subject to regulatory restraint, might interfere with other uses. And as we found in *Mineral Economics*, the showing of a slight diminution of another resource is insufficient to justify a total prohibition of mining. It is also, of course, recognized that the single purpose of FS regulation of mining is to ensure that the surface of the national forests is not disrupted: FS does not, under its regulations, attempt to balance mining development against competing uses of the forest, nor is FS charged with responsibility for minerals management in the forest. *See generally* 36 CFR Part 228. That responsibility must be borne by this Department. 30 U.S.C. § 621(b) (1982).

Our original decision herein, *U.S. Forest Service* v. *Milender, supra*, contained two independent holdings. First, the panel unanimously held that, in determining whether placer mining would result in substantial interference with other uses of the land, the proper focus of analysis was not whether "unrestricted placer mining" would substantially interfere with other uses, but, rather, whether "legal, normal operations, subject to regulatory restraint, might interfere with such uses." *Id.* at 198, 92 I.D. at 185.

[4] Second, proceeding from the first holding, the majority then held that in determining whether substantial interference had occurred, the decision in each case "must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operations, with due regard for the extent to which such operations may be controlled, inhibited and/or mitigated by existing law and regulations." *Id.* at 204, 92 I.D. at 188. The Board held that, in determining whether or not there was substantial interference, the Department was required to undertake a weighing process in which the benefits of mining were to be set off against the injury to the other uses of the land. It was this second holding from which Judge Irwin dissented in the original decision, a dissent reiterated herein. And it is this holding which the appellant, FS, seeks to have reconsidered in the present appeal.

Judge Irwin dissents on the view that, under the statutory scheme, once it is shown that placer mining will substantially interfere with *any* existing use of the land, placer mining must be prohibited. Thus, he states, "The Act provides for a determination 'whether placer mining operations would substantially interfere with other uses of the land included within the placer claim,' not whether those uses are

substantial or whether they are less significant or valuable than the proposed placer operations." *Infra* at 179. This argument is flawed for two reasons. First as observed in *Milender*, by its nature placer mining necessarily interferes to a substantial extent with any other use, at least during the period of active mining. *Id.* at 200, 92 I.D. at 186. Thus, the position taken by the dissent requires the total prohibition of placer mining activities on lands withdrawn for powersite purposes, a result which is clearly inconsistent with the intent of Congress to open some powersite lands to placer mining.

Second, and more critically, there is a legal error in the dissent's analysis. As pointed out previously, there is simply no provision in the Act which requires the Secretary to prohibit placer mining even if he affirmatively finds that substantial interference with other uses will occur as a result. If Congress had intended that placer mining be prohibited whenever it was shown that it would substantially interfere with any existing use, Congress clearly could have expressly so provided in the Act. No such language exists.

FS attacks the balancing test enunciated in *Milender* from a different angle than does the dissent. Thus, FS argues that, regardless whether such a test can be theoretically justified, as a practical matter it would prove impossible to administer. As an illustration of this contention, it points to the decision which Administrative Law Judge Luoma entered in the instant case.

FS argues that Judge Luoma found both that large-scale open pit mining operations "would effectively take the disturbed acreage out of timber production for the foreseeable future," but that "if a mining operation reached the stage of full-scale open pit mining the mineral values would of necessity far outweigh the timber management values" (Decision at 11). FS argues that the reasoning utilized by Judge Luoma is inherently flawed:

> It appears that Judge Luoma reasons the mining claimant will not conduct a large-scale mining operation unless he is able to sell his gold for more than it costs to produce, etc. Further he reasons if the miner is making a profit, the value to the public of the gold he produces is greater than the value to the public of all other resources lost as a result of this mining operation.
>
> The flaw is there is no linkage between mining profitability and other values, i.e., timber. The profitability of a mining operation, or the price/value of gold produced thereby, has absolutely no relationship to the price/value of timber (or other resources) lost as a result thereof.
>
> Under the foregoing reasoning the mining claimant can operate in total disregard of the timber destroyed, or other uses lost, because the lost timber values, etc., come out of someone else's pocket, e.g., the public treasury. Expressed otherwise, the profits to the miner from his gold in an ongoing operation may be at the expense of the public in the loss of timber or other resources, but this does not constitute substantial interference and grounds for refusal to approve the placer mining claim.

(Statement of Reasons at 11).

While it may be true that no prudent individual will mine where the costs of mining far outstrip the return to the miner, this fact has relevance only to those costs which the mining claimant must absorb. Costs which are incurred by someone other than the mining claimant

will not affect his decision to initiate full-scale development. Thus, the mere fact that a mining claimant will not proceed to full-scale mining unless he has a reasonable likelihood of making a profit, while relevant, is not dispositive of the question whether the value of the land for mining exceeds the value of the land for other purposes.

The question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes. In the instant case, while there was substantial evidence tendered by FS concerning the effect of full-scale mining on the value of the land for timber management purposes, there is little information from which to guess at the ultimate value of the land for mining purposes.

Walter Milender, the mining claimant, testified at the second hearing about his lack of knowledge of the extent of mineralization on his claims:

> There seems to be a gap in the fact that the mining law says you are to stake a claim once you find enough mineral you are to stake - you can stake a claim, and then you can prospect the claim to find a lode or seam, or whatever.
>
> And the Forest Service seems to have the idea that once I stake the claim I'm ready to go mining, and I am not. I should be ready to go mining, and once I find mineral enough on the claim, then I would have time enough to make application for mining through the standard practices of mining. You have to get an application, you have to go through the Forest Service, you have to go through the state laws to do any mining at all, and this is the part I'm confused on.
>
> But either I'm doing it wrong or the Forest Service is doing it wrong, that somehow I wasn't prepared to answer all these questions on all the mining. I know what type of mining it would have to be, yes, pit mining, but if I have time enough, once I have the claim, I have time enough to prospect it or even drill it if the claim is mine.

(1985 Tr. 76). Milender reiterated this point later in the hearing:

> If I were granted the mining claims, then I could go ahead and prospect the area and see if there is enough to spend more money in the area to see if the sample I have go all through the area or even get better deeper, because we are on top of the mountain and it's - then after you find this out, why, then you would be - and start mining or thinking about mining, then, of course, you would have to go to the Forest Service and make an application to mine, you would have to go probably to the State, you would have to make an environmental report, you would - it goes on, it's endless, you know.
>
> So there are just plenty of laws that, after you find enough material, but there isn't any reason to spend money looking for material when you don't know if you can have the mining claims or not.

(1985 Tr. 136).

This testimony highlights a shortcoming in the legislative scheme with respect to the opening of powersite lands hinted at by our first *Milender* decision. While the mining laws clearly contemplate the making of a discovery prior to the location of a mining claim, it has long been recognized that, as a practical matter, location normally precedes discovery. Indeed, it was awareness of this reality that originally led to the legal recognition of pedis possessio. Thus, the

Supreme Court noted in *Union Oil Co. of California* v. *Smith*, 249 U.S. 337 (1919):

> For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working *against all others having no better right*, and while he remains in possession, diligently working towards discovery, is entitled - at least for a reasonable time - to be protected against forcible, fraudulent and clandestine intrusions upon his possession.
>
> And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, *provided no rights of third parties have intervened.* [Citations omitted; italics supplied.]

Id. at 346-47.

Two salient facts must be kept in mind with reference to the instant case. First, the rights appurtenant to the operation of the doctrine of pedis possessio do not apply against the United States. Since the United States holds paramount legal title and has permitted the taking up of mineral lands only upon the making of a discovery, pre-discovery locations gain the locator no rights vis-a-vis the United States, which may at any time withdraw the lands from location under the mining laws and thereby defeat any inchoate rights flowing from a mere location.

Second, and more critically for Milender, the statute opening up lands within powersite withdrawals to mineral entry expressly requires that the locator of a claim file a copy of his notice of location in the appropriate BLM office within 60 days of the date of location. 30 U.S.C. § 623 (1982). It further provides, in the case of placer locations, that no operations may be conducted in the ensuing 60 days. If, within those 60 days, the Secretary of the Interior notifies the claimant that he intends to hold a hearing to determine whether placer mining operations would substantially interfere with other uses of the land, no operations may be conducted until such time as the Secretary enters one of the three orders set forth above. 30 U.S.C. § 621(b) (1982). Thus, with respect to claims located within a powersite withdrawal, a placer mining claimant is forestalled from performing any discovery work after the filing of his notice of location until *after* the Secretary has determined either that placer mining would not substantially affect other land uses, or until it has been determined that despite such interference the value of mining in a specific case exceeds the loss suffered by interference with other uses.

The problem is obvious. Since we held in *Milender* that proper adjudication under 30 U.S.C. § 621(b) (1982), requires a balancing of the benefits and detriments flowing from placer mining operations, any prospective locator who files a notice of location prior to completion of exploration activities runs the risk that he may be unable to show that

the benefits accruing from placer mining will, in fact, outweigh the detriments. Most locators would be somewhat reluctant to proceed with full exploration before locating the claim since it might make them subject to topfiling by another locator. But even if they were protected by pedis possessio in pre-location prospecting activities, they would have no assurance that, should they ultimately make a discovery, mining might nevertheless be prohibited under 30 U.S.C. § 621(b) (1982), because the Secretary deemed the damaging effects of mining outweighed the benefits of full-scale development.

Thus, the prospective locator is faced with the Hobson's choice of either locating his claim upon relatively meager showings and running the risk that, should a hearing be held, he will be unable to establish the benefits that might flow from full-scale mining, or of forgoing the location of the claim until exploration is completed, thereby running the risk that, even should he succeed in making a discovery, it will count for nothing should placer mining ultimately be prohibited. This is precisely the dilemma which Milender faced here. And this is the source of FS' contention that, in practice, the balancing test must necessarily prove unworkable.

The fact that we recognize that a locator is faced with a difficult choice cannot justify absolving a locator from the effects of the choice actually made. Milender elected to proceed to locate the claims based on relatively preliminary exploration. He was therefore placed at a distinct disadvantage in his attempts to show that the benefits of placer mining operations outweighed the detriments. The question then is whether for each of Milender's claims, FS has shown that substantial interference with timber management practices will be caused by full-scale placer mining, conducted in accordance with normal practices, subject to legal and regulatory restraints.

At the remand hearing, several FS employees testified concerning the probable effects of placer mining on the two Milender claims. Two of these witnesses, District Ranger Michael Robert Wickman and Zone Soil Scientist Denny Michael Churchill, described a nearby placer mine, the Cal-Gom operation, using it as an example of placer development in the vicinity. The operating plan for the Cal-Gom mining operation had been approved by FS in November 1984. At the time of the hearing, approximately 5 tons of overburden had been removed for each ton of gold-bearing material recovered. The Cal-Gom operation involved the widening of a road to approximately two to three times the width needed for normal forest management uses and also involved a disposal site for the overburden. After consultations with other Federal and state agencies, the plan of operations was approved in November 1984, and a $280,000 performance bond was posted by Cal-Gom. Certain restrictions were imposed in the operating plan including restrictions for the protection of water and for the safety of the workers and the general public.

According to Wickman, FS determined that the Cal-Gom area could not be restored for timber production because the area would be an open pit which could not economically be filled. Therefore, the rehabilitation plan of the Cal-Gom pit operation calls for establishing a covering of grass and brush and will forgo the immediate opportunity to grow timber in the future.

The present Cal-Gom operating plan, which contemplates a 20-year life, is now approved for a 3-year period in which approximately 91 acres of land will be disturbed. In the initial mining pilot set-up, there were disclosed values of gold which appeared to weigh in favor of going ahead with the operating plan. Under the operating plan, topsoil which was moved was to be stored and used later to cover the area that was to be excavated. However, Wickman testified, there was no way that the topsoil would cover completely the restored area. Movement of topsoil from other areas was considered but found to be uneconomic.

After describing the Cal-Gom operation, Wickman went on to testify about the timber production on Milender's claims, the Red Rock and Agate One claims. The existing volume of timber on the Red Rock claim is about 14,000 board feet per acre; this is considered a low volume and the claim is considered a poor timber site. It is capable of growing 20 cubic feet of timber annually on an acre of land. The Agate One claim lies in a better timber growing site, presently containing about 30,000 board feet per acre for harvesting. This site was previously logged. An acre of this land is capable of producing 50-80 cubic feet of wood annually or about 16,000 board feet per acre. Wickman said that timber production of that volume every 120 years into the future is the management purpose planned for both claims by FS. He expressed the opinion that if a moderate to large-scale open pit mining operation, similar to the Cal-Gom operation were to occur, it would be very difficult to manage timber on the land afterward.

Churchill, FS soil scientist, testified at length on the types of soils found on the two claims and concluded, as did Wickman, that it would be very difficult, if not economically impossible, to restore either site to viable timber production following an open pit mining operation such as the Cal-Gom operation described by Wickman.

The soils on the Red Rock claim were badly eroded: Churchill testified that the soil on this claim had been "highly impacted by some previous logging" (1985 Tr. 88). While the Red Rock soil was generally of similar quality to that found on the Agate One, Churchill said the productivity of the Red Rock site "has been markedly lowered by surface erosion from previous management practices" (1985 Tr. 89). The Red Rock soils were characterized by Churchill as two types: Deadwood and Kinkel, with Kinkel being the better soil. Because of erosion the land was "less than satisfactory" for timber production (1985 Tr. 92-93).

The Agate One claim was of better soil quality. It was comprised also of Kinkel-Deadwood soils, estimated to be potentially productive of 50-80 cubic feet of wood per acre annually (1985 Tr. 92). Deadwood soils

are shallow and nonproductive, timber production on such soil falling below 20 cubic feet per acre annually, but the presence of the Kinkel type raises the estimate of productive value on the Agate One claim, which contains about 25 percent Deadwood soil. Kinkel-type soil comprises about 60 percent of the area (Churchill Soil Report at 2). Like the Red Rock, the Agate One claim was logged at one time, a circumstance which lowers the present harvest value of this acreage.

Churchill testified, concerning the mineral potential of the Red Rock and Agate One claims, that the geology is basically the same as it is at the Cal-Gom operation, which consists of disseminated gold in loose material. The zones of highest concentration at Cal-Gom range anywhere from 60 to about 140 feet below the surface. Potential mining on the Milender claims would cover approximately 30 to 40 acres compared to close to 100 acres on the Cal-Gom operation. Churchill's opinion about the Milender minerals relied on his feeling that the geological type is the same as in the Cal-Gom operation, and being neither a geologist nor a mining engineer he really could not say how actual mining would be done on the claims. Churchill stated that FS, when it entered into the plan of operations with Cal-Gom, knew that it would completely destroy the forest management program at that point. He said FS decided in that case to sacrifice timber production in favor of mining.

While it is clear that FS established that full-scale placer mining would cause interference with timber management on both Milender claims, it is obvious that the adverse effects which could be anticipated vary substantially between the Agate One and the Red Rock. Nor does the value of the standing timber which is presently merchantable have any relevance to this question. Since these claims were located after the adoption of the Surface Resources Act, 30 U.S.C. §§ 601-615 (1982), FS may harvest the timber prior to commencement of mining operations, and, consequently suffer no loss to the merchantable timber presently found on either claim.

The same, however, does not apply to the growing timber which is not presently merchantable. FS presented testimony that a significant part of the Agate One claim had been partially cut in 1975 (Exh. 17 at 3). While the remaining overstory would be recoverable now, the understory timber would not have reached sufficient maturity to be marketable if a clear cut were undertaken at the present time. Thus, this timber would constitute a total loss. The loss of over 10 year's growth of timber on this land could not be deemed insignificant. Moreover, during any period of full-scale mining development, obviously no timber can be grown on the land. This, too, represents a demonstrable loss.

FS has also argued that, since its experience with the Cal-Gom operation had shown that it would be virtually impossible economically to restore the land to its present condition, timber management would

also be adversely affected on Milender's claims because the land might never be able to be managed for timber production in the future. The dissent agrees with this position when arguing that FS has established placer mining would substantially interfere with timber management.

This contention misapprehends the nature of the order entered by Judge Luoma. Pursuant to the statute, Judge Luoma allowed placer mining "upon the condition that, following placer mining operations, the surface of the claims shall be restored to the condition in which it was immediately prior to those operations." Thus, under the Judge's order, if the claimant wishes to mine, he is obligated, upon completion of mining, to return the land to the condition which existed prior to mining. With respect to the Agate One, since the testimony was unequivocal that the majority of the land was capable of sustained yield at the rate of 50 to 84 cubic feet per acre per year, Milender would be required to return the land to that condition, *regardless* how much it cost. This is true even if these costs, by themselves, made mining prohibitively expensive.

[5] It seems likely that the parties were misled by FS' experience with the Cal-Gom operation. Thus, FS's witnesses recounted the damage which they were unable to prevent and assumed that they were equally fettered with respect to the instant case. In this, they made a fundamental error. There is one crucial difference between the Cal-Gom operation and the two claims here at issue - the Cal-Gom operation is not within a powersite withdrawal, while all of the Agate One and half of the Red Rock are.

With respect to mining operations occurring on otherwise unreserved National Forest lands, FS may well be limited to imposing only those restrictions which do not effectively foreclose otherwise legitimate mining operations, even if to allow mining means that there will be a loss of land from the permanent forest base. But this is so precisely because FS has no general authority to precondition mining plan approval on the return of mined acreage to its pre-mining condition. The Department of the Interior, however, possesses just such authority with respect to lands within powersites under section 2 of the Mining Claims Rights Restoration Act.

While it is true that the Department has no authority to issue an order directing specific operations, it may nevertheless accomplish the same result by requiring that, after completion of operations, the surface be restored to the prior condition. Such a requirement may well compel a mining claimant to forgo certain activities since the cost of ameliorating them will prove excessive. Issuance of an order requiring restoration of the surface to the status quo ante may prevent the most damaging effects of mining precisely because the costs of conducting the clean-up operation would exceed any profit obtained. By requiring restoration, the Department forces the *mining claimant* to absorb certain environmental costs. His right to mine the claim is made subordinate to his obligation to restore the surface upon the completion of mining. If this obligation ultimately precludes

development of the claim, the claimant has no cause for complaint, since he has no right to mine unless and until he agrees to restore the land.

Pursuing this analysis, therefore, there can be no costs attributable to the ultimate destruction of the surface, since Milender is required to restore the surface to the same condition which existed prior to his mining activities. If he finds this too expensive, he may elect not to proceed. But, to the extent that he disturbs any part of the surface, he is required to return it to its pre-mining condition.

Nor must FS simply rely on his assurances that he will reclaim. Section 2 of the Act provides that the Secretary may make such rules concerning bonds as he deems desirable. *See* 30 U.S.C. § 621(b) (1982). Under the terms of 43 CFR 3738.1, should a limited order be issued, as was done here, the mining claimant *is required* to provide a bond, in an amount set by the Administrative Law Judge, for the purpose of assuring surface reclamation after mining is complete. Thus, the costs attributable to the removal of the land from the permanent forest base are not properly computed within the confines of the balancing test mandated by our original *Milender* decision.

Therefore, with reference to the Agate One claim, we find FS has established that there will be a loss in the mortality to those trees which have not yet reached maturity, as well as a loss in annual growth throughout the period in which full-scale mining is occurring. The mining claimant, on the other hand, has provided virtually no information on which one could make a finding that the benefits from mining would outweigh the losses directly attributable thereto. Applying the balancing test required by our first *Milender* decision, Judge Luoma's decision allowing mining on the Agate One claim is reversed.

The Red Rock claim, however, located only partially within the powersite withdrawal, is of marginal commercial timber value, having been damaged by prior logging operations which caused substantial soil erosion.[8] Within the withdrawal, it comprises about 10 acres. Even assuming that the worst case, as exemplified by Cal-Gom, could occur on this claim, therefore, nothing in the record before us shows that interference with timber use on the Red Rock claim is an interference with a substantial interest which would warrant a prohibition of mining operations. The existing volume of timber on that portion of the Red Rock claim which is within the withdrawal is low. This stand is only marginally commercial timberland, owing to erosion and to a low site capacity because of poor soils. FS has classed this land at the lowest commercial timber category. It will not regenerate successfully for silvicultural purposes. Since the order entered by the

[8] FS has not analyzed the effect of mining on the southeastern part of the Red Rock claim. As to mining this portion of the claim, therefore, there has been no objection.

Administrative Law Judge requires that this tract be restored, following mining, "to the condition in which it was immediately prior to those operations," it cannot be assumed that FS will allow the Cal-Gom operation to be repeated here. The land will, therefore, only be affected by mining during the life of the mining operation. In any event, even should the principal regulatory mechanisms for controlling mining operations prove to be somehow ineffective in this instance, a bond must be obtained to ensure that the reclamation ordered by Judge Luoma will take place.

[6] Judge Luoma, however, made no provision for a bond in his decision, although the regulations governing powersite mining operations require the Administrative Law Judge to set a bond. 43 CFR 3738.1. Moreover, a review of the record fails to disclose a foundation for setting the amount of a bond in this case. It is apparent this requirement was overlooked by all parties to this proceeding. Accordingly, we must direct that FS and Milender attempt to reach an agreed-upon amount for a bond. If this cannot be done, another fact-hearing will be required, limited to the question of the proper amount of bond to be furnished.

Following the approach taken in *Mineral Economics*, therefore, we find, as did the Administrative Law Judge, that loss of timber production on the Red Rock claim would not substantially interfere with other uses of the land, because the competing use described by FS, cultivation for commercial timber, was not shown at the hearing to be a substantial competing alternative so as to justify a prohibition of mining. Particularly at this early stage in the mineral development of the Red Rock claim, it is clear that the marginal timber located on this claim does not reasonably justify an order prohibiting placer mining, since, as the Administrative Law Judge found, the possibility that a claim might contain a profitable gold mining opportunity merits exploration of this otherwise marginally productive tract of land. Subject to regulation and reclamation, therefore, Milender should be allowed to explore the mineral value of this claim.

This realistic approach to decisionmaking is the approach outlined by our prior decision in *Milender*. The first consideration in determining whether mining is to be preferred over some other use in any given case is that Congress generally intended to open powersite lands to mining. FS has not submitted sufficient evidence to establish that an order prohibiting mining is necessary for the Red Rock claim. It has, however, established that mining should be prohibited on Agate One. The relative merits of the known competing uses are therefore found to be weighted in favor of the gold mining operation on the Red Rock and in favor of the timber values which have been shown to be more substantial on the Agate One. We conclude, therefore, that the Administrative Law Judge was correct when he concluded that mining

should be allowed, subject to site reclamation, on the Red Rock claim.[9] We reverse his decision as to the Agate One claim, finding that the comparative values of silviculture on that claim outweigh any evidence of the value of the claim for gold. A bond must be posted before mining can proceed on the Red Rock.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge at the hearing on remand is affirmed as to the Red Rock claim and reversed as to the Agate One claim; upon reconsideration of our opinion in *Milender, supra*, that decision is affirmed as explained herein.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

JOHN H. KELLY
Administrative Judge

R. W. MULLEN
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I am in agreement with the result reached in the majority decision, I wish to write separately to underline a conclusion which I believe is necessarily implicit in that decision, viz., the mining claimant bears the ultimate burden of showing by a preponderance of the evidence that benefits resulting from placer mining outweigh the injuries caused by mining to other uses of the land. This holding is, of course, directly contrary to a subsidiary holding of our original decision in this case. *See United States Forest Service* v. *Milender*, 86 IBLA 181, 204, 92 I.D. 175, 188 (1985).

Thus, in our earlier decision in *Milender*, the Board held that "the party who seeks an order prohibiting mining" is required to prove by a preponderance of the evidence that such an order is necessary. *Id.* No support was cited for this proposition other than a general reference to the intent of section 2 of the Act of August 11, 1955, 69 Stat. 682, *as*

[9] Since three members of the Board feel there is an issue in this case concerning the manner of the allocation of the burden of proof which warrants separate emphasis, it should be noted that we agree with the analysis of that question stated in the concurring opinion. The rule as stated by the separate opinion is the rule generally applied by the Board and correctly describes the approach taken by this opinion. Since it is apparent that the dissenter also does not quarrel with this aspect of the decision as written, there is complete unanimity in the Board on this matter.

amended, 30 U.S.C. § 621 (1982), to open up powersite land to mining. I perceive two problems with this analysis. First of all, the Act of August 11, 1955, exhibits two discrete intents. One *was* to open up some powersite lands to mining. The other, however, as shown by Judge Irwin in his dissent, was to protect other uses presently occurring on powersite lands. Nothing in the Act supports the implicit assertion in our original decision in *Milender* that congressional desire to open up lands closed to mining was intended to predominate over its desire to protect other uses of the land from substantial interference.

Second, under the structure of the Act, hearings are not held in response to a request from a "party who seeks an order prohibiting mining." On the contrary, the Act clearly vests the authority to initiate a hearing in the Secretary of the Interior whenever he wishes to determine *whether* placer mining would substantially interfere with other land uses. 30 U.S.C. § 621(b) (1982). While other individuals or entities such as the Forest Service may request that the Secretary issue such a notice, only the Secretary, through his authorized delegate, can initiate the statutory process. In this regard, it would seem to me that there was no justification for departing from the well-recognized procedures with which the Department regularly conducts contest hearings: The Government is required to put on a prima facie case that placer mining will substantially interfere with other uses of the land and then the burden devolves to the claimant to overcome this showing by a preponderance of the evidence. What evidence may be used to overcome this showing is, of course, at the heart of the present appeal. But I think it imperative to keep in mind that, once the Government shows substantial interference with a use, it is the mining claimant's obligation to overcome this showing and, if he or she is unable to do so, for any reason, placer mining operations may properly be prohibited. [1]

The question, then, is whether, for each of the two claims, the Forest Service has shown that substantial interference with timber management practices will be caused by full-scale placer mining, conducted in accordance with normal practices, subject to legal and regulatory restraints. [2] If the answer to this question is in the

[1] I also agree with the majority rationale for rejecting the dissent's contention that if substantial interference with *any* existing use is shown, placer mining must be prohibited. Moreover, the interpretation espoused by the dissent is clearly more restrictive than that which has been applied by the Forest Service. Thus, at the second hearing, in order to dispel any misconception as to its operations under the Act of Aug. 11, 1955, *supra*, testimony was presented showing that, with respect to 44 notices of placer locations in powersite withdrawals, which the Forest Service Region 5 had received during the period from June 1, 1984, through May 31, 1985, the Forest Service had recommended that a hearing be held in only six instances. *See* 1985 Tr. 17-19; Exh. 19. It seems obvious from these statistics that the Forest Service was not mechanistically challenging every filing, but rather was engaged in its own weighing process, a process which the dissent suggests is contrary to congressional intent.

[2] Inasmuch as the Board's prior decision in this case expressly limited the hearing on remand to the effect of full-scale placer mining operations on use of the land for timber management (*see United States Forest Service* v. *Milender*, *supra* at 208, 92 I.D. at 190), no further testimony was presented as to the impact of placer mining on either visual resource values or potential degradation of the North Fork of the Feather River. Indeed, a review of the hearing clearly indicates that both Judge Luoma and counsel for the Forest Service were of the opinion that the Forest Service was absolutely precluded from introducing further testimony on either of these two questions. *See* 1985 Tr. 6-7. Since the Forest Service neither petitioned for reconsideration of that holding nor reargued its original contentions in the context of this appeal, I must agree with the majority opinion that, in this case, only the impact of placer mining on timber management is properly before the Board.

affirmative, the issue then becomes whether appellant has established that the benefits from placer mining outweigh the detriments engendered thereby. Inasmuch as I agree with the majority that the quality of the evidence from the point of view of the initial showing by the Forest Service differs substantially between the Agate One and the Red Rock, I will review the two claims separately.

With respect to the Agate One placer claim, the Forest Service presented testimony showing that the Agate One presently contains approximately 24 to 30 mbf per acre and that the site is capable of growing 50 to 80 cubic feet per acre per year (1985 Tr. 61, 88). Thus, District Ranger Mike Wickman estimated that, based on past timber harvests and the present amount of merchantable timber on the site, the land within the Agate One was capable of producing 31 mbf per acre every 120 years into the indefinite future (1985 Tr. 68).

Zone Soil Scientist Denny Churchill testified as to a soil survey he had conducted on the Agate One. *See* 1985 Tr. 86-93; Exh. 21, Attachment 4. Churchill noted that there were two dominant soil types on the claim, the Kinkel and the Deadwood. He stated that the Kinkel soil, which he described as "fairly well-developed deep soils, fairly productive soils" was the dominant soil on the Agate One (1985 Tr. 88). The Kinkel soils had the potential of sustaining an annual growth of 50-84 cubic feet per acre and carried a Forest Service Site Class 5 rating, meaning it was to be managed for commercial forest production. His report, however, did note that Deadwood soils, which he described in his testimony as "shallow, rather rocky soils * * * essentially nonproductive (1985 Tr. 88)," made up approximately 25 percent of the soils within the claim. Churchill noted that the areas where the Deadwood soils predominated, which were capable of maintaining a growth rate less than 20 cubic feet per acre per year and were therefore rated as Site Class 7, would be considered noncommercial forest land under the National Forest Management Act (1985 Tr. 92). But, overall, Churchill concluded that the land within the Agate One had good to excellent potential for regeneration after a timber harvesting, at least insofar as the Kinkel soils were concerned (1985 Tr. 93). Churchill subsequently noted that Site 5 land constituted 40 percent of the 900,000 acres in the entire Plumas National Forest and over 60 percent of the total land base in the Greenville Ranger District, and encompassed the majority of the land actually managed for commercial forest production in the Plumas National Forest (1985 Tr. 118).

In discussing the effects that full-scale placer mining would have on use of the land within the Agate One claim for commercial timber purposes, both Wickman and Churchill referred to the nearby Cal-Gom operation, also known as the Goldstripe mine, a large open-pit mine located approximately 2 miles from the claim, but totally outside the powersite withdrawal. The plan of operations for this mine had been

approved by the Forest Service pursuant to its surface management regulations (*see generally* 36 CFR Part 228). Nevertheless, even though mining activity was proceeding in a prudent, responsible manner, and appropriate reclamation activities were being pursued, it was clear that the disturbed area, which was already scheduled to aggregate approximately 91 acres, would not be returned to commercial forest production. Indeed, Wickman testified that there would be insufficient topsoil to fill the 21 acres of open pits, and that, while Cal-Gom was going to replace the stored topsoil on the 51 acres being used for overburden dumps and residue disposal, the Forest Service had determined that timber production in the area would not be possible for "some time," without significant expenditures by the Forest Service (1985 Tr. 48-9). [3]

Wickman explained that the Forest Service had approved the plan of operations, even though it realized the timber resource loss which would occur, because of its view that it could not impose conditions on mining, beyond those necessary for compliance with statutory environmental or water quality requirements, if those conditions, because of the expenses necessitated thereby, would make the mining economically infeasible. *See* 1985 Tr. 50-52. Thus, the Forest Service expected to absorb a significant loss in timber production capability within the area of the Cal-Gom operations, even though the operations were being conducted in a responsible manner.

Assuming that similar development would be undertaken on the Agate One claim,[4] Wickman asserted that significant interference with existing timber production use would occur (1985 Tr. 72). In this conclusion, he was supported by the testimony of Churchill, who was the Forest Service's liaison with Cal-Gom and, therefore, had first-hand knowledge of the adverse impacts associated with its open-pit mining activities (1985 Tr. 110).

In their testimony related to that part of the Red Rock placer claim which was located within the powersite withdrawal, [5] both Wickman and Churchill noted that the timber-growing potential of the lands within that claim were significantly below that of the lands within the Agate One. This difference was primarily occasioned by the fact that all of the soils within the Red Rock exhibited severe erosion, much of which was directly attributable to past logging practices under Forest Service contracts (1985 Tr. 88-89, 118-19). As a result, the Kinkel soils within the claim carried a Class 6 rating, meaning they were capable of producing only from between 20 to 49 cubic feet per acre per year, the lowest commercial rating. Churchill noted that "the productivity of

[3] Thus, Churchill testified that insofar as the areas disturbed by Cal-Gom were concerned "[o]ur main point is to simply stabilize disturbed areas so that they create no other impacts, no off-site adverse impacts, and that is usually only in terms of regenerating, let's say, annual or perennial grasses. That is as best as we can do" (1985 Tr. 94).

[4] In this regard, it is important to note that the Forest Services' witnesses were not testifying that the mineral deposit located within the two claims was comparable with that being developed by Cal-Gom. On the contrary, Churchill expressly testified that he had seen no specific data related to the mineral potential of either the Agate One or the Red Rock claims (1985 Tr. 97, 108-110).

[5] Approximately half of the Red Rock claim was located outside the powersite withdrawal and, accordingly, was not covered by the proceedings (1983 Tr. 32, Exh. 3).

this site has been markedly lowered by surface erosion from previous management practices" (1985 Tr. 89). Indeed, in discussing clear-cut harvesting of the timber on the claims, he stated that while the likelihood of successful regeneration on the Agate One would be good to excellent, "it would be less than satisfactory on the Red Rock claim because of previous damage that has occurred on that site" (1985 Tr. 93).

While I think that it is clear that the Forest Service established that full scale placer mining would cause interference with timber management on both claims, I also think it is obvious that the adverse effects which could be anticipated vary substantially between the Agate One and the Red Rock.

Thus, with respect to the Agate One, while I agree with the majority that, under the restriction which Judge Luoma imposed, namely that the surface of the land be restored to its pre-mining condition, the Forest Service will not suffer any loss attributable to the removal of the land from the permanent forest base, I also agree with the majority that the Forest Service has established that it will suffer an increase in the mortality to those trees which have not yet reached maturity as well as the loss of a substantial amount of annual growth throughout the period of full-scale mining. The mining claimant, on the other hand, has provided virtually no information on which one could predicate a finding that the benefits from mining would outweigh the losses directly attributable thereto.

Thus, as the majority notes, the claimant repeatedly admitted that further prospecting was necessary in order to determine whether any development was warranted. While he had submitted assay results at the first hearing (Exh. A), he was unable to say which ones came from the five claims at issue, much less which specific claims were related to which assays (1983 Tr. 153-55). Moreover, his subsequent tender at the second hearing of Master Title plats for Ts. 26, 27 N., R. 8 E., Mount Diablo Meridian (Exhs. B and C), which depict a number of mineral surveys and patented mineral entries in the two townships can scarcely be said to establish that the specific land within his claim is mineral in character, to say nothing of showing the specific values which would outstrip the losses absorbed by timber management should full-scale mining occur. In short, I cannot agree with the decision below that application of the balancing test mandated by our previous *Milender* decision supports permission to mine the Agate One. Accordingly, I agree with the majority that Judge Luoma's decision permitting placer mining on the Agate One claim must be reversed.

I find the situation with respect to the Red Rock claim much more problematic. While the paucity of evidence on behalf of the benefits derived from mining which characterized the Agate One is also manifested with respect to this claim, I found the Forest Service's evidence of damage much less convincing. In fact, my reading of the

record supports the view that, while the land within the Red Rock claim is presently managed as commercial forest land, it would be unlikely to retain such a rating after the timber now standing thereon was harvested. Such being the case, it is difficult to perceive exactly how timber management would be adversely affected by full-scale mining, which, itself, would not occur unless there were adequate indications that mining would be sufficiently remunerative not only to support a mining operation but to recover the cost of returning the surface to the condition it was in prior to mining. Moreover, while I would not necessarily consider damage to 10 acres to be a matter of insignificance, I do believe the small acreage involved in this claim, coupled with the Forest Service's evidence, is a factor which weighs on allowing appellant's mining activities to proceed, subject to the requirement of ultimate surface restoration. As a result, I find myself in agreement with the majority that, subject to surface restoration, placer mining may be allowed on the Red Rock claim.

Since I believe that the majority decision has correctly allocated the burden of proof, and in view of my agreement with the majority's conclusions concerning the legal and factual issues presented by this appeal, I concur with its disposition of the instant case.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

With this decision the Board disfigures the Mining Claims Rights Restoration Act of 1955.

Although that Act was designed to open public lands that were withdrawn or reserved for power development or powersites to mineral development under the general mining laws, [1] it did so "subject to conditions and procedures." [2] One of the conditions is applicable to the owner of any unpatented mining claim located on land described in the Act, *i.e.*, the requirement for filing a copy of the notice of location within 60 days of location. [3] One of the conditions, however, applies only to a person who has located a placer mining claim. [4] This

[1] S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S. Code Cong. and Ad. News 3006. One reason for the interest in the legislation is indicated in the explanation provided for H.R. 3915, the similar bill considered by the 83rd Congress: "Included in the minerals the location and patenting of claims for which would be authorized by this measure on lands now withdrawn is uranium. Large deposits of uranium are believed to exist in several areas set aside for a power site." S. Rep. No. 1532, 83rd Cong., 2d Sess. (1954) at 1.

[2] S. Rep. No. 1150, *supra*, note 1, at 3006.

[3] *See* 30 U.S.C. § 623 (1982).

[4] "The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after filing of a notice of location pursuant to section 623 of this title." 30 U.S.C. § 621(b) (1982).

condition is the subject of this appeal. It "limits the effect of entry * * * under Federal mining laws" by giving "to the Secretary of the Interior authority to hold public hearings to determine whether placer mining operations would be detrimental to other uses of the lands involved." [5]

The Congress implemented its concern about the effects of placer mining with a special procedure. It prohibited the locator of a placer claim under the Act from conducting mining operations within 60 days of filing a copy of the notice of location with the district land office of the land district in which the claim is situated. [6] If, within this time, the Secretary notifies the locator of his intention to hold a public hearing "to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim," then mining operations on the claim are further suspended until the hearing has been held and the Secretary has issued "an appropriate order." [7] Such an order

> shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. [8]

This language of this provision of the Act originated with the Department of the Interior. Assistant Secretary Orme Lewis, in a July 18, 1955, letter to Senator Murray, chairman of the Committee on Interior and Insular Affairs, while agreeing fully "with the need for encouraging mineral development in public-land areas not now subject to mining location," observed:

> The various provisions in the bill which are designed to protect these lands for other uses appear well justified. Powersite lands are often quite valuable for other surface uses. For example, many of the lands withdrawn for power-site purposes are timbered lands situated in national forests. The timber on these lands usually constitutes an integral part of large timber tracts which should be managed on a sustained yield basis. * * * [I]t is particularly important that the Secretary of the Interior be advised immediately when placer claims are initiated since the most serious conflict between mining activities and other land uses occurs when placer mining and dredging operations are involved. The mining of monazite sands by dredging in flat meadow areas has recently caused serious problems in the West because such operations interfere with recreational, grazing, and scenic values of these lands. [9]

The language of the Assistant Secretary's proposed amendment was adopted verbatim by the Congress. [10] The Board has previously said:

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[5] S. Rep. No. 1150, *supra*, note 1, at 3006-7.

[6] 30 U.S.C. § 621(b) (1982).

[7] *Id.*

[8] *Id.*

[9] S. Rep. No. 1150, *supra*, note 1, at 3010-11.

[10] See Conference Report 1610, July 30, 1955, Statement of the Managers on the Part of the House, *id.* at 3013. In explanation, the Managers stated:

"In addition, language has been adopted in the form of a new subsection added to section 2 affecting placer-mining claims which may be located on lands opened to mining entry by H.R. 100. The House managers agree that the

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Inasmuch as such reports represent views of senior officials of this Department which served as the basis for legislative action, this Board is not generally disposed to apply enacted legislation in a manner inconsistent with such statements. * * * Such a conclusion is especially compelling where, as here, Congress enacted *verbatim* the statutory language proposed by the agency. [Italics in original.]

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53, 77, 94 I.D. 394, 408 (1987). [11]

The Board's decision, however, applies section 621(b) of the Act in a manner that is inconsistent with the views of the Department when it was proposed and with the intent of the Congress when it was enacted.

If a hearing is held under that section, the majority says:

[N]othing in the Act links any available alternative [order] to a particular finding, and any limitations placed upon the proper exercise of Secretarial discretion exist only to the extent legal constraints require reasonableness in actions affecting the public lands. Since the Act does not require any particular result, the third, and most liberal alternative to the miner, a general permission to engage in placer operations, is always a possibility.

(Majority Opinion at 159). [12]

I disagree. The three alternative orders the Congress provided in section 621(b) authorize either a prohibition of or a permission to conduct placer operations on the condition the lands are restored to their previous condition afterwards if it is shown at the hearing that there are other land uses that placer mining would substantially interfere with, and a general permission if it is not. [13] Although the Congress opened powersite lands to mining generally, it was concerned about the "serious conflict [that] frequently arises between mining activity and other land uses when placer mining and dredging operations are involved," and therefore provided that such operations be subject to special procedures and conditions. If the evidence presented at a hearing demonstrates no serious conflict, then a general

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Secretary of the Interior should be advised immediately when placer claims are initiated since serious conflict frequently arises between mining activity and other land uses when placer mining and dredging operations are involved, as this amendment provides. The language adopted would give the Secretary authority in the case of placer-mining claims to hold public hearings to determine whether placer-mining operations in the areas would be detrimental to other uses of the lands." *Id.*

The language of this provision has only been amended to allow for the use of certified mail in providing notice to the locator of the Secretary's intention to hold a public hearing. Section 1(27), P.L. 86-507, June 11, 1960, 74 Stat. 202.

[11] "[C]ourts have generally accepted such appended reports and letters from officials of this Department as evidence of legislative intent. *See e.g., Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 50, 55-56 (1983); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 407 n. 1 (1917); *United States* v. *Union Oil Co.*, 549 F. 2d 1271, 1277 (9th Cir.), *cert. denied sub nom. Ottoboni* v. *United States*, 434 U.S. 930 (1977). So has this Board. *E.g., Western Nuclear, Inc.*, 35 IBLA 146, 157, 85 I.D. 129, 135 (1978), *aff'd, Watt* v. *Western Nuclear, Inc., supra; Cecil A. Walker*, 26 IBLA 71, 76 (1976)." *Id.*

[12] The language of H.R. 3915 in the 83rd Congress did not contain this alternative, but provided:

"[M]ining operations on such claim shall be further suspended until the Secretary holds the hearing and issues an appropriate order prohibiting or permitting such operations or permitting such operations upon the condition that, following such operations, the surface of the claim shall be restored by the locator substantially to its condition immediately prior to such operations." S. Rep. No. 1532, *supra*, note 1, at 5.

The report of the Senate Committee on Interior and Insular Affairs explained:

"The Secretary can then prohibit mining operations altogether, or may permit them only on condition that the locator file a bond or undertaking to restore the surface of the land substantially to its condition prior to such mining operations, if the Secretary deems the public interest to require such action." *Id.* at 2.

The general permission alternative was added to the bill enacted by the 84th Congress to authorize mining in accordance with existing laws, without posting a bond, where the hearing revealed that placer mining operations would not substantially interfere with other uses of the land. *See* note 13, *infra*.

[13] A general permission to engage in placer mining operations means they would be "carried out under existing laws regulating such activities." S. Rep. No. 1150, *supra*, note 1, at 3006; *U.S. Forest Service* v. *Walter D. Milender*, 86 IBLA 181, 92 I.D. 175 (1985).

permission to engage in placer mining operations may be granted. If, however, the evidence presented at the hearing demonstrates that placer mining operations would cause such a conflict, *i.e.*, would substantially interfere with other land uses, the conflict must be resolved by requiring the restoration of the lands *or* by prohibiting the operations. To do otherwise ignores the conditions under which the Congress authorized placer mining operations. If there is evidence of substantial interference, it would be outside the range of choices available to the Secretary to grant a general permission anyway, and it would be arbitrary and capricious, an abuse of discretion, and not in accordance with law to do so. 5 U.S.C. § 706(2)(A) (1982); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-16 (1971). *See Hurley* v. *United States*, 575 F.2d 792 (10th Cir. 1978). That is, it would violate "legal constraints [that] require reasonableness in actions affecting the public lands."

The Board adopts an approach to decisionmaking under section 621(b) that requires the use of a balancing test. Central to this approach "is the concept that competing uses must be substantial if they are to be used to prohibit placer mining" (Majority Opinion at 160). The majority says "Congress intended that placer mining should, in general, be permitted," and finds that an order granting general permission to engage in placer mining would be appropriate "when the competing surface use has less significance than a proposed placer mining operation." *Id.* at 161. Elsewhere the majority says "[i]f other uses than powersite use are insubstantial, there cannot be a substantial interference with such uses." *Id.* note 1 at 158. "The question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes," according to the majority. *Id.* at 220.

The Congress intended that mining, in general, be permitted on powersite lands, but limited the circumstances under which placer mining could be. The Act provides for a determination "whether placer mining operations would substantially interfere with other uses of the land included within the placer claim," not whether those uses are substantial or whether they are less significant or valuable than the proposed placer operations. Granting a general permission to engage in placer operations in the face of evidence demonstrating other land uses would be substantially interfered with would be outside the scope of the Secretary's authority and would therefore be arbitrary and capricious. *Citizens to Preserve Overton Park* v. *Volpe, supra.*

The majority observes that, because 43 CFR 3738.1 requires that a bond be posted if an order conditioning permission to conduct operations on restoration of the lands involved is issued, "there can be no costs attributable to the ultimate destruction of the surface" (Majority Opinion at 169). Its "calculation" of relative values results in

an application of the balancing test that disallows placer mining on the Agate One claim because the locator did not provide sufficient information to overcome the Forest Service's showing of the loss of immature trees that could not be marketed before mining, and of annual growth during the mining operation. *Id.* at 169. Because the land within the Red Rock claim "is of marginal commercial timber value," however, the majority concludes that "nothing in the record before us shows that interference with timber use * * * is a substantial interest which would warrant a prohibition of mining operations," and allows placer mining subject to restoration of the surface and the accompanying bond. *Id.* [14]

The majority's decision concerning the Red Rock claim contradicts the conclusion of the Administrative Law Judge, based on the evidence at the hearing on remand, that the kind of placer operation that would be conducted "would effectively take the disturbed acreage out of timber production for the foreseeable future, in spite of best efforts to restore the surface to its present conditions." [15] Just as it would be arbitrary and capricious to grant a general permission where the evidence shows placer mining operations would substantially interfere with other land uses, it is arbitrary and capricious to authorize such operations where the evidence shows that restoring the surface of the claim to the condition in which it was immediately prior to those operations is not possible. Where, as here, the evidence shows that this alternative will not avoid substantial interference with other land uses, the only order the Secretary is authorized to issue is one prohibiting placer mining operations.

The majority does not define what other land uses it regards as substantial or significant. In this case the lands are precisely the kind cited by the Department in its letter to the Congress as an example of those "quite valuable for other surface uses," *i.e.*, "timbered lands situated in [a] national forest * * * which should be managed on a sustained yield basis," and they are so managed by the Forest Service. Even so, and even where the worth of the use could be measured in relatively objective terms, the majority finds this use is not substantial enough on one claim involved in this case, and implies that it might well have found the same for the other claim if the locator had provided a little more information about the benefits from the

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[14] The majority's calculation with respect to this claim says nothing about the values of the proposed placer mining. The concurring opinion observes: "[T]he paucity of evidence on behalf of the benefits derived from mining which characterized the Agate One is also manifested with respect to this claim." *Supra* at 175.

[15] Decision on Remand dated Sept. 27, 1985, at 11; *see* Exhibit G 21, report of Mike Wickman, District Ranger, Greenville Ranger District, Plumas National Forest, dated June 25, at 2-3:

"*Impacts of Mining on the Timber Resource*

"We believe that wherever topsoil is stripped on these claims in conjunction with mining, the producitivity of the site will be reduced to the extent that it will no longer be commercial timerland (productivity will drop below 20 ft.^{3}/acre/year).

"Productivity would be impacted due to changes in the physical and chemical characteristics of the site. This would hold true even if soil were stripped and stockpiled for eventual use in reclaiming the site (as would be a provision of the Plan of Operations). Soil handled in this way has reduced nutrient levels. Bulk density is also impacted. The main obstacle to restoring commercial timber site is rooting depth. Following reclamation, the site would be characterized by a thin soil mantle sitting on top of bedrock. Such a situation does not provide sufficient rooting area to maintain productive timberland." *See also* Tr. 47-49, 51-52, 70-72, 94-97, 100, 110.

proposed placer mining. Nor does the majority consider the "recreational, grazing and scenic values of these lands," or their other values, under the balancing approach. It does not because the scope of the hearing on remand did not allow for evidence on those values. How will such less tangible values be weighed in the balance where they are involved?

I agree that the Congress intended to restore rights to locate mining claims, as the name of the Act indicates. However, the Congress also recognized that certain land uses and land-use values cannot be restored after placer mining and sought to protect them. In its apparent concern to prevent the frustration of one purpose of the Act in some future case by the assertion of some fabricated use or imaginary value, the Board ignores the other purpose of the Act and sacrifices silviculture on national forest lands involved in this case.[16] The discretion that the majority says is afforded under section 621(b) exceeds the scope of the authority the Congress delegated. The result in this case is an abuse of the discretion that is delegated and is arbitrary and capricious. The balancing approach the majority adopts offers neither objectivity nor methodology and makes it impossible to predict how land-use values will be weighed against proposed placer mining values in future cases.

The Congress charted a straightforward course: Are there other land uses? If there are not, no hearing is necessary. If there are, will placer mining substantially interfere with them? If not, it may be granted a general permission. If so, can the use be restored? If it can, placer mining may be permitted on the condition the land is restored. If it cannot, it must be prohibited. The Board discards both the chart and the compass.

I dissent.

WILL A. IRWIN
Administrative Judge

NATIONAL MINES CORP. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

104 IBLA 331 Decided: *September 23, 1988*

Petition for discretionary review of a decision of Administrative Law Judge Joseph E. McGuire denying petition for review of notices of violation and assessing civil penalties. CH 5-19-P.

Affirmed in part and affirmed as modified in part.

[16] When the Act was enacted there were approximately 3½ million acres of national forests located within power withdrawals. H. Rep. No. 86, 84th Cong., 1st Sess. (1955) at 6.

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1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

OSMRE properly issues a notice of violation for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that water used to control dust on the permittee's access road was carrying suspended solids in excess of the allowable limit set by 30 CFR 717.17(a)(3) off the permit area and into a river.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness

An assignment of 15 points for probability of occurrence is proper where the violation cited is failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow and the evidence shows that suspended solids in amounts substantially greater than allowable limits were being carried off the permit area and into a nearby river.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness

The Board will reduce the points assigned for extent of potential or actual damage for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that, while damage would extend outside the permit area, there was no evidence as to the extent or duration of potential or actual damage.

4. Board of Lands Appeals--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

When the Board of Land Appeals reduces the number of points assigned for a violation to fewer than 30, and that violation is not contained in a cessation order, in accordance with 30 CFR 723.12(c), the assessment of a civil penalty is discretionary and the factors in 30 CFR 723.13(b) are to be taken into consideration.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

As a general rule, where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed by the permittee's operations, the discharge from the sedimentation pond must meet the effluent limitations of the regulations. However, where a person charged with a violation of the effluent limitation can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations, the person may escape responsibility for the violation. However, a failure to provide such evidence will result in an affirmation of the violation.

APPEARANCES: Joseph M. Karas, Esq., and Chester R. Babst III, Esq., Pittsburgh, Pennsylvania, for petitioner; Lynne N. Crenney, Esq., Office of the Field Solicitor, Pittsburgh, Pennsylvania, and Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

September 23, 1988

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

By order dated November 7, 1986, the Board granted the petition of the National Mines Corp. (National Mines) for discretionary review of a September 11, 1986, decision of Administrative Law Judge Joseph E. McGuire denying National Mines' petition for review of notices of violation (NOV) Nos. 82-1-36-2 and 82-1-36-3 issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) and assessing civil penalties in the amount of $3,600.

This case was initiated when OSMRE inspector Thomas F. Koppe issued the two NOV's to National Mines on April 16, 1982, for violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *as amended*, 30 U.S.C. §§ 1201-1328 (1982), at National Mines' underground mining operations, known as the Isabella Mine, in Fayette County, Pennsylvania. The NOV's were issued following an inspection of the Isabella Mine on March 29 and 31, 1982, by Koppe. He issued NOV No. 82-1-36-2 for failure to maintain two roads, the access road from the scalehouse to the preparation plant and the access road to the scrap yard, so as to prevent additional contributions of suspended solids to the streamflow in the Monongahela River, in violation of 30 CFR 717.17(j)(1) (Respondent's Exh. 27).

Koppe issued NOV No. 82-1-36-3 for discharges from sedimentation pond 004 for the active refuse pile which failed to meet the numerical effluent limitations for pH and total manganese, in violation of 30 CFR 717.17(a) (Respondent's Exh. 39). In each case, the NOV required certain abatement measures to be undertaken immediately and completed by June 16, 1982.[1] Subsequently, on June 17, 1982, Koppe modified the two NOV's to require completion of abatement by July 16, 1982. *See* Respondent's Exhs. 28, 40. Koppe granted the extensions of time in order to permit a subcontractor hired by National Mines to complete the necessary work.

By notices dated April 30, 1982, the Assessment Office, OSMRE, informed National Mines that OSMRE proposed to assess civil penalties of $1,500 and $1,400, for NOV No. 82-1-36-2 and NOV No. 82-1-36-3, respectively. *See* Respondent's Exhs. 29, 41.

On October 7, 1983, National Mines filed a petition for review of the proposed assessment of civil penalties in connection with the two NOV's, which petition was amended on February 22, 1984.[2] In

[1] NOV No. 82-1-36-2 required National Mines to prevent additional contributions of suspended solids to the Monongahela River by, among other things, constructing sumps, redirecting runoff to existing ponds and/or cleaning and removing silt from ditch lines. NOV No. 82-1-36-3 required National Mines to prevent discharges exceeding 4.0 milligrams per liter (mg/1) total manganese and a pH range not greater than 9.0 and less than 6.0 by, among other things, installing, operating, and maintaining adequate treatment facilities.

[2] As amended, National Mines' petition for review challenged the amount of the proposed assessments, asserting that OSMRE had assigned an incorrect number of penalty points and failed to assign any good faith points. The petition also challenged the fact of the violation cited in NOV No. 82-1-36-3 on the basis that the violative discharges from the sedimentation pond were not caused by National Mines' active refuse pile, but prior surface mining operations of the Luzerne Coal Corp. (Luzerne) on reclaimed land adjacent to the permit area.

conjunction with filing its petition for review, National Mines paid the proposed civil penalties. On September 18, 1985, Judge McGuire conducted a hearing on the petition. Following the close of the hearing, Judge McGuire issued his September 1986 decision from which National Mines (hereinafter petitioner) has been granted a discretionary right of review, pursuant to 43 CFR 4.1270. For the sake of clarity, we will review the two violations cited by OSMRE separately, both as to the fact of violation and the proper civil penalty, if any.

Failure to Maintain Access Road

At the time of his March 29 inspection, OSMRE Inspector Koppe testified that he observed turbid water entering the Monongahela River. He testified that he determined the water was originating from a 4-inch hose laid along the side of the access road near the scalehouse and that the purpose of the system was to water down the road to control fugitive dust (Tr. 29-30, 82, 85-86). Koppe testified that he traced the water down the access road towards the preparation plant, around a bend in the road into a ditch along the access road to the scrap yard, from the ditch into a culvert which passed under the access road, from the culvert into an unnamed tributary running parallel to the river, and from that unnamed tributary into another unnamed tributary which then flowed into the river (Tr. 31). The flow of water is indicated in green on a sketch map of the Isabella Mine prepared by Koppe (Respondent's Exh. 1) and is documented in photographs taken by Koppe (Respondent's Exhs. 2-16). *See* Tr. 32-40.

Koppe also testified that he took four water samples, using the grab method (Tr. 30, 41). Sample No. 1 came from the ditch along the access road to the scrap yard (Tr. 35; Respondent's Exh. 17). A test revealed it contained 6,785 mg/l of suspended solids (Tr. 53; Respondent's Exh. 23). Koppe took sample No. 4 from the first unnamed tributary where it intersected the second unnamed tributary (Tr. 38; Respondent's Exh. 20). It tested at 759 mg/l of suspended solids (Tr. 57; Respondent's Exh. 26). Sample Nos. 2 and 3 were taken, respectively, where the second unnamed tributary entered the river and upstream in the river from that point (Tr. 39; Respondent's Exhs. 18, 19). They contained 343 mg/l and 16.1 mg/l of suspended solids, respectively (Tr. 56-57; Respondent's Exhs. 24, 25). Koppe testified that, following receipt of the test results, he issued NOV No. 82-1-36-2 during an April 16, 1982, followup inspection (Tr. 58).

Petitioner offered the testimony of James R. Bearden, who at the time of issuance of the NOV was a mining engineer employed by petitioner. Bearden testified that the access road near the scalehouse was maintained by periodic scraping and, when necessary, a "sprinkling type system" (Tr. 151). Bearden described the system as consisting of a 1-inch hose laid along the side of the road with a flattened pipe or nozzle inserted in the end which sprayed water on the road, the hose being connected to a fire hydrant which was just barely

opened[3] (Tr. 151-53). Bearden testified that the system was unmanned (Tr. 177), but that it worked "fairly well" to control fugitive dust (Tr. 154). He also testified that OSMRE's water samples could have been influenced by drainage other than that which originated at the hose, viz., drainage from sedimentation pond 005 which entered the first unnamed tributary, as well as drainage from sedimentation pond 004, drainage around that pond, and drainage from the town of Isabella, all of which entered the second unnamed tributary (Tr. 158). Following receipt of the NOV, Bearden testified that petitioner ceased using the sprinkler-type system and, on June 15, 1982, began to employ, as an alternative means of controlling fugitive dust, a water tank mounted on a truck which dispersed water on the access road (Tr. 159-62).

After reviewing all of the evidence adduced at the hearing with respect to NOV No. 82-1-36-2, Judge McGuire concluded that the NOV was properly issued because petitioner had failed to maintain the access road so as to prevent the additional contribution of suspended solids to streamflow. Judge McGuire particularly relied on the fact that OSMRE's sample Nos. 1, 2, and 4 showed suspended solids in water running down from the access road near the scalehouse and entering the Monongahela River, in amounts which exceeded the maximum allowable concentration set forth in 30 CFR 717.17(a)(3), *i.e.*, 70 mg/l (Decision at 5-6).

[1] The regulation which petitioner was cited as violating is 30 CFR 717.17(j)(1), which provides that access roads in the case of underground mining

> shall be constructed, maintained, and reclaimed so as to the extent possible, using the best technology currently available, prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable State or Federal law.

We conclude that the evidence clearly establishes that petitioner violated this regulation. Petitioner's sprinkler-type system in use on March 29, 1982, was part of its maintenance activities undertaken on the access road near the scalehouse. Koppe testified that turbid water could be visually traced from the hose laid along the side of that road eventually into the Monongahela River. *See* Tr. 29-30. Water sample No. 1 taken in the drainage ditch along the access road to the scrap yard and sample No. 4 taken from the first unnamed tributary just before its intersection with the second unnamed tributary both exhibited high concentrations of suspended solids, far in excess of the allowable limit.[4] Thus, it is clear that solids picked up by the water

[3] Koppe was asked whether he could recall a nozzle at the end of the hose that he observed. He replied: "Not offhand" (Tr. 82).

[4] Petitioner contends that sample No. 1 is suspect because it was taken a significant distance from the receiving stream and, therefore, does not reflect any "settling out" of suspended solids which would occur before the runoff reached the stream (Petitioner's Brief at 9). However, the amount of settling out which occurred by the time the runoff

Continued

from the hose were being carried into the streamflow of the second unnamed tributary in excessive quantities.

Petitioner maintains that, because OSMRE offered no evidence of upstream samples which would establish the background concentration of suspended solids in the second unnamed tributary (*see* Tr. 93-94), OSMRE failed to prove that water from the hose was contributing additional suspended solids to the river[5] (Petitioner's Brief at 9). It is true that OSMRE introduced no upstream samples; nevertheless, exhibit 13 is a photograph taken March 29, 1982, of the intersection of the two tributaries. It shows the second unnamed tributary as clear, while the tributary carrying the water from petitioner's access roads is visibly turbid. The turbid water was carried into the river and is reflected in an excessive concentration of suspended solids in sample No. 2 (343 mg/l), which is not accounted for by the background level in the river, as reflected in sample No. 3 (16.1 mg/l). Given OSMRE's exhibit 13, the failure of OSMRE to submit an upstream sample from the second unnamed tributary is not significant.

Thus, we conclude that the evidence establishes that petitioner's access road was not maintained so as to prevent additional contributions of suspended solids to streamflow, in violation of 30 CFR 717.17(j)(1). *See Island Creek Coal Co.*, 1 IBSMA 285, 86 I.D. 623 (1979). Accordingly, we affirm Judge McGuire's September 1986 decision to the extent he affirmed issuance of NOV No. 82-1-36-2.

We turn, therefore, to the question of what is the appropriate civil penalty to be assessed for NOV No. 82-1-36-2. The record indicates that OSMRE assessed a civil penalty in accordance with the point system and conversion table set forth in 30 CFR 723.13 and 723.14. OSMRE assigned a total of 35 points, allocated as follows: probability of occurrence - 14 points; extent of potential or actual damage - 9 points; and negligence - 12 points, equating to a civil penalty of $1,500 (Respondent's Exh. 29 at 4). In his September 1986 decision, Judge McGuire increased the civil penalty to $2,200 based on his determination that 15 points should have been assigned for both probability of occurrence and extent of potential or actual damage for a total of 42 points.

[2] In its brief, petitioner disputes Judge McGuire's assignment of 15 points for probability of occurrence. This category measures the "probability of the occurrence of the event which [the] violated standard is designed to prevent." 30 CFR 723.13(b)(2)(i). Petitioner argues that a 1-inch hose with a flow restricting nozzle discharging at a point 1/4 mile from the Monongahela River "would have virtually no

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reached the second unnamed tributary is reflected in the decrease in suspended solids from 6,785 to 759 mg/l, as between sample Nos. 1 and 4. Sample No. 1 is significant because it indicates that water from the hose was picking up solids as it flowed down the road and drainage ditch. Sample No. 4 shows that, even with the settling occurring, the concentration of suspended solids where the water intersected the second unnamed tributary was significantly in excess of the allowable limit.

[5] Petitioner also challenged all of OSMRE's test results as "questionable" because the samples were not "preserved," *i.e.*, they were gathered without acidification (Tr. 104-05) (Petitioner's Brief at 8). However, there was no evidence that the fact that the samples were not preserved had any effect on the test results for suspended solids.

probability of contributing additional solids to the river" (Petitioner's Brief at 13). The record, however, clearly contradicts that argument. Although the record is not clear regarding the size of the hose, the evidence shows that the cumulative flow from the hose was sufficient on March 29, 1982, to create the flow carrying the suspended solids into the river. Thus, the event which 30 CFR 717.17(j)(1) was designed to prevent did, in fact, occur. Under 30 CFR 723.13(b)(2)(i), 15 points are properly assigned.

[3] Petitioner also disputes the assignment of 15 points for extent of potential or actual damage, contending that no additions of suspended solids to streamflow occurred on or off the permit area. Under 30 CFR 723.13(b)(2)(ii), 0 to 7 points are to be assigned if the damage which the violated standard is designed to prevent would remain within the permit area and 8 to 15 points if it would extend outside the permit area, with the actual points to be determined according to the duration and extent of the damage. It is clear that, since additional suspended solids were, in fact, contributed to the river as a result of petitioner's access road maintenance practices, damage would extend outside the permit area. However, there was no evidence regarding the extent or duration of the actual or potential damage resulting from the violation observed on March 29, 1982. Although there is evidence that petitioner had been utilizing the sprinkler-type system prior to March 29, 1982, on an as-needed basis (Tr. 151), there is no indication that the volume of water used on other days was such as would have resulted in the same circumstances as occurred on March 29, 1982. Accordingly, only eight points should have been assigned under this category.

Petitioner also disputes the assignment of 12 points for negligence. Under 30 CFR 723.13(b)(3)(i), up to 12 points may be assigned for negligence, with the actual points dependent on the degree of negligence. OSMRE's notice of proposed assessment contained a section entitled "Assessment Explanation." Under the heading of "Negligence," only the number 12 appears without any explanation for that assignment.[6]

Petitioner contends that its actions did not constitute negligence where, according to Bearden, the sprinkler-type system was a reasonable method of controlling fugitive dust (Tr. 154). However, regardless of the efficacy of the system as a dust control measure, it had obvious consequences with respect to water quality. OSMRE seeks the imposition of 20 points based on its contention that petitioner's conduct exhibited a greater degree of fault than negligence. We disagree. Where the water from the hose was creating a clearly observable flow of turbid water which eventually entered the river, we

[6] Although there is no explanation for the assignment of 12 points, we note that the Mar. 1980 version of OSMRE's Penalty Assessment Manual provides that the assessor "should always start at twelve (12) points and work down for any moderating circumstances." One of the examples given in the manual of when to assess lower points for negligence is when "the permittee is trying to do something but is doing it wrong."

must conclude that petitioner's failure to prevent the contribution of additional suspended solids to the river was "due to indifference, lack of diligence, or lack of reasonable care." 30 CFR 723.13(b)(3)(ii)(B). There is no evidence of a greater degree of fault than negligence. Here, petitioner was attempting to address one problem and through inattention it created another. We find that under 30 CFR 723.13(b)(3)(i), the assignment of 12 points was too many; six points are properly assigned.

Finally, petitioner contends that 10 points should be subtracted for petitioner's good faith efforts to abate the violation. Under 30 CFR 723.13(b)(4), between 1 and 10 points may be subtracted for good faith if the person to whom the notice or order issued achieved rapid compliance. "Rapid compliance"means the person took "extraordinary measures" to abate the violation in the shortest possible time and abatement was achieved before the time set for abatement. 30 CFR 723.13(b)(4)(ii)(A). Bearden testified that use of the sprinkler-type system ceased when petitioner received the NOV and the truck-mounted system was purchased and began operation on June 15, 1982, prior to the deadline for abatement originally set in the NOV (Tr. 159, 161-62). Despite this testimony by Bearden, the record shows that on June 17, 1982, OSMRE Inspector Koppe issued a modification of NOV No. 82-1-36-2 extending the abatement time from June 16 to July 16, 1982 (Respondent's Exh. 28). Koppe testified that the modification was issued as a result of a June 17, 1982, visit to the minesite at which time he communicated with petitioner's staff and was informed that more time for abatement was necessary because "they needed to complete the work with the subcontractor" (Tr. 61).

We do not believe the record supports petitioner's claim of good faith, as defined in the regulations. Although Bearden states that the use of the sprinkler-type system ceased immediately following the receipt of the NOV and that the alternative system was in operation on June 15, 1982, he does not explain why a 30-day extension of the abatement period was necessary. Under the circumstances, no good faith points are warranted.

[4] Therefore, the total number of points that should have been assigned for this violation is 29 (15 for probability of occurrence, 8 for extent of potential or actual damage, and 6 for negligence). Under 30 CFR 723.14, 29 points translates to a civil penalty of $900. While the Board has the authority to waive the assessment of a civil penalty for a notice of violation where less than 30 points have been assigned (*see Lone Star Steel Co.* v. *OSMRE*, 98 IBLA 56, 67 (1987); 30 CFR 723.12(c)), we decline to do so where petitioner was negligent in creating a condition which clearly violates Departmental regulations.

Accordingly, we modify Judge McGuire's decision to the extent he imposed a $2,200 civil penalty for NOV No. 82-1-36-2. Petitioner is properly assessed a civil penalty of $900.

Discharges Exceeding Effluent Limitations

OSMRE issued NOV No. 82-1-36-3 to petitioner because discharges from sedimentation pond 004 exceeded numerical effluent limitations for pH and total manganese. Koppe testified that, at the time of his March 31 inspection, he took two water samples in order to judge the quality of the water in and around sedimentation pond 004 (Tr. 69-70). Sample No. 5 was taken at the discharge point for the pond (Tr. 69; Respondent's Exhs. 32 and 34). Koppe testified that the discharge from the pond enters a ditch which diverts water from an old spoil area around the edge of the pond and this water then flows down under the access road, eventually entering the second unnamed tributary and then the Monongahela River (Tr. 67-69, 101). Sample No. 6 was taken from groundwater seepage from the spoil area situated between the active refuse pile and sedimentation pond 004 (Tr. 70; Respondent's Exh. 35). Although at one point Koppe testified that this groundwater seepage was caught in a diversion ditch and carried off the permit area (Tr. 98), he later agreed that seeps from the spoil area would run into a ditch leading to the sedimentation pond (Tr. 101-02). Sample Nos. 5 and 6 were tested and determined to have, respectively, a pH of 4.88 and 4.34 and a total manganese content of 39.7 mg/l and 62.5 mg/l (Tr. 76; Respondent's Exh. 38). Koppe testified that the acceptable limits were no less than 6.0 or greater than 9.0 for pH and a maximum daily limit of 4 mg/l of manganese (Tr. 76).

The applicable regulation cited in the NOV as having been violated, 30 CFR 717.17(a), provides in relevant part that discharges from areas disturbed by the surface activities of an underground mining operation shall at a minimum meet certain numerical effluent limitations.[7] The maximum allowable limit is within the range of 6.0 to 9.0 for pH and 4 mg/l for manganese. 30 CFR 717.17(a)(3). The discharge from sedimentation pond 004, as reflected in sample No. 5, exceeded both effluent limitations. This would be sufficient to establish a prima facie case of a violation of 30 CFR 717.17(a). *See A&S Coal Co.* v. *OSMRE*, 96 IBLA 338, 345-46 (1987).

Petitioner maintains, however, that it is not responsible for the excessive pH and manganese levels in the discharge from sedimentation pond 004. In support thereof, petitioner offered the testimony of Bearden and Robert D. Volkmar, an environmental

[7] "Disturbed area" is defined in the regulations at 30 CFR 701.5 as

"an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as *disturbed* until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter is released." (Italics in original).

In addition, 30 CFR 717.17(a)(2) provides that:

"For purposes of this section only, disturbed areas shall include areas of surface operations but shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Disturbed areas shall not include those surface areas overlying the underground working unless those areas are also disturbed by surface operations such as fill (disposal) areas, support facilities areas, or other major activities which create a risk of pollution."

scientist with Baker TSA, Inc. (Baker), which was hired by petitioner to do an acid seepage study of the Isabella Mine. Bearden testified that the pond was originally built to catch surface runoff from the active refuse pile (Tr. 164) and that a diversion ditch was also constructed at that time "to divert water from the Luzerne strip mine operation off of our permit site, which was known to be bad water, around our treatment facilities" (Tr. 167). Bearden explained that petitioner subsequently constructed another diversion ditch above the first, at OSMRE's direction, in order to catch groundwater seepage from off the permit area south of the active refuse pile and bring it to the inlet of the pond for treatment (Tr. 167-68, 170-73; Petitioner's Exh. 2). Bearden stated that in the ditch line this water was treated with soda ash (Tr. 169).

In an effort to establish the source of this groundwater seepage, petitioner contracted with Baker (Tr. 174-75). Volkmar testified that, in conducting its study, Baker initially did a geophysical survey to determine areas of high conductivity, in order to guide the placement of boreholes (Tr. 187). Boreholes were then drilled in both the active refuse pile and adjacent spoil areas to the north and south in order to extract material and monitor groundwater (Tr. 188). Volkmar explained the location of certain of the boreholes as follows: "Holes MB1 and MB3 and MB7 were placed entirely in spoil material in areas uninfluenced by refuse material. Holes MB4 and MB5 were placed in refuse material. Holes MB2 and MB6 were located such that they would penetrate the refuse material at the surface and go through the spoil material underneath" (Tr. 188). The quality of groundwater in five of the boreholes was tested in samples taken on December 19, 1984, and April 15, 1985, and the results shown on petitioner's exhibits 3 and 4 (Tr. 189). In addition, the Acid Seepage Study, dated April 29, 1985, prepared by Baker is contained in the record and indicates, at pages 21-27, that Baker tested groundwater acid seepage at seven separate sites, identified as sampling points 53-55 and 58-61 on petitioner's exhibit 2. *See* Acid Seepage Study at 24. The test results of the seepage indicate a low pH and a high manganese content.

Volkmar also testified that weathering tests were conducted on material taken from the boreholes. The tests consisted of "subjecting samples of the material to actual additions of weathering and measuring the reaction products" (Tr. 193). Volkmar testified that, based on these weathering tests, the refuse material was generally considered to be "relatively non-acid producing," while the spoil material was considered to be a "very significant acid producer" (Tr. 192). He also stated that the manganese content would be higher in acid-producing material (Tr. 194). The relatively low pH and high manganese content of groundwater taken from spoil areas is reflected in petitioner's test results for boreholes MB1, MB3, and MB7 (Petitioner's Exhs. 3 and 4). The acid-producing nature of spoil material, as opposed to refuse material, is reflected on petitioner's exhibits 5 and 6, which are graphs indicating acid production for

boreholes MB5 and MB6 (Tr. 193-94). Volkmar testified that it was his opinion that the low pH and high manganese content of the discharge from sedimentation pond 004 was due to "acid seepage out of the spoil material immediately above the * * * pond" (Tr. 195).

In his September 1986 decision, Judge McGuire noted that a permittee is generally responsible for meeting effluent limitations for water discharged from a disturbed area where the water either originated from that area or, having originated from outside the permit area, became commingled with water from the disturbed area, citing *Consolidation Coal Co.*, 4 IBSMA 227, 89 I.D. 632 (1982), and *Jeffco Sales & Mining Co.*, 4 IBSMA 140, 89 I.D. 467 (1982). Judge McGuire held that in order to avoid responsibility for water coming from outside the permit area, a permittee must demonstrate that this water did not become commingled with water originating from the disturbed area. Judge McGuire found in this case that petitioner had failed to do so because

> petitioner's evidence demonstrated that it had diverted acid drainage originating on an off-permit area that had been previously mined by Luzerne Coal Company to its sedimentation pond 004, the structure which served its active refuse pile. Once commingled in that manner, the obligation of meeting the applicable effluent limitations was that of petitioner.

(Decision at 7).

In its brief, petitioner contends that it should not be held responsible where the evidence establishes that groundwater seepage from off the permit area originated in spoil areas created by Luzerne and was carried into sedimentation pond 004 by a diversion ditch which petitioner constructed at the request of OSMRE and thus became commingled only because of that action. Petitioner argues that to hold otherwise would be unjust and contrary to the law (Petitioner's Brief at 17).

The pertinent part of the regulation which petitioner is charged with violating, 30 CFR 717.17(a)(3), requires that discharges from areas disturbed by underground operation and by surface operation and reclamation operations conducted thereon comply with regulatory effluent limitations.[8] The Department commented concerning essentially the same language in 30 CFR 715.17(a) with respect to surface coal mining and reclamation operations, as follows: "[T]he regulations require application of the effluent limitations only to discharges from the disturbed area and not to discharges from areas the permittee has not disturbed through mining and reclamation. * * * Effluent limitations do not apply to discharges from undisturbed areas." 42 FR 62651 (Dec. 13, 1977).

[8] The quality of discharges from disturbed areas is measured at "the point at which drainage from the disturbed area leaves the last sedimentation pond through which it is passed." *Island Creek Coal Co.*, 3 IBSMA 383, 399, 88 I.D. 1122, 1130 (1981).

[5] In accordance with the regulations, a permittee is responsible for all discharges from its disturbed areas and must ensure that those discharges meet the effluent limitations, irrespective of the source of the discharges. *Cravat Coal Co.*, 2 IBSMA 249, 255, 87 I.D. 416, 419 (1982). However, a permittee is not accountable for discharges from areas which are not disturbed by it in the course of its operations. *Darmac Coal Co.*, 74 IBLA 100 (1983). Nevertheless, it has been held generally that where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed, the discharge from the sedimentation pond must meet the effluent limitations. *Jeffco Sales & Mining Co.*, 4 IBSMA at 148, 89 I.D. at 472.

The evidence in this case shows a commingling of waters in the sedimentation pond; however, petitioner's position is that the commingling took place only as a result of OSMRE's insistence that the drainage from the seepage be diverted to the sedimentation pond and that, but for that commingling, the discharge from the sedimentation pond would have met the effluent limitations.

In *Jeffco*, the Board held that one seeking to show the "inapplicability of the effluent limitations in 30 CFR 715.17(a) to discharges from its sedimentation pond" is in essence claiming an exemption from coverage by the regulations and must affirmatively demonstrate its entitlement thereto, citing *Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). 4 IBSMA at 150, 89 I.D. at 473.[9] Judge McGuire held that petitioner's own evidence, in essence, precluded a ruling in its favor because that evidence showed commingling of water from seep areas with water from disturbed areas. His conclusion was that commingling results in a finding of violation. Such a conclusion is, we believe, too restrictive.

In *Consolidation Coal Co.*, 4 IBSMA at 244, 89 I.D. at 641, the permittee was charged with an effluent violation concerning seepage from the base of a refuse pile. The permittee alleged that OSMRE had failed to show that the seepage included any surface drainage from an area disturbed by the permittee. The Board held that the evidence presented by OSMRE, showing that at least part of the drainage from the base of the refuse pile had percolated through the refuse pile from the top surface which had been disturbed by the permittee, established a violation, and that the permittee failed to rebut that evidence.[10] The Board stated, however, that if drainage was proven to be solely from an area not disturbed in the course of the permittee's operations, there

[9] We note that in *Jeffco* IBSMA found that OSMRE had presented a prima facie case of an effluent violation and that Jeffco "failed to carry its burden of persuasion." 4 IBSMA at 152, 89 I.D. at 474. In *Consolidation*, IBSMA held that OSMRE made a prima facie showing regarding an effluent violation and that Consolidation "did not rebut this evidence." 4 IBSMA at 244, 89 I.D. at 641. In each of those cases the proceeding was a review proceeding in which the regulations provide that the person seeking review shall have the ultimate burden of proof as to the fact of violation. 43 CFR 4.1171. IBSMA's holding in *Jeffco* that an applicant for review claiming that the effluent limitations of 30 CFR 715.17(a) are not applicable to discharges from its sedimentation pond bears the burden of proving the facts to support the claim of inapplicability is consistent with 43 CFR 4.1171. Although the present case involves a civil penalty proceeding, in which OSMRE bears, in accordance with 43 CFR 4.1155, the ultimate burden of persuasion as to the fact of violation, petitioner must still demonstrably show entitlement to an exception from responsibility.

[10] *Consolidation* was overruled in part not pertinent to the present discussion in *Alpine Construction Corp.* v. *OSMRE*, 101 IBLA 128, 95 I.D. 16 (1988).

would be no liability for the drainage. *Id.* at 244 n.10, 89 I.D. at 641 n.10.

We conclude, in accordance with the thrust of the *Consolidation Coal* case, that a person charged with a violation of the effluent limitations may escape liability for such a violation which is based on the discharge from a sedimentation pond where it can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations. We will review petitioner's evidence to determine if it made the necessary showing.

In order to support its position, petitioner hired an experienced consulting firm to define the origin of acid seepage at the minesite in question. The results of that study provide convincing evidence that the spoil areas have groundwater which has a low pH and a high manganese content, exceeding acceptable limits, while the refuse disposal material generally does not (*see* Tr. 193-95; Acid Seepage Study at 39-40). Petitioner's consultant concluded that the source of the low pH, high manganese content discharge from the sedimentation pond was acid seepage from the spoil material immediately above the pond (Tr. 195), and that but for such seepage, he would not expect the discharge to violate the effluent limitations (Tr. 196). The location of seepage from the spoil areas is shown on petitioner's exhibit 2.

On petitioner's exhibit 2, Bearden identified two seep areas as having been diverted into the sedimentation pond (Tr. 171-72). Those were sample point 60 and an area near sample point 58 (*see* Petitioner's Exh. 2). Petitioner claims that these areas are the sole cause of the low pH and high manganese content of the sample from the sedimentation pond discharge. However, Volkmar's testimony that the effluent violations were due to "acid seepage out of the spoil material immediately above the * * * pond" (Tr. 195), was never directly linked by petitioner to the two seepage areas identified by Bearden. While Volkmar's testimony was clearly general enough to have encompassed those two areas, it also could have included sample points 53-55 and 58-61, all of which were identified as acid seepage areas and could be considered "immediately above the pond" (*see* Petitioner's Exh. 2).

Moreover, while sample point 53 represents an acid seep area from spoil material, petitioner's exhibit 2 shows the location of that seep area within a disturbed area, *i.e.*, the refuse hollow fill area. In addition, sample point 54 may also be located in that same area. There is no evidence that seepage from sample points 53 and 54 would not have entered the sedimentation pond. Also, while refuse material generally exhibited a minimal acid production rate in weathering tests, two refuse samples produced significant amounts of acid. Acid Seepage Study at 33-34.

We conclude that petitioner has failed to establish that but for diversion of acid seepage from the two areas identified on petitioner's

exhibit 2 into the sedimentation pond, discharges from that sedimentation pond would have met the regulatory effluent limitations. Therefore, we affirm as modified Judge McGuire's decision upholding the violation in NOV No. 82-1-36-3.

We now consider the question of the appropriate civil penalty for NOV No. 82-1-36-3. In assessing a civil penalty, OSMRE assigned a total of 34 points, allocated as follows: probability of occurrence - 13 points; extent of potential or actual damage - 9 points; and negligence - 12 points (Respondent's Exh. 41, at 4). In his September 1986 decision, Judge McGuire affirmed OSMRE's civil penalty assessment of $1,400.

In its brief, petitioner does not dispute the assignment of points for probability of occurrence, extent of potential or actual damage or negligence. Rather, petitioner contends that it is entitled to points for good faith because it took "extraordinary measures" to abate the violation upon issuance of the NOV, as follows:

> Initially, National Mines increased the amount of soda ash treatment by relocating the treatment dispenser [down to the inlet of the pond]. (Tr. 204). Such effort began *immediately* upon receipt of the Notice of Violation. (Tr. 209). When this effort proved unsuccessful, National Mines determined that the only feasible alternative was to pipe the sedimentation pond discharge to its main treatment plant. (Tr. 204). This required engineering, approval by the Pennsylvania Department of Environmental Resources, and construction. (Pet. Exhibit 7). The construction involved approximately 2,000 feet of pipe and cost over $14,000. (Tr. 204-209; Pet. Exhibit 8). [Italics in original.]

(Petitioner's Brief at 18-19).

Bearden testified that all of the work done in order to pipe the sedimentation pond discharge to petitioner's main treatment plant was completed September 12, 1983, over 1 year after the initial time set for abatement in the modified NOV (Tr. 209). Even assuming that construction of the pipe constituted extraordinary measures, petitioner is not entitled to any points for good faith where petitioner admits that abatement was not achieved "before the time set for abatement," as required by 30 CFR 723.13(b)(4)(ii)(A).

In the alternative, petitioner contends that use of the point system and conversion table should be waived and the civil penalty reduced or eliminated in the interest of equity and fairness. The Board, as well as an Administrative Law Judge, has the authority to waive use of the point system and conversion table. 43 CFR 4.1157(b)(1) and 4.1270(f). However, waiver is permitted only where it would "further abatement of violations of the Act."[11] 43 CFR 4.1157(b)(1). We find no

[11] The preamble to the proposed rulemaking which became 43 CFR 4.1157(b)(1) indicates that the regulation was intended to accord the same authority to the Administrative Law Judge as was available to the Director, OSMRE, to waive use of the point system and conversion table. 43 FR 15442-43 (Apr. 13, 1978). As expressed in 30 CFR 723.16(a), the Director may waive use of the point system and conversion table where "taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust." Even utilizing that standard, we are not persuaded that the civil penalty is "demonstrably unjust." Petitioner had adequate opportunity to monitor discharges from sedimentation pond 004 and ensure that effluent limitations were met prior to issuance of the NOV. If it believed that acid seepage diverted to the pond at OSMRE's direction would cause or was causing discharges from its sedimentation pond to violate effluent limitations, it should have objected to OSMRE. The record contains no evidence of objection by petitioner.

justification for waiver of the use of the point system and conversion table in this case. Accordingly, the Board is required by 43 CFR 4.1270(f) to use the civil penalty formula set forth in 30 CFR 723.13 and 723.14. Given the points assigned, this translates to a civil penalty of $1,400 under 30 CFR 723.14. We affirm Judge McGuire's September 1986 decision to the extent that he assessed a civil penalty of $1,400 for NOV No. 82-1-36-3.

In summary, we affirm that part of Judge McGuire's decision upholding the violation in NOV No. 86-1-36-2 and affirm the imposition of a civil penalty for that violation, but we modify Judge McGuire's decision as to his imposition of a civil penalty of $2,200, and we assess a civil penalty of $900. We affirm as modified Judge McGuire's decision to the extent it upheld the violation in NOV No. 82-1-36-3, and we affirm the imposition of the $1,400 penalty assessed therefor. OSMRE is directed to refund to petitioner, in accordance with 30 CFR 723.20(c), the difference between its prepayment for the proposed civil penalties in this case ($3,600) and the amount assessed in this decision ($2,300).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and affirmed as modified in part.

BRUCE R. HARRIS
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Administrative Judge
Alternate Member

APPEAL OF TROY AIR, INC.

IBCA 2370-A, IBCA 2371-A Decided: *September 28, 1988*

Contract No. 81-0344, Office of Aircraft Services.

Sustained in part.

1. Contracts: Construction and Operation: Duty to Inquire

A contractor's claim under an Office of Aircraft Services contract for actual flight time during relocation of two aircraft from their reporting base to their releasing bases is denied, where the Board finds the contract provisions in issue to be patently ambiguous requiring the contractor to seek clarification from the Government before resolving the ambiguity in its own favor.

2. Contracts: Construction and Operation: Conflicting Clauses-- Contracts: Construction and Operation: Construction Against Drafter

In a case involving an Office of Aircraft Services Contract containing conflicting clauses which the contractor construes as providing for payment at contract rates for the

availability of two aircraft during the period of relocation flights from a reporting base to releasing bases, the Board finds the contractor's interpretation of the ambiguous provisions to be reasonable and that under the *contra proferentem* rule such provisions will be construed against the Government.

3. Contracts: Construction and Operation: Changes and Extras

A contracting officer's direction to a contractor to provide its pilots with a minimum of 1 hour of flight training instruction is found to constitute a constructive change where the Board finds that the contract provisions relied upon by the contracting officer in issuing the directive do not support the Government's position that the directed instruction was to be given at the contractor's expense.

APPEARANCES: Clark Reed Nichols, Attorney at Law, Perkins Coie, Anchorage, Alaska, for Appellant; Bruce E. Schultheis, Department Counsel, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Troy Air, Inc. (Troy, contractor, appellant), has timely appealed the decision of the contracting officer (CO) denying its claim for relocation of aircraft in the amount of $10,690.01 and its claim for an equitable adjustment under the Changes Clause in the amount of $2,422.50 for supplemental services ordered by the CO (Appeal File (AF), Tab 2.07).

Claim for Relocation of Aircraft (IBCA 2370-A) - $10,690.01

Background

On April 11, 1986, the Office of Aircraft Services (OAS) awarded contract No. 81-0344 to Troy in the estimated amount of $826,320. The contract called for the rental to the Government of three aeroplanes which were to be operated and maintained by the contractor for the benefit of the Bureau of Land Management, Alaska Fire Service. The aeroplanes were to be used as "smokejumpers," aircraft used for low level flights, aerial delivery of personnel and cargo by parachute, and transportation of personnel, equipment, and supplies, all in furtherance of the Government's mission of fighting fires in various places in Alaska, Canada, and the 48 coterminous United States. The contract vested the Government with the authority to determine whether the pilots proposed by the contractor met the requirement of the contract and provided for the issuance of an OAS Pilot Qualification Card to pilots who were determined to be qualified.

Included in the contract were a number of pay items including those for availability (when the aircraft were idle but ready to perform), actual flight hours, overnight subsistence allowance for the pilots, fuel and airport costs. Two of the aircraft had the same reporting base (Fairbanks) but different releasing bases (Boise, Idaho, for one and Redding, California, for the other).

The dispute concerns amounts claimed separately for actual flight time and for availability of aircraft during relocation for Item 1

(Report: 4/22 Fairbanks, AK; Release: 8/19 Boise, ID) and for Item 3 (Report 5/19 Fairbanks, AK; Release: 9/15 Redding CA). See Item Description (AF, Contract, Tab 1.03, at 5, 9).[1]

The contract includes a great number of provisions, among which are the following:

F4. *EXCLUSIVE USE PERIOD*

F4.01 *General.* Services shall be performed throughout the entire period stipulated in the Schedule of Items, including extensions.

F5. *AVAILABILITY PERIOD*

F5.01-01 *Hourly Availability.* Service shall be available eight hours per day throughout the Exclusive Use Period * * *.

F6. *Flight*

F6.02-01 Flight required for reporting or removal of aircraft, personnel and support equipment to and from the report and release bases specified in the Schedule of Items will not be measured for payment.

F13. *RELOCATION*

F13.02 *Period of Performance.* Relocation shall be accomplished within two calendar days.

F13.03 *Measurement and Payment.* Relocation shall be incidental to other work required under the contract and will not be measured or paid separately. * * *.

Except for excusable delays as provided under the Default Clause of Section I, service will be listed as unavailable in accordance with Section F. throughout any delay in completing the relocation.[2]

(AF, Contract, Tab 1.03 at 34-35, 38, 42).

Appellant's claim for relocation of the aircraft involved in the dispute is in the amount of $10,690.01, computed as follows:

Contract Item 1: Relocation from Fairbanks to Boise, Idaho (N-900TH)

Date		Flight Hours	Amount @ $200 per Flt. Hr.
07/31/86	Fairbanks to Anchorage	1:15	$ 250.00
08/04/86	Anchorage to Boise	8:53	1,776.67
	Two Days Availability		3,360.00
			$ 5,386.67

[1] For both items the period from report date to release date is 120 days. This figure multiplied by 8 (an 8-hour day) results in the 960 hours shown as Hourly Availability for Item 1a and the 960 hours shown as Hourly Availability for Item 3a. The total contract price for these items is obtained by multiplying the 960-hour figure by the appropriate unit price (*i.e.*, that bid by Troy for Item 1a or for Item 3a, adjusted for any quantity discount offered by Troy). See AF, Contract, Tab 1.03 at 5, 9, and 11.

[2] The contract also includes a provision applicable to subitem b. (Extended Availability) and subitem c (Additional Flight Crews) as part of Items 1, 2, and 3. Captioned "B3. Estimated Quantities," the provision reads as follows:

"Final quantities to be required under subitem[s] b. and c. are unknown and have been estimated for bid evaluation purposes only. The quantities will vary according to weather and the unscheduled needs of the Government. Estimated quantities do not represent an order or future order, expressed or implied, of the final quantities to be required under the contract."

(AF, Contract, Tab 1.03 at 11).

Contract Item 3: Relocation from Fairbanks to Redding, California (N-800TH)

Date		Flight Hours	Amount @ $200 per Flt. Hr.
07/22/86	Fairbanks to Anchorage	1:26	$ 286.67
07/23/86	Anchorage to Redmond	7:33	1,510.00
07/24/86	Redmond to Redding	1:32	306.67
	Two Days Availability		3,200.00
			$ 5,303.34

AMOUNT CLAIMED FOR RELOCATION OF AIRCRAFT (ITEMS 1 & 3) $10,690.01

(Appellant's Brief at 4-5).

Contention of the Parties

According to appellant, it is entitled to be paid the entire amount claimed for relocation of the two aircraft in question because the flights from the reporting base to the releasing bases were made at the direction of the Government during a period when the Government had exclusive use of the aircraft. The contract language "[r]elocation * * * will not be measured or paid separately" (F13.03, *supra*) is viewed as preventing the contractor from claiming rates different from those set forth in the contract for availability and flight hours. After asserting that Troy's interpretation of subsections F13.02 and F13.03, *supra*, is reasonable and literal and that there is no ambiguity, appellant goes on to state that to the extent the language is ambiguous, the contractor's interpretation controls (citing several cases applying the contra proferentem rule) (Appellant Brief at 3-7).

The Government's position is stated in its answer where it is contended (i) that the interpretation placed by Troy upon F13.03, *supra*, would leave subsection F13 without meaning; (ii) that provisions susceptible to two or more reasonable interpretations are considered to be ambiguous; (iii) that when ambiguities are patent or obvious, contractors are charged with an affirmative duty to make inquiry seeking clarification before such a provision will be construed against the Government as the drafter; and (iv) that failure to inquire places the risk of an incorrect interpretation on the contractor. Thereafter, citing cases [3] the Government requests the Board to deny the claim.

[3] Among the cases cited is *Beacon Construction Co. of Massachusetts* v. *United States*, 161 Ct. Cl. 1, 7 (1963), from which the following is quoted:

"We do not mean to rule that, under such contract provisions, the contractor must at his peril remove any possible ambiguity prior to bidding; what we do hold is that, when he is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representatives if he intends to bridge the crevasse in his own favor. Having failed to take that route, plaintiff is now barred from recovering on this demand (footnote omitted)."

September 28, 1988

Discussion and Decision

[1] For recovery on its relocation of aircraft claim, the appellant argues that its interpretation of the contract terms is both literal and reasonable but that assuming *arguendo* that the provisions of the contract respecting relocation of aircraft are ambiguous, it is entitled to have the ambiguity resolved in its favor under the rule *contra proferentem*. In defending against the claim made, the Government relies upon the affirmative duty of a contractor to make inquiry seeking clarification before a patent ambiguity will be construed against the Government as the drafter.

In *Newsom* v. *United States*, 230 Ct. Cl. 301 (1982), the Court of Claims noted that the doctrine of patent ambiguity is an exception to the general rule of *contra proferentem* which requires a contract to be construed against the party who wrote it, after which the Court stated:

> The analytical framework for cases like the instant one was set out authoritatively in *Mountain Home Contractors* v. *United States*. It mandated a two-step analysis. First, the court must ask whether the ambiguity was patent. This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum: Is it *so* glaring as to raise a duty to inquire? Only if the court decides that the ambiguity was not patent does it reach the question whether a plaintiff's interpretation was reasonable. The existence of a patent ambiguity *in itself* raises the duty of inquiry, regardless of the reasonableness *vel non* of the contractor's interpretation. It is crucial to bear in mind this analytical framework. The court may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist. [italics in original; footnotes omitted.]

(230 Ct. Cl. at 304).

Claim for Actual Flight Hours (Item 1 and Item 3) - $4,130.01

Apropos the claim for actual flight hours involved in relocation of the two aircraft in question, the appellant undertakes to analyze the provisions of subsection F6.02-01 ("Flight required for reporting or removal of aircraft, personnel and support equipment to and from the report and release bases specified in the Schedule of Items will not be measured for payment") and those of F13 (Relocation) including F13.03, "*Measurement and Payment*" ("Relocation shall be incidental to other work required under the contract and will not be measured or paid separately").

After noting that it is making no claim for flight to position the aircraft for the commencement of the contract at Fairbanks (reporting base) or for the removal of the aircraft from Boise/Redding (releasing bases), appellant states that it is entitled to payment for flights from the reporting base to the releasing bases made at the direction of the Government during the term of the exclusive use rental period. Read literally the provisions of F6.02-01 does not support the construction which appellant wishes to place upon it since the language "(f)light required * * * to and from the report and release bases * * * will not

be measured for payment" is sufficiently encompassing to cover flights to the releasing bases from the reporting base. While subsection F13.03 pertaining to relocation merely states that "[r]elocation * * * will not be measured or paid separately," subsection F6.02-01 (concerned exclusively with flight) states categorically that flights involved in relocation "will not be measured for payment."

The Board finds that if at the time of bidding Troy construed the provisions of F6.02-01 and F13.03--insofar as they relate to actual flight hours during relocation--in the manner now alleged, then such provisions were patently ambiguous requiring the contractor to seek clarification from the Government before construing the ambiguous provisions in the contractor's favor (*Beacon Construction Co. of Massachusetts, supra*, note 3). Since no such clarification was sought, appellant's claim for actual flight hours during relocation in the amount of $4,130.01 is denied.

Claim for Hourly Availability (Item 1 and Item 3) - $6,560

[2] Turning now to the claim for availability of the two aircraft during relocation, the Board notes (i) that subsection F13.02 provides that "[r]elocation shall be accomplished within two calendar days"; (ii) that included in subsection F13.03 is a paragraph stating that service will only be listed as unavailable if there is any delay in completing the relocation; (iii) that in that case at hand there was no delay in completing the relocation since it was accomplished within the 2 days allowed in subsection F13.02; (iv) that appellant interpreted the language of subsection F13.03 ("Relocation shall be incidental to other work required under the contract and will not be measured or paid separately") as only preventing the contractor from claiming rates different from those set forth in the contract for services rendered during relocation; (v) the Government has not undertaken to identify the "other work required under the contract" to which "relocation shall be incidental to"; nor has it offered any explanation as to why if at the time the invitation-for-bids was issued it interpreted the contract then in the manner it does now, it failed to adjust the contract price for Item 1a (Hourly Availability) and for Item 3a (Hourly Availability) to reduce the amount of payment due under each item by the 2 days (16 hours) allowed for relocation in subsection F13.02.[4]

With this the state of the record, the Board finds that the contract was ambiguous in regard to reimbursement to the contractor at contract rates for availability of aircraft during relocation; that the ambiguity was not patent; that insofar as the question of the amount to be paid for availability of aircraft during relocation, Troy reasonably construed F13.02 and F13.03 to mean that the contractor could not

[4] Note 1, *supra*. The contract prices shown for Item 1a (Hourly Availability) and Item 3a (Hourly Availability) are not estimates as is considered to be clear from the absence of any reference to either of such items in the "Estimated Quantities" provision contained in the contract (note 2, *supra*).

claim for such services at other than the contract rates; and that under the *contra proferentem* rule, appellant is entitled to be paid at the contract rates for the availability of two aircraft for the 2 days involved in relocation. So finding, appellant's claim for hourly availability of aircraft during relocation is granted in the amount claimed of $6,560.

Claim for Government-Directed Travel and Aircraft Flight Time to Provide Pilot Training (IBCA 2371-A) - $2,422.50

This claim is for Government-Directed travel and aircraft flight time to provide a minimum of 1 hour flight training instruction to all contract pilots.

As presented in the claim letter of September 22, 1986 (AF, Tab 3.12), the instant claim is in the amount of $2,422.50, computed as follows:

Instructor Pilot (travel and per diem)	$1,242.50
Aircraft Flight Time and Availability at Contract Rates	1,180.00
Total	$2,422.50

To a considerable extent appellant relies for recovery upon the fact that on August 14, 1986, the CO had directed that the flight training instruction here in issue take place and in connection therewith had represented that such instruction would be "at Government expense" (AF, Tab 3.04). In regard to all of the pilots to whom the directed flight training instruction pertains, Troy also avers (i) that it had previously complied with subsection E2 "Inspection of Personnel"; (ii) that the contractor's pilots had already demonstrated that they met all contract requirements; and (iii) that OAS had issued each of them OAS Pilot Qualification Cards in accordance with contract subsection E2.04 (Appellant's Brief at 8).

The Government has filed no brief and for the Answer it has filed a General Denial.

[3] The record shows that on August 14, 1986, the CO directed Troy to proceed with a minimum of 1 hour flight training for its pilots "at Government Expense" (AF, Tab 3.04). It appears, however, that in a conference on the following day related to such instruction, Troy was told that service would be interrupted throughout the training flight in accordance with subsections F5.06-02 and F6.02-03 and that neither availability nor flight would be measured for payment during those periods (AF, Tab 3.06). In any event it is clear that the flight training instruction involved in the claim was not conducted until August 17 and August 19, 1986 (Appellant's Brief, Exh. 7, 8), *i.e.*, subsequent to the time appellant appears to have been notified of the change in the Government's position.

We need not determine what effect, if any, should be given the fact that initially the Government had said that the directed flight training instruction would be "at Government expense." This is because the authorities cited by the CO and apparently relied upon by him in denying the claim are not supportive of that position. Both of the provisions cited (subsections F5.06-02 and F6.02-03) reference section E of the contract provisions as their authority. Section E, however, relates entirely to situations where the contractor is made responsible for all costs incurred for reinspection of personnel or equipment that did not comply with contract specifications upon initial inspection and for the costs involved in the inspection of substitute personnel or equipment (AF, Contract, Section E at 32-33).

In this case the Board finds that none of the costs for which claim is being made involve reinspection of personnel that did not comply with the contract specifications upon the initial inspection; nor do any of such costs involve substitution of personnel. The Board further finds that no other provision contained in the contract indicates that the contractor is required to provide flight training instruction at its expense for pilots whom the Government had found "met all the contract requirements," to whom OAS Pilot Qualification Cards have been issued, and for whom no replacement pilots had been requested. So finding, the Board concludes that the action of the CO in directing the flight training instruction here in issue constituted a constructive change under the contract for which the contractor is entitled to an equitable adjustment. As the claim reflects the use of contract rates for flight time and for availability and as the amount claimed for travel and per diem is supported by an itemized statement, the Board finds that the equitable adjustment to which the contractor is entitled is in the amount claimed of $2,422.50.

Summary

The appeal in IBCA 2370-A is granted in the sum of $6,560 and is otherwise denied.

The appeal in IBCA 2371-A is granted in the sum of $2,422.50.

The two appeals are granted in the aggregate sum of $8,982.50, together with interest thereon computed in accordance with the Contract Disputes Act of 1978 from the date the Government received the contractor's claim letter of September 22, 1986 (AF, Tab 2.05).

WILLIAM S. MCGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1989 O - 240-940 (1)

January 14, 1988

ISSUES REGARDING LATE PAYMENT INTEREST & CIVIL PENALTIES RELATED TO OFFSHORE OIL & GAS LEASES GOVERNED BY § 8(g) OF THE OUTER CONTINENTAL SHELF LANDS ACT *

M-36956 *January 14, 1988*

Appropriations--Outer Continental Shelf Lands Act: Generally

Civil penalties and late payment interest assessed against Outer Continental Shelf lessees are not "bonuses, rents . . . royalties, [or] other revenues (derived from any bidding system . . .)," within the meaning of 43 U.S.C. § 1337(g)(2). Therefore, they may not be shared with coastal states and must be deposited in miscellaneous receipts in the Treasury.

Mineral Leasing Act: Royalties--Outer Continental Shelf Lands Act: Generally

For royalty revenues from leases subject to 43 U.S.C. § 1337(g), the provisions of sec. 1337(g)(2) and (4), on investing and disbursing funds to coastal states supersede the provisions of 30 U.S.C. § 1721(b).

Accounts: Payment--Outer Continental Shelf Lands Act: Generally

Under 43 U.S.C. § 1337(g)(2), the Department is not required to invest a state's share of revenues. It may instead disburse them to the state as soon as they have been transferred from the Treasury's general suspense account to the special account created by sec. 1337(g)(2).

Appropriations--Outer Continental Shelf Lands Act: Generally

Under 43 U.S.C. § 1337(g)(2), the Department has no authority to pay interest to a coastal state on revenues held in the suspense account pending resolution of errors and disputes.

To: Secretary

From: Solicitor

Subject: Issues Regarding Late Payment Interest & Civil Penalties Related to Offshore Oil & Gas Leases Governed by § 8(g) of the Outer Continental Shelf Lands Act

By letter to you of June 24, 1987, Senator J. Bennett Johnston, Chairman of the Senate Committee on Energy and Natural Resources, raised three issues regarding interest and civil penalties related to offshore oil and gas leases governed by section 8(g) of the Outer Continental Shelf Lands Act of 1953 (OCSLA), *as amended*, 43 U.S.C. § 1337(g). That provision pertains to leasing of Outer Continental Shelf lands within 3 miles of the seaward boundary of a coastal state. [1] You have referred these questions to our office for analysis.

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* Not in chronological order.

[1] The "seaward boundary" of a coastal state is defined generally as a line 3 geographical miles distant from the state's coast (except for the Gulf coast of Florida and Texas, for which it is a line 3 leagues distant from the coast). 43 U.S.C. § 1312; *United States v. Louisiana*, 364 U.S. 504 (1960). Thus, the "8(g) zone" as used herein means the "belt" extending 3 miles beyond the first 3 miles (or leagues) from the coast.

SUMMARY

Senator Johnston has raised two issues regarding the proper disposition of monies collected from activities on leases in the 8(g) zone. Specifically, Senator Johnston has asked whether the Federal Government is authorized to share with the coastal states civil penalties paid in connection with any violation of OCSLA, and whether it may share interest paid to the Government for late payment of royalties (hereinafter "payor late payment interest") in the same manner as royalties. In addition, Senator Johnston has raised a third issue, namely, whether the Federal Government is obligated to pay interest to coastal states for untimely disbursement of their share of revenues from 8(g) leases. For the reasons explained below, we have concluded that there is insufficient authority for the United States to share either civil penalties or payor late payment interest with the coastal states. In response to the third issue, we have concluded that the United States must pay the states interest on 8(g) revenues only when interest has accrued under section 8(g)(4) from the investment of those revenues in certain securities.

BACKGROUND

For several years, the Department of the Interior and several coastal states disputed the disposition of revenues derived from leases within the 8(g) zone. After the OCSLA was amended in 1978 (Pub. L. 95-372, 92 Stat. 644) and until April 7, 1986, section 8(g)(4) provided that the Secretary was to deposit in a separate Treasury account "all bonuses, royalties, and other revenues attributable to oil and gas pools underlying both the Outer Continental Shelf and submerged lands subject to the jurisdiction of any coastal State . . ." pending either an agreement or judicial decision on how the revenues should be divided.

In 1986, section 8(g) was amended extensively by Title VIII of Pub. L. 99-272, 100 Stat. 148 (April 7, 1986). That title provided for the disposition of funds placed in escrow under the old section 8(g)(4). [2] It further provided a new scheme for the disposition of 8(g) revenues. The new section 8(g)(2), enacted in the 1986 amendment, 43 U.S.C. § 1337(g)(2), now provides:

> Notwithstanding any other provision of this subchapter, the Secretary shall deposit *into a separate account in the Treasury* of the United States *all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section*, excluding Federal income and windfall profits taxes, and derived from any

[2] To resolve the existing conflicts and provide a permanent formula for revenue disposition, the monies which had been deposited to the escrow account derived from any lease of Federal lands wholly or partially within 3 miles of the seaward boundary of a coastal state before Oct. 1, 1985, were distributed to the States of Louisiana, Texas, California, Alabama, Alaska, Mississippi, and Florida, pursuant to a formula prescribed in sec. 8004(b)(1)(A) of the statute. *See* 43 U.S.C. § 1337 note. Amounts derived between Oct. 1, 1985, and Apr. 15, 1986, were to be distributed according to a percentage formula prescribed in the new sec. 8(g)(2) discussed below. *See* sec. 8004(a)(1). The Act also provided, in sec. 8004(b)(1)(B), for annual distribution of a specified percentage of identified exact sums from revenues derived from Outer Continental Shelf leases generally. This provision is not relevant to the issues here. Acceptance by the respective states of these payments was deemed to satisfy all claims of each state against the United States under the earlier provisions of sec. 8(g). *See* sec. 8004(b)(2), 43 U.S.C. § 1337 note.

lease issued after September 18, 1978 of any tract which lies wholly . . . within three nautical miles of the seaward boundary of any coastal State, or . . . in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, *not later than the last business day of the month following the month in which those revenues are deposited in the Treasury*, the Secretary shall transmit to such coastal State 27 percent of those revenues, *together with all accrued interest* thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States. [Italics added.]

The accrued interest referred to in section 8(g)(2) is interest earned from investment of these revenues as provided for elsewhere in the amended section 8(g). Specifically, the new section 8(g)(4), 43 U.S.C. § 1337(g)(4), now provides the authority for the Federal Government to invest the revenues deposited in the special account:

The deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury in securities backed by the full faith and credit of the United States having maturities suitable to the needs of the account and yielding the highest reasonably available interest rates as determined by the Secretary of the Treasury.

Thus, under the amended section 8(g), the Secretary is required to deposit into a separate account in the Treasury all lease revenues as described in section 8(g)(2). Monies deposited there are to be invested, and 27 percent of the deposited sum and accrued interest are to be paid to the coastal state by the last business day of the month following in which those revenues are "deposited in the Treasury."

ANALYSIS

I. Authority to Share Civil Penalties

The first issue raised is whether the United States has authority to share with coastal states civil penalties paid by 8(g) lessees. Offshore lessees may incur civil penalty liability under two statutes. Section 24(b) of the OCSLA, 43 U.S.C. § 1350(b), provides for civil penalties of up to $10,000 per day for failure to comply with any provision of that statute or any regulation, order, or lease issued thereunder, after notice and a reasonable opportunity to correct the violation. In addition, the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1701 *et seq.*, adds extensive civil penalty authority. The civil penalty provisions of FOGRMA section 109, 30 U.S.C. § 1719, apply to leases subject to section 8(g). [3]

[3] Sec. 109(a) and (b) provide for general civil penalties for failure or refusal to comply with any requirements of FOGRMA or the mineral leasing laws, any rules or regulations issued thereunder, or the terms of any lease, with penalties of up to $5,000 per violation per day after certain specified notice requirements and allowed periods for corrective action. Sec. 109(c) provides for penalties of up to $10,000 per violation per day for knowing or willful failure

Continued

There is no specific provision in either FOGRMA or the OCSLA for the United States to share with coastal states civil penalties collected from 8(g) lessees. The issue, then, is whether civil penalties constitute "bonuses, rents, . . . royalties, [or] other revenues (derived from any bidding system authorized under [section 8(a)(1)])," within the meaning of the amended section 8(g)(2). Civil penalties plainly are not bonuses paid to obtain a lease or rents or royalties required by the terms of the lease. Therefore, they may be shared only if they are "other revenues" derived from a bidding system authorized under section 8(a)(1) of the OCSLA.

This Office previously has addressed a similar issue under the OCSLA. In Solicitor's Opinion, M-36942, 88 I.D. 1090 (1981), the Solicitor considered whether the Department could refund an overpaid civil penalty imposed under section 24 of the OCSLA. The Department's authority to issue refunds under the OCSLA was found in section 10 which permits refunds of overpayments made "in connection with any lease." 43 U.S.C. § 1339(a). The Solicitor concluded that civil penalties were not paid in connection with any lease:

> Civil penalties may be imposed against lessees, right-of-way holders, holders of exploration permits, and even persons with no permits at all, such as diving contractors. The Department's civil penalty authority is independent of the oil and gas lease.

88 I.D. at 1094. This reasoning is equally applicable here to penalties arising under both the OCSLA and FOGRMA. Revenues which are paid "in connection with any lease," as that phrase is used in section 10, include bonuses, rents, royalties, minimum royalties, net profit share payments, and so forth. *Id.* at 1095. These payments are not independent of, and indeed result from, an interest in the lease, *i.e.*, they are derived from bidding systems under section 8(a)(1). Because civil penalties are not received "in connection with" any lease in this sense, they necessarily cannot be "other revenues" derived from a bidding system.

When Congress has intended that civil penalties be shared with the states, it has established a specific mechanism. FOGRMA contains such a mechanism, but expressly excludes Outer Continental Shelf leases from its operation. Specifically, under FOGRMA section 206, 30 U.S.C. § 1736, one half of any civil penalties collected as a result of certain state audit and investigation activity is to be paid to the state. In addition, any civil penalty collected in a state suit under section 204, 30 U.S.C. § 1734, is retained by the state for expenditure as it sees fit. However, under FOGRMA section 201, 30 U.S.C. § 1731, the provisions of FOGRMA title II, which include sections 204 and 206, "shall apply only with respect to oil and gas leases on Federal lands or Indian lands. Nothing in this title shall be construed to apply to any lease on

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to pay royalty, permit lawful inspection or audit, etc. Sec. 109(d) provides for penalties of up to $25,000 per violation per day for knowing or willful submission of false or misleading reports or information, removal or diversion of oil or gas from a lease without authority, or purchase or acceptance of stolen oil or gas.

the Outer Continental Shelf." Therefore, the provisions for retaining or sharing in FOGRMA civil penalties do not apply to civil penalties assessed with respect to Outer Continental Shelf leases, including those subject to section 8(g).

Under Article I, § 9 of the Constitution, no payment may be made out of the Treasury except in consequence of an appropriation made by law. *See* Solicitor's Opinion, M-36942, *supra* at 1092. The new section 8(g)(2) is a permanent (or continuing), indefinite appropriation. It contains both a direction to pay and a designation of what funds are to be paid or used to make the payment. Under 31 U.S.C. § 1301(d), a statute "may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . ." *See also* the former 31 U.S.C. § 627. An appropriation cannot be inferred or made by implication. 50 Comp. Gen. 863 (1971). These considerations lead to a more strict construction of appropriations statutes. Sol. Op., M-36242, *supra* at 1092. For this reason, additional categories or sources of funds should not be read into a continuing indefinite appropriation by inference. Monies received by the Government must be despoited to miscellaneous receipts in the Treasury in the absence of other statutory direction. *See* 31 U.S.C. § 3302(b) and former 31 U.S.C. § 484; 22 Comp. Dec. 379, 381 (1916); 5 Comp. Gen. 289 (1925); 47 Comp. Gen. 70 (1967); 52 Comp. Gen. 125 (1972); 56 Comp. Gen. 275 (1977); and *Principles of Federal Appropriations Law* at 5-64 to 5-72.

Therefore, in view of the absence of a specific statutory directive, the Department must deposit receipts from civil penalties to the credit of miscellaneous receipts. *See also* 23 Comp. Dec. 353 (1916); 39 Comp. Gen. 647, 649 (1960); 47 Comp. Gen. 674 (1968); and *Principles of Federal Appropriations Law* at 5-75 to 5-76. In short, there is no authority under existing law to pay any civil penalty receipts with respect to section 8(g) leases to a state.

II. *Authority to Share Payor Late Payment Interest*

The second issue raised is whether the United States has authority to share with the coastal states late payment interest paid by 8(g) lessees. As with civil penalties, there is no specific provision dealing with sharing these revenues. Therefore, the issue is essentially the same as it was for civil penalties: whether late payment interest paid by lessees and other royalty payors is part of "royalties" or of "other revenues" within the meaning of section 8(g)(2). Our analysis of this issue is informed by how Congress dealt with this matter in FOGRMA, which contains express provisions for sharing late payment interest with the states. Consequently, we examine that statute first.

A. Authority to Share Late Payment Interest Under FOGRMA

For onshore oil and gas leases on public domain lands, section 35 of the Mineral Lands Leasing Act (MLLA), 30 U.S.C. § 191, requires that of all royalties, rents, bonuses, and proceeds of sale, 50 percent must be paid to the state in which the lease is located (except for Alaska, which receives 90 percent), 40 percent to the reclamation fund (except for Alaska), and 10 percent to miscellaneous receipts. [4] FOGRMA section 111(g) *amended* 30 U.S.C. § 191 specifically to include interest charges collected under FOGRMA within the term "royalties." Thus, late payment interest is part of the revenues distributed to the state according to the prescribed formula. That amendment, however, by its terms applies only to distributions under 30 U.S.C. § 191, which govern revenues received under the MLLA. [5] Neither FOGRMA nor any subsequent statute contains any provision similar to section 111(g) with respect to other mineral leasing laws, such as the OCSLA or the Mineral Leasing Act for Acquired Lands. And, except for Indian leases in section 111(c),[6] FOGRMA does not otherwise provide for sharing of payor late payment interest.

The relevance of FOGRMA to our interpretation of section 8(g)(2) is that in considering FOGRMA, Congress rejected language which would have resulted in coastal states sharing in late payment interest from 8(g) leases. The bill which became FOGRMA, H.R. 5121, as originally passed by the House of Representatives, would have shared payor late payment interest as part of any royalties distributed to other recipients. Section 116 of H.R. 5121 (which became section 111 of FOGRMA), as passed on September 29, 1982, provided:

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[4] Under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351 *et seq.*, royalties from onshore leases on acquired lands are distributed to the same funds or accounts as other revenues from those lands pursuant to other legislation applicable to the lands involved. *See* 30 U.S.C. § 355.

[5] Additionally, that amendment applies only to late payment interest collected under FOGRMA, as opposed to interest collected under regulations issued prior to FOGRMA. For offshore leases, interest charges resulting from late payment, underpayment, or nonpayment of royalty by lessees and other royalty payors were first assessed by regulation beginning in late 1979. On Oct. 16, 1979, the Department promulgated the former 30 CFR 250.49 (44 FR 61,892), which became effective on Dec. 13, 1979. MMS revised this regulation on May 25, 1982 (47 FR 22,528) to change the interest rate charged for late payments to the Treasury current value of funds rate. The regulation was redesignated as 30 CFR 218.150 on Aug. 5, 1983 (48 FR 35,641).

For onshore and Indian leases, regulations requiring assessment of late payment interest from payors were first promulgated approximately 1 year after those for the Outer Continental Shelf. On Dec. 23, 1980, the Department promulgated the former 30 CFR 221.80 (45 FR 84,764), effective Feb. 1, 1981, as part of the oil and gas operating regulations. These operating regulations applied to both Federal public domain and acquired land leases and leases on Indian lands. MMS revised this regulation on May 25, 1982, simultaneously with the offshore regulation, to change the interest rate (47 FR 22,527), effective June 1, 1982. On Aug. 5, 1983, simultaneously with the redesignation of the offshore regulation, the former 30 CFR 221.80 was redesignated as 30 CFR 218.102 (48 FR 35,641).

The requirement to charge interest on payor late payments became statutory with the enactment of FOGRMA on Jan. 12, 1983. FOGRMA sec. 111(a), 30 U.S.C. § 1721(a), required the Secretary to charge interest on late payments or underpayments at the rate applicable under sec. 6621 of the Internal Revenue Code (26 U.S.C. § 6621). The FOGRMA requirement was reflected in amendments to the regulations included in the initial FOGRMA rulemaking on Sept. 21, 1984 (49 FR 37,347), and the required interest rate is now found in 30 CFR 218.54.

[6] The regulation governing Indian leases specifically provided, even before FOGRMA, that "late payment charges assessed with respect to any Indian lease, permit, or contract shall be collected and paid to the Indian or tribe to which the amount overdue is owed." The Secretary could not have promulgated a similar regulation to share payor late payment interest with states. On Indian leases, the Secretary administers the interest of the Indian tribe or allottee. Indian lessors are entitled to lease revenues by virtue of ownership interest. The states, in contrast, do not have a property interest in Federal leases and receive a share of lease revenues only by virtue of statute. The requirement to pay late payment interest from indian tribal or allotted leases to the tribe or allottee became statutory upon FOGRMA's enactment. *See* sec. 111(c), 30 U.S.C. § 1721(c). The amendments to the regulations also moved the relevant provision to a new 30 CFR 218.55(a).

(d) for purposes of applying provisions of law relating to the distribution of royalty payments, *any interest charges under this section* or under § 103 [which became § 104 of FOGRMA] with respect to late royalty payments or underpayments of royalty *shall be included in, and deemed a part of such royalty payments.*

128 Cong. Rec. H 7893; H.R. Rep. No. 97-859, 97th Cong., 2d Sess. 8 (1982) (italics added). In turn, the House Report stated that "[s]uch interest penalties are deemed part of royalty payments." *Id.* at 36, *reprinted at* 1982 U.S. Code Cong. & Ad. News 4290.

Had this provision been enacted, it would have required distribution of all payor late payment interest to the same recipients and in the same proportions as the principal royalty amounts. However, the Senate amendment to S 2305 in the nature of a substitute, which was similar to H.R. 5121 and which passed the Senate on December 6, 1982, did not contain the same provision as the House bill. Instead, it provided narrower sharing authority. Specifically, section 111(c) required that all interest charges collected because of late payment or underpayment of royalties owing to an Indian tribe or allottee be paid to the tribe or allottee, and section 111(g) amended the distribution scheme of 30 U.S.C. § 191 to include interest charges collected. 128 Cong. Rec. S 13935. These provisions, which have been explained above, were enacted in the final statute. The section-by-section summary analysis printed simultaneously in the Congressional Record stated:

Sec. 111(a)-(d). Provides that late payments for royalties shall be charged interest at the IRS rate. Such interest shall be paid in the appropriate share to State [sic] and Indian tribes.

* * * * * * *

(f-g). Technical.

128 Cong. Rec. S 13939-13940. There is no other discussion in the legislative history, and no reference to why the new language was substituted for the House language.

Because Congress chose to amend the word "royalty" in the MLLA to assure that states would share in late payment interest, and because it chose not to apply that amendment to revenues under other statutes, we must be particularly careful in determining Congress' intent in using the phrase "royalties, and other revenues" in section 8(g)(2)

B. Authority to Share Late Payment Interest Under Section 8(g)(2)

In addition to the caution suggested by our review of FOGRMA, traditional rules on interpreting laws appropriating public funds require that we construe section 8(g)(2) strictly. As discussed previously with respect to sharing civil penalties, a statute may be construed to make an appropriation only if it specifically so states. 31 U.S.C. § 1301(d). Funds which the Government received must be deposited to

miscellaneous receipts absent other statutory direction. 31 U.S.C. § 3302(b) and former 31 U.S.C. § 484.

Our review reveals insufficient evidence that Congress intended to share late payment interest under section 8(g)(2). The term "other revenues" in section 8(g)(2) refers to revenues "derived" from any of the bidding systems set forth in section 8(a)(1). Historically, the Department has not used bidding systems, which are reflected in the terms of the leases issued, to impose late payment interest. Instead, as explained in note 5 above, the Department has imposed the duty to pay late payment interest at prescribed rates through regulations and, subsequently, under FOGRMA, a separate statute. 30 U.S.C. § 1721(a). Consequently, we cannot say that late payment interest is a kind of revenue which OCSLA contemplates as "derived" from a bidding system.

Not sharing late payment interest with the coastal states is consistent with the limited right to royalty revenues Congress has provided them. The United States is the sole lessor for onshore public domain and acquired lands and on the OCS. The revenue distribution provisions of the MLLA and the new OCSLA section 8(g)(2) (and 30 U.S.C. § 355 for acquired lands) do not create a beneficial or equitable interest in the lease on the part of the state. Therefore, the state's right to royalty revenue derives solely from statutory command. The state does not hold a royalty interest and is not entitled to any payment until after the Department actually receives payment. Whether a royalty payment is late with respect to the state depends on whether the Department disburses the state's share within the required time after the Federal Government receives it. Hence, the time value for late royalty payments to the lessor, the United States, belongs only to the United States and should not be shared with the state absent affirmative statutory command.

Although there are some arguments in favor of sharing late payment interest, we find them unpersuasive. For example, the previously quoted Congressional Record excerpt accompanying the final FOGRMA legislation stated in general terms that interest would "be paid in the appropriate share" to states, and referred to the amendment to 30 U.S.C. § 191 as "technical." This arguably could be read to infer that Congress intended no change between the House bill and the enacted language of FOGRMA. However, the amendment failed to deal with other statutes which allocate Federal mineral lease revenues. Not only was the Mineral Leasing Act for Acquired Lands not included, but the enacted language also did not cover the statutes providing for sharing with a state royalties from leasing of the National Petroleum Reserve in Alaska (42 U.S.C. § 6508), certain lands in the south half of the Red River, Oklahoma (*see* 42 Stat. 1448, 44 Stat. 740, 62 Stat. 576, and 65 Stat. 248), and certain state-selected lands (43 U.S.C. § 852(a)(4)). It is therefore difficult to view the enacted FOGRMA

provision as having the same comprehensive intent and effect as the House bill. FOGRMA demonstrates that Congress knows how to provide for distribution of late payment interest to the states if it desires to do so, and it has not done so here.

It might also be observed that before the enactment of the April 1986 amendments to section 8(g), the former section 8(g)(4) provided that "*all* bonuses, royalties, and *other revenues* attributable to oil and gas pools" underlying both state submerged lands and the Outer Continental Shelf were to be deposited into a Treasury account to await disposition. Because the language "all . . . other revenues" is broad and inclusive in form, it may be argued that "other revenues" in this context included late payment interest. The "other revenues" wording was retained in the April 1986 amendments. From this it could be argued that late payment interest must already be included within the continuing indefinite appropriation of the new section 8(g)(2). What this argument overlooks is that under the former section 8(g), the "other revenues" were those "attributable" to common pools; now they are those "derived" from bidding systems. While it may be plausible to "attribute" late payment interest to the production from the common pool on which royalty is owed, it is a different matter, as explained above, to say that the interest is derived from the bidding system underlying the provisions of the lease.

It might also be observed that section 10 of the OCSLA, 43 U.S.C. § 1339, requires the Secretary to repay (subject to the procedures of that section) a payment "*in connection with* any lease" in excess of the amount lawfully required to be paid. Late payment interest payments are made "in connection with" a lease; and if the Secretary determined that a lessee had paid late payment interest which was not owing, such excess interest payment would be refunded under this provision. MMS has refunded late payment interest from Outer Continental Shelf leases on previous occasions. It may be argued that it is difficult to distinguish payments made "in connection with" a lease from "all . . . other revenues" derived from an authorized bidding system, and that payor late payment interest therefore should be regarded as "other revenues." The problem with this argument is, again, that section 10 is not limited to revenues derived from a bidding system, even though such revenues comprise the bulk of those paid "in connection with" a lease.

For these reasons, and because Congress did not expressly include late payment interest in those revenues to be shared from 8(g) leases, we conclude that such interest may not be shared with the coastal states in the same manner as royalties under current law.

III. Interest Owed By the United States to the States on Untimely Disbursement of Royalty Revenues from Leases Subject to Section 8(g)

The third issue raised is whether the United States has authority to pay interest to the states under section 8(g) or under FOGRMA section 111(b), when it is untimely in disbursing section 8(g) revenues, and if so, when the disbursement becomes untimely.

FOGRMA sec. 104(a) (amending the MLLA, 30 U.S.C. § 191) and section 111(b), 30 U.S.C. § 1721, create two avenues for interest liability on the part of the United States to a recipient state under FOGRMA for untimely disbursement of a state's share of royalty revenues under any statute providing for such payments. [7]

Because the term "royalty," as defined in FOGRMA section 3(14), 30 U.S.C. § 1702(14), includes payments from leases on Outer Continental Shelf lands, the FOGRMA time deadlines and the suspense account interest provisions would have applied to section 8(g) disbursements to the coastal states under FOGRMA section 111(b) after the April 1986 amendments if Congress had enacted the 27-percent sharing provision with no reference to the time of disbursement.

However, the amended sections 8(g)(2) and (4) contain express payment time requirements applicable to section 8(g) revenues. Section 8(g)(2) requires the Secretary to "deposit into a separate account in the Treasury . . . all bonuses, rents, and royalties, and other revenues" from the 8(g) leases and then to transmit 27 percent thereof to the appropriate coastal state "not later than the last busines day of the month following the month in which those revenues are deposited in the Treasury," with the balance going to miscellaneous receipts. Section 8(g)(4) then requires that "[t]he deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury . . ." Therefore, the amended section 8(g) sets out a scheme for disbursement of revenues to a state which is separate from that set out in FOGRMA by prescribing the time deadline for

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[7] FOGRMA sec. 104(a) *amended* 30 U.S.C. § 191 by deleting the former semi-annual payment deadlines (as soon as possible after Mar. 30 and Sept. 30) and adding a new one:

Payments to States under this section with respect to any money received by the United States shall be made not later than the last business day of the month in which such monies are warranted by the United States Treasury to the Secretary as having been received, except for any portion of such monies which is under challenge and placed in a suspense account pending resolution of a dispute . . . Moneys placed in a suspense account which are determined to be payable to a state shall be made not later than the last business day of the month in which such dispute is resolved. Any such amount placed in a suspense account pending resolution shall bear interest until the dispute is resolved.

FOGRMA sec. 111(b), 30 U.S.C. § 1721(b), then provides:

Any payment made by the Secretary to a State under section 35 of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 191) and any other payment made by the Secretary to a State from any oil or gas royalty received by the Secretary which is not paid on the date required under section 35 [30 U.S.C. 191] shall include an interest charge computed at the rate applicable under section 6621 of the Internal Revenue Code of 1954.

Therefore, one way in which the United States may incur an interest liability for untimely disbursement is failure to pay within 10 days after the Treasury "warrant." The other is the holding of certain funds in suspense "pending resolution," which "shall bear interest" in favor of the state from the time it otherwise would have been paid until the date of payment, which is required to be not later than the last business day of the month in which the "dispute is resolved." MMS has incurred all of the liability for late payment interest which it has paid to states under the suspense account provisions, which consistently have been interpreted to apply to payments retained in suspense because of payor reporting errors which prevent proper disbursements, etc. The meaning and application of these provisions is set forth more fully in an Opinion of the Solicitor addressed to the MMS Director dated Feb. 10, 1986.

disbursement of the state's share and also providing for investment of the funds deposited in the special Treasury account.

These provisions therefore control over those in FOGRMA which by virtue of section 111(b), 30 U.S.C. § 1721(b), are otherwise applicable to all disbursements to states from any royalty revenues from Federally issued mineral leases. Consequently, the coastal states will not receive FOGRMA late payment interest in the same manner as states in which onshore leases are located.

The second question is when disbursements under the amended section 8(g) provisions result in liability for interest on the part of the United States. The statutory language is susceptible of two possible interpretations. One is that the requirement to disburse to the state "not later than the last business day of the month following the month in which those revenues are deposited in the Treasury" refers back to the time of initial payment and receipt of 8(g) revenues. The other is that the quoted phrase refers to the deposit of those revenues into the Treasury account which may be invested. Determining which interpretation is correct requires a brief review of what actually happens to royalty revenues when MMS receives them.

MMS has advised that because royalty payments are due on the last business day of the month following the month of production (*see, e.g.*, 30 CFR 218.50(a) and relevant lease terms), most royalty payments are received in the last 2 days of the month. Upon receipt of any revenues, including payments from 8(g) leases, MMS must and does promptly deposit them to the Treasury through the Federal Reserve. (Payments made through electronic funds transfer are deposited directly with a copy of the advice to MMS.) Payments from 8(g) leases are received together with large numbers and amounts of other payments from other sources and cannot be identified, checked, correlated with royalty reports, and posted to the correct accounts for investment or disbursement at the moment they are received. Consequently, the funds must first be deposited to general suspense. When a royalty report corresponding to that line are transferred from general suspense to the special account which may be invested and from which disbursement of the state's share is made. Processing of the royalty reports requires between 3 and 3-½ weeks following receipt of the payments and reports. (The process summarized here is explained in greater detail in the February 10, 1986, Solicitor's Opinion referred to above.)

If the requirement of section 8(g)(2) to disburse the state's share of 8(g) lease revenues by the last business day of the month following the month in which those revenues are "deposited in the Treasury" is interpreted to refer to initial receipt of payment and deposit to general suspense, the requirement of section 8(g)(4) to deposit the funds in a

separate account and to invest them in the prescribed securities is rendered virtually meaningless. The funds cannot be deposited into a separate account for investment until the royalty reports have been processed and the funds indentified and cleared, which does not occur until very close to the end of the month following the month of receipt. If the funds must be disbursed by the end of the same month, there is not sufficient time to invest them as part of the separate special account such that the monies would earn any significant interest. In addition, the Treasury would incur the associated administrative costs to obtain only a marginal return.

The only way to give real meaning to section 8(g)(4)'s investment requirement is to interpret the term "deposited in the Treasury" as referring to the deposit of the funds into the separate account after identification and processing. Under that reading, disbursement is required not later than the last business day of the month following the month in which the revenues are transferred from general suspense to the special account. The funds could then be invested for between 4 and 5 weeks before MMS must disburse the state's share of revenues and interest.

The MMS brought the interpretive question to the attention of the Congress before the amendments were enacted through an informal inquiry. The final enactment language did not change the language of the bill. However, the conference explanation included in the *Congressional Record* confirmed that the latter reading of the statute was correct. It also clarified that the Department was not required to hold funds and invest them for the subsequent month following deposit, but could disburse the state's share of the funds as soon as they were segregated and deposited to the separate account. The conference explanation stated:

> Section 8(g)(2) as amended by this title requires that the State's share of the 8(g) revenues together with accrued interest shall be transmitted "not later than the last business day of the month following the month in which these revenues are deposited in the Treasury." The Conferees fully expect that the Department will comply with this prescribed deadline. *However, under this language the Department may expedite distribution of the State's share to the State by omitting the step of investing these escrowed revenues in interest-bearing securities, which may have a maturity of 30 days or more, and by paying the State its share as soon as the 8(g) revenues can be identified among non-8(g) royalty payments by a lessee.*
>
> Under the current reporting system in place, the OCS lessee aggregates payments to the Federal Government of 8(g) and non-8(g) revenues, so some period of time is required for the Department to identify the 8(g) revenues. Thus, even where the Department does invest the State's share of 8(g) revenues, the period during which interest accrues to the State will not commence until the 8(g) revenues can be segregated by the Department and actually invested. It is anticipated that the Department can meet the requirements of section 8(g)(2) as amended without substantial revision of the current OCS reporting system, reporting forms, or Treasury accounts.

131 Cong. Rec. H 13218 (December 19, 1985) [italics added]. Even in the absence of this specific legislative history, the term "deposited in the Treasury" would still be interpreted to refer to deposit of the funds

into the separate account in view of the well-established principle of statutory construction that statutory provisions are not to be construed as meaningless or superfluous if such constructions can be avoided. *E.g., Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Thus, MMS may disburse at any time before the end of the month following the month of deposit of the funds into the special account; if the funds are held long enough to be invested, then the interest earned of course must be shared with the state pursuant to the section 8(g)(2) formula.

The Department has no authority to pay interest to the states except as specified in the statute. *E.g., United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), *reh. denied*, 447 U.S. 930 (1980). Because the amended section 8(g) contains no provision for interest to be paid to the coastal states on funds held in suspense pending resolution of errors and disputes, the United States cannot pay interest on such funds when disbursed, in contrast to situations covered by the FOGRMA provision.

CONCLUSION

The Department is not authorized to share civil penalties or late payment interest with coastal states under section 8(g) of the OCSLA. The Department may pay to the states their share of 8(g) revenues promptly after identifying them and depositing them in the special Treasury account. If it does this, the Department has neither authority to pay interest nor any obligation to invest the funds. It may, however, keep the 8(g) revenues in that account until the last business day of the month following the month of deposit into the special account; if it does so, the earnings from investment of the funds in certain Treasury securities are to be shared with the states. Section 8(g) contains no other provision creating an interest liability on the part of the Federal Government.

RALPH W. TARR
Solicitor

APPEAL OF HARDRIVES, INC.

IBCA-2375 Decided: *October 14, 1988*

Contract No. 6-CC-30-04090, Bureau of Reclamation.

Appellant's motion for sanctions denied.

Rules of Practice: Appeals: Discovery--Rules of Practice: Appeals: Evidence--Rules of Practice: Appeals: Motions

No sanctions were imposed on the Government for its failure to comply with a discovery order where its failure was not shown to be willful or to have caused appellant substantial prejudice. Noted by the Board was the fact that throughout much of the period of time within which the Government was to respond to the discovery order, appellant had been either unwilling or unable to comply with requests of Government auditors for cost information pertaining to appellant's multiple claims and that scheduling the various appeals for hearing was dependent upon the requested information being furnished not only in regard to discovery but also with respect to the Government audit.

APPEARANCES: Rolf R. von Oppenfeld, James R. Morrow, Attorneys at Law, Fennemore Craig, P.C., Phoenix, Arizona, for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Appellant has filed a motion calling for the imposition of sanctions against the Bureau of Reclamation (Bureau/Government) for its failure to comply with our Order dated July 5, 1988 (the Order) by which the Bureau was directed to produce the documents requested and to answer the interrogatories propounded by appellant within the 45-day period specified therein.

In support of its motion, appellant asserts that despite repeated inquiries the Government has offered no reason for its failure to cooperate in voluntary discovery and that during a meeting on August 24, 1988, the Department Counsel failed to give any indication as to when a response to the discovery requests would be made. Appellant also asserts that no rationale for the Bureau's noncompliance with the Order has been offered and that the Bureau has failed to file a statement with the Board setting forth the reason or reasons for its failure to respond within the time allowed by the Order.

After characterizing the Bureau's actions as "blatant stalling tactics" and after referring to the Bureau's consistent efforts to thwart proper discovery, appellant states that it is important for the Board to take some responsibility for curbing this persistent abuse and delay designed to defeat the valid claims of smaller adversaries by tactics of attrition. Thereafter, appellant asks that "the Board sanction the Bureau by (a) directing the Bureau to give *complete* answers to the discovery requests immediately or face waiver of all defenses and (b) barring the Bureau from presenting any evidence concerning the claim other than on cross-examination." (Italics in original.)

In the Government's Response to Motion for Sanctions, the Bureau states (i) that the instant appeal is one of nine claims on this contract which has reached the appeal stage; (ii) that contrary to the apparent belief of Hardrives, the Arizona Project Office, Bureau of Reclamation (which has administrative responsibility for the contract including the claims), does not have inexhaustible resources, either in personnel or in time; (iii) that that office administers the entire Central Arizona

Project system which involves many construction contracts in excess of $20,000,000; (iv) that the Bureau has made a good faith effort to meet the heavy demands placed on it by the Hardrives claims, involving the preparation of contracting officer's decisions, appeal files, answers to complaints and answers to the extensive interrogatories propounded in IBCA-2319, as well as accommodating counsel in the request for production of documents and with respect to Freedom of Information Act Requests related to these claims; and (v) that the actions of the Bureau and of the Department Counsel have not involved "blatant stalling tactics."

Although acknowledging the delay by the Bureau in responding to the 155 pages of interrogatories submitted by appellant, the Department Counsel notes that during the period involved in the delay appellant has been proceeding with discovery work by examining the contract records at the Bureau and at the A-E, Franzoy-Corey, as well as at the affected irrigation district, Hohokam Irrigation and Drainage District.

The Government response concludes by asserting that there has not been abuse or delay designed to defeat the possible valid claims of Hardrives by tactics of attrition but that rather it has been a case of a good faith effort on the part of the Bureau to accommodate Hardrives on many fronts which has led to the delay in the Bureau's response to the requested discovery. Immediately thereafter, the Department Counsel states: "I promise the Board and counsel that it [discovery] will be completed no later than Friday, October 21, 1988" (Government's Response to Motion for Sanctions at 3).

Discussion and Decision

Very recently in the course of reversing a decision of the Claims Court in a case where sanctions had been imposed against the Government, the Court of Appeals for the Federal Circuit noted that there is a strong policy favoring a trial on the merits, after which the Court stated:

> The harsh remedy of de facto dismissal is appropriate where the failure to comply with a pretrial discovery order is due to "willfulness, bad faith, or * * * fault" on the part of a litigant. *Societe Internationale*, 357 U.S. at 212; *see also National Hockey League*, 427 U.S. at 643 (dismissal under Rule 37 justified where there was "flagrant bad faith" and counsel displayed "callous disregard" of their responsibilities); *Mancon*, 210 Ct. Cl. at 696 (sanctions not warranted where there was no evidence of willfulness).

(*Ingalls Shipbuilding, Inc.* v. *United States*, No. 88-1203 (Sept. 29, 1988), slip. op. at 8).

Although the authority has been used sparingly, the Boards of Contract Appeals have sometimes imposed sanctions where their orders have been flouted or ignored. *See*, for example, *Ralph Construction, Inc.*, ASBCA No. 35633 (Mar. 22, 1988), 88-2 BCA par. 20,731. For sanctions to be imposed, however, something more is

required than mere noncompliance. *M.T.F. Industries, Inc.*, IBCA-977-11-72 (July 17, 1973), 73-2 BCA par. 10,145. But evidence in support of a claim was found to be properly excluded where an appellant never complied with the condition imposed by the Board (answering interrogatories) over a protracted period of time, resulting in the denial of the claim to which the excluded evidence pertained. *Evergreen Engineering, Inc.*, IBCA-994-5-73 (Oct. 29, 1974), 81 I.D. 615, 74-2 BCA par. 10,905 (decision on motion to dismiss); 85 I.D. 107, 110, 78-2 BCA par. 13,226 at 64,679 (decision on merits).

In responding to appellant's motion for sanctions, the Department Counsel states that the Board should be aware of Hardrives' unwillingness or inability to accommodate the Government auditors as indicated by an attached memorandum dated August 3, 1988. The memorandum reports the attempts made to audit Hardrives' own claims [1] and those of two of its subcontractors (MRT Construction and Valley Ditch Lining) [2] during the period from April 27 to August 3, 1988. Thereafter, the Department Counsel notes that opposing counsel has taken steps designed to assure future cooperation by Hardrives and it two subcontractors which it is hoped will enable the auditing process to move to a rapid conclusion.

While sanctions were found to be warranted and were imposed in *Evergreen, supra*, the Board stated that it undertook "such a drastic measure with extreme reluctance." 81 I.D. at 618, 74-2 BCA at par. 51,890). Here appellant has requested that the Board impose sanctions against the Government for its failure to comply with the Order dated July 5, 1988, pertaining to discovery. It has proceeded, however, in a perfunctory manner. Although correctly citing rule 4.100(g) as the Board's authority for imposing sanctions, appellant's motion contains no citation to case authority and is not accompanied by a copy of a letter dated August 29, 1988, which the motion states is "attached as Exhibit A."

The Government acknowledges that it failed to comply with the terms of our discovery order of July 5, 1988. It relates such failure to personnel and time limitations, however, and to the fact that much time has been devoted to the processing of other appeals of appellant under the instant contract including the preparation of extensive

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[1] According to the memorandum the initial site review of the claims began on Apr. 27, 1988, with a return visit being made on June 8, 1988. On both visits the company officers stated that the claims were ready for review and promised full cooperation. After noting that the auditors' various requests for information usually received inordinately slow, and often incomplete responses, the regional audit manager states:

"In fact, most information requests were never responded to, even though the June visit covered nearly 3 weeks. These information requests remain unanswered to this date. When we departed the contractor's office on June 23, 1988, we submitted a written information request and stated that we would return to Hardrives when the request is answered in full * * *." (Memorandum of Aug. 3, 1988, to Contracting Officer from Regional Audit Manager at 1).

[2] The Government auditors were unsuccessful in even commencing the audit of the subcontractors' claims. While the attorney who represents both subcontractors attributes their failure to make the records available for audit to insufficient prior notice, the regional audit manager states:

"[T]he attorney's position on insufficient audit notice contradicted statements made by the Contractor. Hardrives' vice-president had previously informed us that both subcontractors were given ample notice of the audit long before our direct notification of subcontractor audits. Actually, little notice should be necessary, since all applicable supporting documentation for claimed costs should be readily available from company accounting records." (Memorandum of Aug. 3, 1988, to Contracting Officer from Regional Audit Manager at 2).

answers to the interrogatories propounded in IBCA-2319. Responding to the serious charges made by appellant's counsel, the Department Counsel denies that there has been any abuse or delay designed to defeat any valid claims of Hardrives by tactics of attrition and commits himself to complete the Government's response to the requested discovery by no later than Friday, October 21, 1988.

While the Board does not lightly countenance a party's failure to comply with any of its orders and particularly where, as here, the party against whom the sanctions are sought failed to offer any explanation to either the Board or to the appellant until a motion for sanctions was filled, it does not consider that resort to the harsh remedy of sanctions is warranted in the present circumstances.

The Board finds that appellant has not shown that the Government's failure to comply with the Order dated July 5, 1988, was due to willfulness or bad faith or that it was otherwise culpable. So finding, the Board further finds that appellant is not entitled to the remedy it seeks. Accordingly, appellant's motion for sanctions against the Government in the above-captioned proceedings is denied. The denial of the motion for sanctions is without prejudice to the motion being renewed at a later date [3] if the circumstances then obtaining so warrant.

WILLIAM F. MCGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

GORDON B. COPPLE, ESTATE OF JANET COPPLE, ESTATE OF GUST E. SVENSSON, JR.

105 IBLA 90 Decided: *October 20, 1988*

Appeal from the decision of the Arizona State Office, Bureau of Land Management, declaring the Betty Lee mining claim, A MC 72979, and the Frisco No. 20 mining claim, A MC 90517, abandoned and void.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976:

[3] Since the scheduling of the hearing requested by appellant is dependent upon the completion not only of requested discovery but also of the requested audits (it is our practice to have the hearing cover not only entitlement but also quantum), any renewal of the motion for sanctions should be accompanied by a status report as to any audits in progress or completed including a statement as to whether there are any records pertaining to the claims which the auditors have requested that have not been furnished, and, if so, the reason or reasons for the refusal to so furnish.

Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calender year, *i.e.*, on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void.

2. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made.

3. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

Under 43 CFR 3833.2-4, a mining claimant is excused from filing evidence of annual assessment work or a notice of intention to hold his claim only if a proper application for a mineral patent is filed and the final certificate has been issued. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements.

4. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

APPEARANCES: Stephen P. Shadle, Esq., Yuma, Arizona, for claimants.

OPINION BY ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF LAND APPEALS

By decision dated April 1, 1986, the Arizona State Office, Bureau of Land Management (BLM), declared the Betty Lee mining claim, A MC 72979, and the Frisco No. 20 mining claim, A MC 90517, abandoned and void for failure to file an affidavit of assessment work or notice of intention to hold the claims for the 1984-1985 assessment year on or before December 30, 1985. The owners of the claims (claimants) have appealed this decision. [1]

These two claims were part of a group of claims held by claimants that were included in an aerial gunnery and bombing range

[1] The BLM decision listed the Estate of Janet Copple and Gust E. Svensson, Jr., as the owners of the claims. A notice of intention to hold the claims dated Apr. 15, 1986, identified the owners as Gordon B. Copple and the heirs of Gust E. Svensson, Fred Cooper, and Ed Cooper.

established on November 6, 1942, that is now associated with Luke Air Force Base, Arizona. The area in which the claims are located was withdrawn from all forms of entry and reserved for continued use as a gunnery and bombing range pursuant to the Act of August 24, 1962, P.L. 87-597, 76 Stat. 399 (1962). Since November 1943, claimants have essentially been barred from access to the claims because of military activities. The claims, with others similarly situated, are the subject of a condemnation action brought by the United States, and by order dated March 29, 1977, claimants were required to deliver possession of the claims to the United States. *United States* v. *1,739.13 Acres of Land*, Civ. No. 77-242 (D. Ariz. Mar. 29, 1977). [2] The United States has paid an annual rent to claimants since 1977.

[1] Under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the mining claim prior to December 31 of each year; *i.e.*, on or after January 1, and on or before December 30. Failure to file within the prescribed period results in the claim being deemed abandoned and void. *United States* v. *Locke*, 471 U.S. 84 (1985).

Claimants do not allege that notices of intention to hold for the 1984-1985 assessment year were filed for the Betty Lee and Frisco No. 20 mining claims. [3] Instead, they argue that the pendency of the contest and condemnation proceedings relieved them of the filing obligation for two distinct reasons: (1) these proceedings provided BLM with actual and constructive notice of their intention to hold the claims, and (2) they had no obligation to file because the United States Government held the possessory interest in the claims by virtue of the 1977 court order and thus assumed the obligation to maintain the claims.

[2] Claimants' second assertion provides no basis for reversal of BLM's decision. In *Comstock Tunnel & Drainage Co.*, 87 IBLA 132, 134 (1985), we observed:

> In section 314 of FLPMA, Congress assigned the owner of the claim the responsibility for making the required filings; the owner must bear the consequence of filings not timely

[2] The Betty Lee claim was also the subject of a previous mining claim contest initiated on Sept. 30, 1980, by BLM at the request of the Corps of Engineers, Department of the Army. Although other mining claims were found invalid as a result of that contest, the contest against the Betty Lee claim was dismissed. *United States* v. *Copple*, 81 IBLA 109 (1984). As noted in *United States* v. *Taylor*, 19 IBLA 9, 25, 82 I.D. 68, 74 (1975), a dismissal of a mining claim contest does not constitute a finding that a claim is valid unless the contest proceeding results from a patent application. Such was not the case in the earlier proceeding against the Betty Lee claim.

[3] Claimants argue both that they were given conflicting advice about whether or not notices of intention to hold were required because of the pending condemnation proceeding and that they had good reason to believe such notices had been filed because notices were filed with the local county recorder's office and there was confusion over what documents had been filed with BLM in April 1985 because of a change in counsel representing claimants. Claimants further state they expected the condemnation proceeding to be tried in late 1985, and the outcome of that proceeding would have determined whether notices of intention to hold were required. Although the record clearly shows that claimants had time to file the notices on or before Dec. 30, 1985, and that there were questions about whether the notices were required and whether they had, in fact, been filed, claimants do not allege that notices were actually filed.

made. *Cf. United States* v. *Boyle*, [469 U.S. 241], 105 S. Ct. 687 (1985) (penalty properly imposed on taxpayer whose attorney filed a late return on taxpayer's behalf).

The filing obligation thus clearly rests with the mining claim owner, regardless of the status of any other property interests in the land at issue.

[3] Claimants' equitable argument that BLM had both actual and constructive notice of their intention to hold these claims by virtue of the contest and condemnation proceedings is not cognizable by the Board under the statute and regulations. Congress provided no relevant exceptions to the filing requirement in 43 U.S.C. § 1744 (1982). The regulations in 43 CFR 3833.2-4 excuse a mining claimant from filing evidence of annual assessment work or a notice of intention to hold the claim only if a proper application for a mineral patent was filed and the final certificate issued. In *United States* v. *Ballas*, 87 IBLA 88 (1985), the Board dismissed as moot an appeal involving a contest against certain mining claims because the claims had become abandoned and void as a result of the claimant's failure to file the required instruments during the pendency of the contest proceedings. [4] In *Robert C. LeFaivre*, 95 IBLA 26 (1986), we noted that the submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982). [5]

Under the clear provisions of 43 U.S.C. § 1744(c) (1982), the automatic consequence of failure to file the required instruments is a finding that the claim has been abandoned and is null and void. *See United States* v. *Locke, supra*. As the Supreme Court made clear in the *Locke* decision, it is the failure to file the required notice that results in the abandonment of the claim; neither the mining claimant's subjective intent nor even the Government's general awareness of such intent is sufficient to avoid the effect of the statute.

[4] Finally, claimants contend that their failure to file was a result of excusable neglect by the contestees or their agents which should not result in the loss of the claims, and that BLM breached an affirmative duty to them because it failed to mail a reminder notice to the address furnished in prior years, but instead mailed the notice to an address of one of the deceased owners whose name was not listed on the 1984 notice. Contrary to claimants' assertion, BLM has no affirmative obligation to send a reminder notice. Although noting in *Locke, supra*

[4] Once the claim has been declared invalid, however, there is no requirement to file an affidavit of assessment work or a notice of intention to hold the claim unless that decision has been suspended during subsequent proceedings. *See J. L. Block*, 98 IBLA 209 (1987).

[5] Claimants observe that the Government sought to introduce into evidence information concerning the loss of these claims in the court proceeding to determine just compensation for the Government's past use of the claims, but the Judge refused to admit this evidence. It is not clear why this ruling should affect our disposition of this appeal. The loss of the claims under 43 U.S.C. § 1744 (1982), does not occur until after the filing deadline expires without the required filing having been made. In this case, that date is Dec. 30, 1985, long after the initiation of occupancy by the Government for which claimants claim a right to compensation. Claimants cite nothing in the Judge's ruling that purports to suspend the statutory filing requirement or the loss which results from their failure to file. Nor may we lightly infer any such intent by the court.

at 109 n.18, that BLM had chosen "[i]n the exercise of its administrative discretion," to send reminder notices, the Court in no way suggested that such notices were required by the statute or that once BLM sent such notices, a right to receive them in the future was created. The following observation from *Locke, supra* at 108, is equally pertinent to claimants' contentions:

> In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. * * * [E]very claimant in appellees' position already has filed once before the annual filing obligations come due. That these claimants already have made one filing under the Act indicates that they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands.

Thus, the loss resulting from claimants' failure to make the required filings cannot be attributed to the United States.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

KATHRYN A. LYNN
Administrative Judge
Alternate Member

I concur:

WILL A. IRWIN
Administrative Judge

UNITED STATES *v.* NEW YORK MINES, INC.

105 IBLA 171 Decided: *October 31, 1988*

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring the New York No. 2 and New York No. 3 lode mining claims null and void. ORMC 470, ORMC 471.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality 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. Although the profitability at the time of the contest hearing of a mining claim located for a precious metal (gold) need not be proven, evidence of the projected costs and anticipated revenues of mining the claim is properly

considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital.

2. Mining Claims: Discovery: Geologic Inference

While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure has been developed which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man may be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. Projection of inferred reserves on the basis of the quantity of ore removed in past mining operations on the vein will not support a discovery where there is evidence of a substantial change in the character of the mineral deposit in the vein from the area previously mined to the deposit remaining.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

It has been recognized that the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of developing a paying mine. Thus, the existence of reserves on adjacent mining properties controlled by the claimant is relevant to the question of whether there is a reasonable prospect of developing a paying mine.

APPEARANCES: Warde H. Erwin, Esq., Portland, Oregon, for appellant; Robert M. Simmons, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

New York Mines, Inc., has appealed a decision dated June 14, 1985, by Administrative Law Judge E. Kendall Clarke declaring the New York Nos. 2 and 3 lode mining claims null and void. [1] The claims were located on lands within the Wallowa-Whitman and Umatilla National Forests in the Granite Mining District, Grant County, Oregon.

On September 27, 1978, appellant filed mineral patent applications for the claims at issue. On June 14, 1983, the Bureau of Land Management (BLM) issued contest complaints charging that no discovery of valuable minerals had been made within the limits of the claims. Appellant timely filed an answer and a hearing was held before Judge Clarke, June 11-14, 1984, in Portland, Oregon. [2]

Daniel G. Avery, a Forest Service mining engineer, examined the claims on April 6, 1981, and thereafter prepared several reports of mineral examination. In his initial report, dated February 17, 1982, Avery noted the existence of three veins on the claims: the Alaska vein; the New York No. 1 vein; and the New York No. 2 vein. Most of

[1] The mining claims are situated in secs. 22 and 27, T. 8 S., R. 35½ E., Willamette Meridian, Grant County, Oregon. Two other claims initially cited in the contest complaint, the New York Nos. 1 and 4, were excluded from the contest proceeding (1 Tr. 3-5).

[2] References to the multivolume hearing transcript in this case identify the volume of transcript followed by the page number.

the development and prior mining has been on the New York No. 1 vein, which is described as a strong fracture varying in width from 2 to over 10 feet, composed of gouge, felsite dike, and breccia fragments. He noted that the original production from the vein was from the oxide zone extending to a depth of about 100 feet below the surface, and that work was stopped when lower-grade sulfide ore was encountered (Exh. B at 7). He noted that the present owners had driven a decline to intersect the New York No. 1 vein approximately 100 feet below the old workings, and had exposed approximately 520 feet of the New York No. 1 vein in the lower level. This exposure was almost entirely within the New York No. 2 and New York No. 3 claims with the bulk of the mineralization in the New York No. 2 claim. He concluded that very few of the New York claims samples showed ore-grade material. He found, however, that on the New York No. 3 claim there was a small block of mineralized material (approximately 800 tons) in the New York No. 1 vein, which, although too small to be mined by itself, "could be mined in conjunction with other ore at this or a nearby mine." He concluded that the New York No. 3 had a valid discovery and met the requirements for patent (Exh. B at 9-10).

In a memorandum dated August 2, 1982, to the Forest Supervisor, the Baker District Ranger refused to concur with Avery's conclusion that a valid discovery existed on the New York No. 3. His critique of Avery's analysis stated in part as follows:

> The examination reflects an added cost per ton for custom milling of ore removed. This figure is more realistic than the speculative cost per ton by using shared milling facilities. At this time there are no "going", operations within the New York[']s vicinity that would conceivably enter into such a venture. A total net loss using these added milling costs would be $191,008.

(Exh. F).

In a letter dated November 17, 1982, to the Forest Service, the Acting Chief, Branch of Lands and Minerals, Oregon State Office, BLM, expressed similar doubts concerning Avery's initial report. He noted first that, according to Avery's report, mining costs were developed by extrapolating costs from an operation processing 1,000 tons per day to the 800 tons of mineral in place in the New York No. 3. He felt that an extrapolation of that magnitude should be justified by an independent calculation of mining and milling costs. Secondly, BLM objected to Avery's conclusion that the ore might be mined and milled in conjunction with other properties because, as a general rule, "each claim should stand on its own" (Exh. C; *see* I Tr. 172-74). Confronted with these objections, Avery reevaluated his data and on April 5, 1983, issued a second report of mineral examination (Exh. D; I Tr. 17).

In his second report, Avery analyzed anticipated smelting as well as mining and milling costs. Based on his reconsideration, he concluded that the "lengths of vein identified by the claimants do not come close

to profitability" (Exh. D at 11; I Tr. 155-56). In explaining the basis for his reevaluation, Avery stated that his initial report was based on a 35-foot strike length along the vein exposed in appellant's drift which contained the high-grade samples from which he estimated an 800-ton deposit of mineralized material, which he identified as ore. His second report, on the other hand, analyzed the entire 169-foot strike length of the New York vein exposed in the drift and identified by appellant as ore grade in its patent application (I Tr. 116-17, 155).

Avery prepared a third supplemental report (Exh. H) on June 8, 1984, prior to the hearing. In this third supplement he further analyzed mining, milling, and smelting costs and the cost of transportation from the mine to a smelter. Avery calculated a "break even value" by comparing the sum of the mining, milling, and smelter costs to the value of the net-recovered gold. [3] Using the various sample points and assay values presented by appellant, Avery analyzed the value per ton of material in place, based upon assay values, anticipated mining width, and the value of gold in place at various gold prices prevailing between 1979 and 1984. The report reaches the following conclusion regarding discovery:

> Utilizing the $50 per ton mining cost and $40 per ton milling cost, both of which I feel are justified, [4] none of the samples in the decline drift would be considered ore grade (see mined grade value calculations). Even the $30 per ton mining cost and $15 per ton milling cost produce a break even value well above the average value of the 169 feet of drift claimed to be ore by Bowes. [5] It is also in excess of all but six samples at the 1979 to 1983 gold price, and all but four samples at the May, 1984 price. I therefore conclude that a discovery of a valuable mineral deposit has not been made on either the New York No. 2 or 3 lode claim on the basis of the material exposed in the decline drifts.
>
> Only four surface samples have been submitted on cuts beyond the limits of the old underground workings. No information has been given as to the total width of the structure in these areas, so for this analysis I have diluted the values to a 5 foot mining width. Two of the samples are ore grade at this width, but are not representative of material to be found underground, in the lower grade sulfide zone. The erratic distribution of values demonstrated in the decline drift could logically be expected to continue under these surface samples. I therefore conclude that a discovery of a valuable mineral deposit has not been made on the New York No. 2 claim on the basis of surface sampling. [Footnote omitted.]

(Exh. H at 5). Avery concluded, based on his research and analyses, that there was no discovery of a valuable mineral deposit on either of the New York Nos. 2 or 3 mining claims (I Tr. 70; IV Tr. 445).

The first witness for the contestee was William A. Bowes, a professional geologist who had undertaken a program of acquisition of mineral properties in the western United States for a group of investors. In the course of this activity he had acquired (by lease or purchase) a number of properties in Oregon's Granite mining district. Among the claim groups acquired were the New York, Cougar-Independence, Ajax, and Magnolia groups, which are contiguous to one

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[3] Net gold recovery was calculated as 82.026 percent by using a 90-percent mill recovery rate and a smelter payment based upon 93 percent of the contained gold and 98 percent of the London gold price (Exh. D at 9-10).

[4] Avery contacted mine managers, exploration experts, and others knowledgeable in the field to obtain his data (I Tr. 47-60).

[5] W. A. Bowes, Inc., is the operator for the claimants of the New York lode mining claims.

another, and other noncontiguous groups. He had also located additional claims around the various properties. He explained his interest in the Granite mining district, which was based upon favorable host rock and a history of past production. He further explained that he acquired the New York and adjacent groups because they covered what he considered to be important mineral bearing structures which could be mined as a logical mining unit. He also described certain of the work conducted to date, consisting primarily of drifting on the Cougar and New York claims and heap leach testing. He noted that, while the oxide ores appeared to be amenable to heap leaching, the results of heap leaching of the primary ores was less than satisfactory.

Steve Aaker, a senior geologist with W. A. Bowes, Inc., testified at some length concerning his interpretation of the mineral reports prepared by Avery. He characterized Avery's figures as being "fairly consistent and in the ball park with what we [claimants] say" (III Tr. 224, 226). Aaker testified that the difference between his projections and those of Avery, which were based upon the same samples, is the amount of dilution encountered in mining the vein (II Tr. 150). He stated ore reserves were difficult to quantify but there could be approximately 70,000 tons of "possible" reserves on the New York Mine (III Tr. 189). When developing mining and processing cost estimates Aaker relied mostly on the experience of Kenneth B. Henderson and Leslie C. Richards (III Tr. 229-35).

Kenneth B. Henderson, a civil engineer with experience in coal and hard rock mine management, testified that the New York vein could be stoped with a 2-½-foot mining width (III Tr. 256, 259-90). He testified that using this mining method and stope width, he anticipated mining costs of about $40 per ton (III Tr. 258), and mining and milling costs would be approximately $55 per ton, which he considered a "reasonable amount for a reasonable and prudent person" (III Tr. 269).

Leslie C. Richards, a geologist, engineer, and consultant for W. A. Bowes, Inc., testified that a prudent man would consider a number of things when deciding to mine the New York claims, such as size of the vein, whether the vein held gold, the fact that some gold has been produced, and the fact that there are adjacent mining properties (III Tr. 333). Alluding to the prudent man standard, he stated that the New York No. 1 vein was of minable width encompassing an ore shoot "that constitutes approximately 40 per cent of the strike length." He continued: "So – and if you – consider what this – this block or exposed zone runs in value and what you estimate it would cost to mine it and what it would cost to mill it, it – it would show a profit. So it fits that category [prudent man standard]" (IV Tr. 355).

Richards described the New York No. 1 vein as being in excess of 2,500 feet long, having an area where "surface samples indicate ore grade that could be mined and milled profitably." He recommended

that development work be continued on the New York No. 1 and other veins in the New York group which are only "part of the picture" with general mines and milling operations taking into account a number of sources of ore, not just the New York No. 1 (IV Tr. 356-57). He indicated that further drifting on the New York No. 1 vein might be justified in the New York No. 2 claim (IV Tr. 359). He could give no definitive data on mining and milling costs and stated that both claims had negligible proven reserves (IV Tr. 361-62, 365-66). Richards could not recommend constructing a mill based on the reserves in the New York Nos. 2 and 3 claims (IV Tr. 374).

Mining geologist William A. Bowes testified that before continuing development on the New York No. 3 claim he would need further information, "positive data," and the promise of greater mineralization at another level (IV Tr. 385). He stated also that conditions "have to be right" before an investment could be made to construct a mill (IV Tr. 393).

In his decision reached after the hearing, the Administrative Law Judge found the Forest Service mineral examiner had testified that a reasonably prudent man would not invest his time and money with a reasonable prospect of success in developing a paying mine because of the lack of evidence of the extent of the reserves and because the material mined would inevitably be diluted by low-grade deposits present in much of the vein material which would preclude recovery of mining and milling costs. Hence, the Administrative Law Judge concluded the Government had presented a prima facie case that the claims were invalid.

In reviewing the case presented by appellant's witnesses, Judge Clarke acknowledged their contention that effective mining widths could be reduced to as little as 2-½ feet thus reducing dilution of ore values, but noted the testimony that proven and probable reserves on the claims are very limited. The Administrative Law Judge acknowledged the testimony to the effect that it is reasonable to expect that, based on the history of mining in the area on this and similar veins, other ore shoots will be discovered at other locations in the vein structure, but found compelling the testimony that a prudent operator would not attempt to operate the mines or to construct the mill which is essential to the operation of these claims based on the proven or probable reserves. Hence, Judge Clarke found appellant had failed to rebut the prima facie case and establish the existence of a discovery.

Appellant raises several contentions in the statement of reasons for appeal. First, it is argued that the Administrative Law Judge erred in holding that a discovery must be established as of the date of the hearing as opposed to the date of the claim or the patent application. Hence, appellant asserts the revised opinion of Forest Service mineral examiner Avery regarding validity is irrelevant. Further, appellant contends the Administrative Law Judge erred in denying contestee's motion to dismiss the contest for failure to establish a prima facie case on the ground that proof of immediate profitability (marketability) is

not required under the mining law to establish a discovery of a claim located for precious metals such as gold. It is contended that evidence of marketability is required only for claims located for nonprecious minerals of common occurrence. Appellant contends the correct standard is that a prudent man would under the circumstances expend his time and money in the expectation of "developing" a paying mine. Appellant argues that this same error in the legal standard for discovery caused the Administrative Law Judge to reach an erroneous conclusion regarding the existence of a discovery on the claims. Additionally, appellant contends there was an improper emphasis on the claims at issue in determining the existence of a discovery and that the development of adjacent claims by the contestee was improperly discounted.

Two of the contentions raised by appellant involve well-settled legal precedent in mining contest adjudication and may be disposed of as a threshold matter. In the absence of evidence of prior payment of the purchase price by the claimant and issuance of a receipt therefor, [6] the validity of a claim must be established as of the time of the hearing. *See e.g.,, United States* v. *Pool*, 74 IBLA 37 (1983). In any event, contrary to appellant's assertion, the revised opinion of Forest Service mineral examiner Avery as to the existence of a discovery on the claims would not be irrelevant. Although the previous opinion may serve to impeach the later opinion, the revised opinion is not irrelevant if sufficient basis is given for the revision.

[1] The basic standard of discovery under the mining laws was set forth by the Department long ago:

> [W]here 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.

Castle v. *Womble*, 19 L.D. 455, 457 (1894); followed, *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). This standard has been supplemented by the "marketability test" requiring a showing that the mineral deposit can be extracted, removed, and marketed at a profit. *United States* v. *Coleman*, 390 U.S. 599 (1968). Although the Court of Appeals for the Ninth Circuit (Oregon is located within the Ninth Circuit) has held that a mining claimant need not show the profitability of a mining claim located for a precious metal (gold) at the time of the hearing and, hence, a showing that the gold can presently be extracted, removed,

[6] In *United States* v. *Whittaker (On Reconsideration)*, 102 IBLA 162 (1988), the Board recognized that where a mineral patent application has been filed and claimant has paid the full purchase price for a claim, a subsequent inquiry regarding discovery is proper focused on the issue of whether or not a discovery was established at the date of entry, *i.e.*, the date of issuance of the final certificate. We find no evidence in the record before us that payment has been made and a final certificate issued. Further, we find that such an occurrence would make no material difference to the result of this contest proceeding. The Government's prima facie case reflected a range of gold values over the timeframe from 1979 to 1984 and the reasonable prudent man determination is not tied to a particular price of gold within the range.

and marketed at a profit is not required, it has held that evidence of the costs and profits of mining the claim should be considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital. *Lara* v. *Secretary of the Interior*, 820 F.2d 1535, 1541 (9th Cir. 1987). Accordingly, we find the Administrative Law Judge did not err when he took into consideration the reasonably anticipated costs of mining and processing the gold and the projected return when determining whether a prudent man would be justified in the further expenditure of his labor and means.

It is well established that when the Government contests the validity of a mining claim on the basis of lack of discovery, it bears the burden of presenting sufficient evidence to establish a prima facie case. However, once a prima facie case is presented, the claimant must present evidence sufficient to overcome the Government's case by a preponderance of the evidence on those issues raised. *United States* v. *Springer*, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States* v. *Whittaker*, 95 IBLA 271 (1987).

The essence of the issue on appeal in this case is twofold. The first question involves the existence of mineral in place of sufficient quantity and quality to justify a prudent man's investment of his time and money. This determination can be made by examining the samples of the vein material taken by appellant, the nature of the vein, and the history of workings on the same vein and similar veins in nearby mines. The second issue is whether the reserves on adjacent mining properties owned or controlled by appellant which, together with the subject claims might be operated as a single mining unit, are sufficient to warrant a prudent man in expending his labor and capital with a reasonable prospect of developing a paying mine.

The record supports the finding of the Administrative Law Judge that a prima facie case of lack of discovery of a valuable mineral deposit was established. Avery, the Forest Service mining engineer, found the average mined grade values to be below the break even value for the 169 feet of drift claimed by Bowes to contain ore grade even using the $30 per ton mining cost and the $15 per ton milling cost estimates made by appellant (Exh. H). [7] Avery's report also concluded that oxide zone samples were not representative of "material to be found underground, in the lower grade sulfide zones" (Exh. H at 5). Hence, he testified that in his opinion there was no discovery on either claim (I Tr. 70). Accordingly, we must affirm the Administrative Law Judge's holding that the Forest Service made a prima facie case of lack of discovery of a valuable mineral deposit. Thus, the issue before the Board is whether contestee's evidence is sufficient to rebut the prima facie case of no discovery.

[7] Appellant's expert, Henderson, conceded that combined mining and milling costs would total $55 per ton (III Tr. 269; Exh. 73).

Contestee's witnesses took issue with the dilution assumed by Avery in his calculations. Appellant's witness Aaker testified that mining the vein by open-stope method in a width as narrow as 2-½ feet is feasible (III Tr. 278). Appellant's witness Henderson concurred in this judgment (III Tr. 256). In his testimony Aaker limited his analysis to the higher grade mineralization found in approximately 40 feet of strike length of the New York No. 1 vein exposed in the Bowes' drift, rather than either the full length of the exposed vein or the full width of the vein, when calculating ore-grade (III Tr. 205-06, 224-25). Richards testified that it would not be necessary to take the full width of the vein or mine the entire strike length of the vein structure. Rather he proposed selective mining of the ore-grade shoots with an allowance for overbreak (III Tr. 326-27). Proper sampling and assaying was cited as the key to mining ore grade and restricting dilution (III Tr. 328). [8] Of importance to our decision is the apparent inconsistency between the testimony regarding the anticipated cost of mining and later testimony regarding selective mining. The anticipated mining costs were based on open-stope mining with an occasional stull to support the ribs. We find the evidence regarding the incompetency of the vein material to be convincing. Clearly, any attempt to mine less than the full width in a shear zone will result in either a marked increase in mining costs, or dilution. The upper oxide stopes indicated that the wall rock was competent and would stand with little support. However, the assay map submitted at the hearing describes the vein in the area where the selective mining would occur as being a "complex fault zone of clay gouge." Thus, while we might be willing to accept appellant's estimates of the mining cost based upon removal of the full vein width, we cannot accept the proposition that the cost of mining less than the full vein width would be the same.

Even if it is assumed that it would be feasible to limit mining operations to the high-grade portion of the vein with mine widths as narrow as 2-½ feet the issue remains whether the exposed mineralization is of sufficient quantity and grade to justify a reasonably prudent man in further investment with a reasonable prospect of success in developing a paying mine. Richards stated in his testimony that the values in the ore shoot in the New York No. 1 vein exposed in the Bowes drift exceed his estimate of the costs of mining

[8] The Forest Service mining engineer, Avery, disputed the feasibility of limiting mining to a narrow and selective width of the vein structure. Based upon his analysis of the samples taken from the vein structure, Avery concluded that mineral values are distributed throughout the entire width of the structure and that higher grade portions of the vein could not be selectively mined (I Tr. 68; IV Tr. 435). Avery noted:

"New York Mines do not allow for any dilution in their analysis of ore grade. They selectively took ore grade samples from their sample locations. They are not consistently on one wall or another. There are various parts within the structure and in some cases even included a waste in between values which apparently wasn't considered and they assumed that they could mine that ore grade material without taking any lower grade along with it." (I Tr. 64).

Additionally, Avery contended that the vein was in an incompetent shear zone, causing him to conclude that the effective mine width would have to be the width of the vein (I Tr. 159, IV Tr. 437).

and milling the ore (IV Tr. 355). [9] Richards indicated that surface samples along the vein in the New York No. 2 indicate ore grade that could be mined and milled profitably (IV Tr. 356). However, Avery concluded that the surface samples were not representative of material to be found underground in the lower-grade sulfide zone (IV Tr. 442; Exh. H at 5, quoted *supra*). [10] This is supported by the discussion of the New York Mine in G. S. Koch, Jr., *Lode Mines of the Central Part of the Granite Mining District, Grant County, Oregon* (State of Oregon, Department of Geology and Mineral Industries, 1959) (Exh. 28):

> Near the face of the lowest adit the vein changes from oxide ore to sulfide ore, containing the minerals quartz, arsenopyrite, chalcopyrite, and gold. Grove [J. Grove, The New York Mine, Granite, Oregon (Washington Univ. (Seattle) 1940) (unpublished thesis)] states that the New York and Cougar veins are alike. From Grove's report and map (Figure 24) it is clear that the New York No. 1 vein has not been completely explored below the surface outcrop and that almost all exploration was confined to the oxide zone.

Id. at 36-37. Indeed, Bowes acknowledged in his testimony that the samples taken on the upper levels were in an oxide zone, but that primary sulfide mineral was encountered in the headings he drove in the Cougar Mine and in the Bowes drift on the New York No. 1 vein (II Tr. 105). [11]

Appellant's expert Aaker described in his testimony how ore reserves were projected by contestee on the basis of historical workings and production:

> [W]e quantified the available working and the percentage of ore that occurred through those workings as evidenced by historical stope production, and the results are that at Cougar we find that to be 39 per cent of the available area that has been opened up by drifting and so forth turned out to be ore grade material.

(III Tr. 187). Bowes confirmed that the reserve estimate was based on the mineralized zones previously mined (IV Tr. 397). For the New York Mine, the historical data indicated that 54 percent of the available vein area had been mined (III Tr. 187). Aaker explained that this technique was used to estimate the "shooting occurrences" along the vein so that "we can come up with possible ore reserves based on this type percentage of the vein as ore" (III Tr. 188).

On this basis, Bowes estimated "potential" reserves on the New York claims as approximately 150,000 tons (IV Tr. 399-400). Appellant's witness Richards, on the other hand, was much more conservative in his tonnage estimates. Richards testified that in the New York No. 3 claim there were negligible proven reserves, in the range of 2,000 tons

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[9] Although Richards referred to the high-grade shoot as comprising approximately 40 percent of the exposed strike length of the New York No. 1 vein exposed in the Bowes drift (IV Tr. 355), Avery described the high-grade shoot exposed by appellant as constituting about 40 feet or 7.7 percent of the 520-foot exposure in the Bowes drift (Exh. D at 8; IV Tr. 441). This latter description is consistent with the 40-foot high-grade shoot identified in the testimony of appellant's experts Richards (III Tr. 177, 205-06) and Aaker (II Tr. 158).

[10] A number of these samples were taken from points on the vein directly above old stopes. Those samples shed light on what was there before mining but are of hardly any value when trying to estimate the amount of mineral in place.

[11] Although the oxidized ore samples from the upper levels were amenable to separation of the gold through the heap leaching process, this technique was not successful with the unoxidized ore (II Tr. 105). This latter type of ore required "regular milling–flotation type operations" (II Tr. 108).

of probable reserves, and probably under 10,000 tons of possible reserves (IV Tr. 365-66). He testified that proven reserves in the New York No. 2 claim were negligible, probable reserves in the range of 4 to 5 thousand tons, and possible reserves in the range of 15 to 20 thousand tons (IV Tr. 366). Bowes acknowledged that proven reserves are negligible (IV Tr. 428).

[2] While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure has been developed which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man may be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. *United States* v. *Feezor*, 74 IBLA 56, 79, 90 I.D. 262, 274-75 (1983).

We find no fault in appellant's projection of the strike length of the New York No. 1 vein. However, we find a fundamental flaw in the projections made by appellant when estimating the potential quantity and quality of the mineralization in the New York Nos. 2 and 3 claims based upon the size of the stopes and reported mined grade of the ore from the stopes. A careful examination of the description of the New York, Cougar, Independence, Ajax, and Magnolia mines set out in Exhibit 28, leaves little doubt that prior mining activity on these claims was from the oxide zone. The author notes that, for the Independence Mine, there is a strong suggestion "that this increase in value is to be attributed to the downward enrichment, following weathering and erosion of the superficial portion of the vein" (Exh. 28 at 34-35). The same report notes that the production in the above-mentioned mines was almost entirely oxide ore. What has been described is almost a classic textbook example of supergene enrichment. [12] In the face of such strong evidence that the past production came from a zone of supergene enrichment, it would not be prudent to project the size or grade of the ores previously mined to the underlying mineral deposit, when the exposures in that deposit show it to be composed of primary mineralization. By increasing the grade of the mineral in place the process of supergene enrichment also increases the amount of mineral which can be mined and processed at a profit. The evidence suggests that the supergene enrichment ore deposits have been mined out years ago. After acknowledging the fact that negligible proven reserves existed in the New York Nos. 2 and 3 claims, appellant's witnesses, Aaker and Bowes, sought to project the occurrence of further ore shoots such as the 40-foot deposit found in the Bowes drift based on the percentage of ore-grade material previously mined from the New York No. 1 vein. However they gave no basis for projecting a similar percentage of ore-grade material in

[12] *See* Hugh E. McKinstry, *Mining Geology* (Prentice-Hall, Inc., 1959) at 392-93.

the sulfide zones, based on prior mining activity. Indeed, in discussing the projected occurrence of ore shoots, Aaker recognized the distinction in his testimony: "[I]n the New York, *in the historical data*, again *not with the Bowes level decline*, it turned out to be 54 per cent of the available area" (III Tr. 187 (italics added)).

When considering the quantity of mineral necessary to establish a discovery of a valuable mineral deposit, the Board has recognized that a reasonable estimate of inferred reserves may be considered when there is strong geologic evidence to support the inference. *United States* v. *Feezor, supra* at 85, 90 I.D. at 278. However, when the record reveals that the character of the vein deposit changes from oxidized ore to sulfide ore, strongly indicating supergene enrichment, the facts will not support a downward projection of the ore-grade oxide deposits to sulfide deposits lying below the water table. Therefore we are unable to conclude from the record that the evidence supports the application of geologic inference to project reserves which would justify a reasonably prudent man in further expenditure of his labor and capital with a reasonable prospect of success in developing a paying mine.

One of the arguments raised by contestee in this appeal is that the decision of the Administrative Law Judge improperly focused solely on the claims being contested. As previously noted, Bowes testified that appellant controlled 32 mining claims in the vicinity of the New York Mine (II Tr. 89). Leslie Richards testified it would be necessary to unitize several previously independent properties in order to establish sufficient reserves to make milling economic (IV Tr. 356-57). Bowes based his conclusion that a reasonably prudent man would be justified in further expenditure of his labor and capital with a reasonable prospect of success in developing a paying mine on the existence of an entire group of properties controlled by appellant including the Cougar, Independence, Ajax, Magnolia, and New York claims and the LaBelleview and Ben Harrison claims (which are not contiguous) which would feed into a single mill (IV Tr. 389-92). Bowes stated that a minimum of four stopes in the Cougar, four in the Independence, and four in the New York Mine would be necessary for the envisioned operation (IV Tr. 392). Bowes projected potential reserves on the Cougar-Ajax extension of 700,000 tons, on the LaBelleview Mine as 300,000 tons, on the Independence-Magnolia claims as 300,000 tons, and on the Ben Harrison claims as 130,000 tons (IV Tr. 401-02).

[3] It has been recognized that the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of developing a paying mine. *United States* v. *Foresyth*, 100 IBLA 185, 94 I.D. 453 (1987). Thus, the existence of reserves on adjacent mining properties controlled by claimant is relevant to the question of whether

there is a reasonable prospect of developing a paying mine. However, the only testimony submitted by appellant was to the "projected" reserves based on previous mining in the oxidized zone of the various veins. The same formula was used by appellant to calculate projected reserves (ore shoots) on the adjacent claims as was used for the New York No. 1 vein, *i.e.*, calculating the percentage of the vein material previously mined along the strike length of a vein, and projecting the reserves at depth based upon the percentage of the total vein mined in the upper levels (III Tr. 187; IV Tr. 401). As noted above, use of this approach to project inferred ore reserves is simply not demonstrated on the record in this case to be reliable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

R. W. MULLEN
Administrative Judge

ATLANTIC RICHFIELD CO.

105 IBLA 218 Decided: *November 2, 1988*

Appeal from a decision of the Montana State Office, Bureau of Land Management, upholding a Miles City District Office decision assessing compensatory royalty for oil and gas drained from lease M-60749.

Set aside and remanded.

1. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. When BLM has established that a leased Federal tract is being drained by a well operated by a common lessee, it need not prove as a part of its cause of action that a protective well would be economic. In such cases the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

2. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Compensatory royalties commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case

BLM need not assume the initial burden of showing that the common lessee knew or that a reasonably prudent operator should have known that drainage was occurring. The common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to notice of drainage.

3. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

If the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas, there would be no breach of a lessee's duty to prevent drainage. However, if a lessee can make a reasonable profit by drilling the well, he should drill. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the offset well were not drilled.

***Gulf Oil Exploration & Production Co.*, 94 IBLA 364 (1986), modified.**

APPEARANCES: Gregory J. Nibert, Esq., Roswell, New Mexico, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Atlantic Richfield Co. has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated October 28, 1986, upholding a decision of the Miles City District Manager assessing compensatory royalty for oil and gas determined to have been drained from lease M-60749. This Federal lease is located within the N½ of sec. 5, T. 31 N., R. 59 E., Montana Principal Meridian, Sheridan County, Montana, [1] and appellant is the lessee. Appellant is also the lessee of the adjacent private lands on which the offending well, the Hoffelt #2, is located. [2]

In his decision of September 26, 1986, the Miles City District Manager found that the Hoffelt #2 well was draining Federal lease M-60749 by a drainage factor of 4.4 percent. Citing lease provisions and applicable regulations, the District Manager assessed appellant for compensatory royalty effective the date of first production from the Hoffelt #2 well and continuing until the date of last production, or the effective date of the relinquishment of affected portion(s) of lease M-60749, or the date on which production commences from a protective well. The record reveals that the Hoffelt #2 well was completed by appellant on January 2, 1985, and it reported production that same month. The record also reveals that production from the relevant (Gunton) formation has been shut off since July 1, 1986, and no protective well has been drilled by appellant.

In affirming the District Manager's decision, the Montana State Office held that an economic well could be drilled on lease M-60749.

[1] Lease M-60749 was issued effective Sept. 1, 1984. Lands described therein are lots 1, 2, 3, 4, S½ NE¼, SE¼ NW¼ sec. 5, T. 31 N., R. 59 E., Montana Principal Meridian.

[2] This well is located in SE¼ SW¼ sec. 32, T. 32 N., R. 59 E., Montana Principal Meridian.

This conclusion was based upon a finding that recoverable reserves totalled 312,000 barrels of oil.

The lease terms referred to by the District Manager are found in section 4 of appellant's lease: "Lessee shall drill and produce wells necessary to protect leased lands from drainage or pay compensatory royalty for drainage in amount determined by lessor." The applicable regulations, 43 CFR 3100.2-2 and 43 CFR 3162.2(a), state in part, respectively:

> Where lands in any leases are being drained of their oil or gas content by wells either on a Federal lease issued at a lower rate of royalty or on non-Federal lands, the lessee shall both drill and produce all wells necessary to protect the leased lands from drainage. In lieu of drilling necessary wells, the lessee may, with the consent of the authorized officer, pay compensatory royalty in the amount determined in accordance with 30 CFR 221.21.
>
> (a) The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage. The authorized officer may assess compensatory royalty under which the lessee will pay a sum determined as adequate to compensate the lessor for lessee's failure to drill and produce wells required to protect the lessor from loss through drainage by wells on adjacent lands.

Appellant observes that despite the regulations' clear direction to drill or pay, this obligation only arises after a determination that drainage is substantial and that a prudent operator would drill an offset well.

In support of its position that a lessee's duty to drill arises only if substantial drainage is occurring, inter alia, appellant cites 5 Williams and Meyers, *Oil and Gas Law* § 822 (1986), *Gerson* v. *Anderson-Pritchard Production Corp.*, 149 F.2d 444 (10th Cir. 1945), and *Cone* v. *Amoco Production Co.*, 87 N.M. 294, 532 P.2d 590 (1975). Appellant acknowledges that the term "substantial drainage" has not been quantified in the case law, but quotes with approval the view stated by Williams and Meyers that substantial drainage should remain as an element of the cause of action for breach of the protection covenant: "Where damages are measured by the amount of oil or gas drained away, the pecuniary award will be modest if not purely nominal. There is no reason to incur the expense of litigation to compensate modest losses, when such losses are established by evidence that cannot be exact." *Id.* at § 822.1 (footnote omitted).

Appellant contends that 4.4 percent of the Hoffelt #2 production can only be considered a modest loss which does not justify drilling a protective well or payment of compensatory royalty.

Appellant further argues that BLM cannot recover damages without proving that a protective offset well can produce in paying quantities sufficient to yield a reasonable profit after paying all drilling, operating, and administrative costs. Appellant alleges that BLM's proof in this respect is flawed because BLM has assumed an unrealistic production decline rate for a protective well. According to appellant, this error caused BLM to overestimate reserves recoverable by an

offset well and to arrive at a conclusion that an economic offset well could be drilled. Appellant insists that an economic protective well cannot be drilled on lease M-60749 and submits data in support of its contention.

Finally, appellant takes exception with the District Manager's assessment of compensatory royalties for the period commencing with *first production* from the Hoffelt #2 well. Such a decision, appellant states, is contrary to *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982). In *Ptasynski* this Board held that "[t]he obligation to protect a leasehold from drainage arises not upon completion of the draining well, but only after the passage of a reasonable time subsequent to notification by the lessor that an adjoining well is draining the leasehold." 63 IBLA at 256, 89 I.D. at 217. Having cited *Ptasynski* with approval, appellant argues that compensatory royalties should not commence until the lapse of a reasonable time, but in no event less than 6 months, after the date of first production from the offending well.

In response, BLM defends its decisions, noting that, even if substantial drainage is an element of its proof, this term has not been quantified and is otherwise ill-defined. No BLM manager has the authority to waive royalties, however insubstantial, without good legal reason, BLM observes. Moreover, if substantial drainage were a requirement, BLM states, its loss of $9,003 in royalties during the period through May 1987 is substantial.

BLM also maintains that it used an accurate production decline rate when estimating reserves for the protective well. Appellant's contention that a steeper decline rate is appropriate is misguided, BLM states, because there has been no physical deterioration of the reservoir. BLM further observes that a model protective well should be based on a minimum of 207,276 barrels of oil. In BLM's view, such reserves can support the drilling and operation of a paying protective well. Whether a paying protective well exists, BLM states, depends upon the sufficiency of reserves recoverable by the protective well and not, as stated in *Gulf Oil Exploration & Production Co.*, 94 IBLA 364, 368 (1986), on the reserves under the Federal lease that are drained by the offending well.

Finally, BLM states that compensatory royalties are properly calculated from the date of first production of the Hoffelt #2 well because appellant, as operator of that well, knew of the potential for drainage at the time it completed the well. As a common lessee, appellant benefitted immediately from this well, BLM states, and had immediate knowledge of the drainage.

In *Nola Grace Ptasynski, supra*, this Board refrained from deciding whether substantial drainage was a part of the cause of action for breach of the protection covenant or merely a restatement of the prudent operator standard. 63 IBLA at 250, 89 I.D. at 214. In the present case, it is not disputed that the Hoffelt #2 well has produced 77,055 barrels of oil and 44,966 MCF gas, of which 4.4 percent may be

regarded as drainage from lease M-60749. Had the United States received royalty on these drained resources, it would have received $9,003 in royalties, according to BLM's calculations. [3] BLM has not used the term "substantial drainage" in its decision. If appellant maintains that substantial drainage is part of BLM's cause of action and that BLM has failed to demonstrate this fact, it is incumbent upon appellant to define this term in order that we might determine whether appellant's contentions are correct. As one seeking reversal of BLM's decision, appellant bears the burden of showing error in that decision by a preponderance of the evidence. *Bender* v. *Clark*, 744 F.2d. 1424 (10th Cir. 1984). By offering only an unsupported conclusion, appellant has failed to meet this burden.

[1] In the decision on appeal, the Montana State Office specifically found an economic protective well could be drilled on lease M-60749. This finding reflects BLM's application of the prudent operator rule in a common lessee context. This rule was previously applied to a common lessee in *Gulf Oil Exploration & Production Co., supra*, when this Board remanded a decision of the New Mexico State Office for application of the rule. In *Ptasynski*, the prudent operator rule was described as a limitation on a lessee's implied obligation to protect against drainage. Quoting from *Olsen* v. *Sinclair Oil & Gas Co.*, 212 F. Supp. 332, 333 (D. Wyo. 1963), the Board set forth the rule in these terms:

> Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill offset wells unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well.

63 IBLA at 247, 89 I.D. at 212.

Upon review of our *Gulf* decision, we find certain refinements of that opinion to be in order. When BLM seeks to recover compensatory royalties from a common lessee, it must establish that a leased Federal tract is being drained by a well operated by the common lessee. However, BLM need not prove as a part of its cause of action that a protective well would be economic, *i.e.*, profitable. Both the burden of going forward and the ultimate burden of persuasion on this issue must rest with the common lessee. These burdens are placed on the common lessee because of the possibility of unfair dealing and because the common lessee possesses the evidence necessary to prove that an economic well cannot be drilled. *See* 5 Williams and Meyers, *Oil and Gas Law* § 824.2 (1986), and *Elliott* v. *Pure Oil Co.*, 10 Ill.2d 146, 139 N.E.2d 295 (1956). If the common lessee satisfies this burden of going forward on the issue of profitability, BLM must produce evidence on this issue or suffer an adverse ruling.

[3] Production from the Gunton formation has been shut off since July 1, 1986. Had production continued, BLM estimates, $24,332 could ultimately be derived in Federal royalty income.

[2] Appellant's argument focusing on when compensatory royalties begin to accrue has been the subject of recent case law. In *CSX Oil & Gas Corp.*, 104 IBLA 188, 95 I.D. 148 (1988), the Board cited *Ptasynski* with approval for the proposition that compensatory royalties commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. *CSX* clarified *Ptasynski*, however, by further explaining that if, in the absence of notice from BLM, BLM can prove that the lessee knew or that a reasonably prudent operator should have known drainage was occurring, the notice requirement was satisfied. 104 IBLA at 196, 95 I.D. at 152-3.

Neither *CSX* nor *Ptasynski* involved a common lessee, and hence these cases do not guide us in every aspect of the present appeal. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such context, we find no reason for requiring BLM to assume the initial burden of going forward with evidence that the common lessee knew or that a reasonably prudent operator should have known that drainage was occurring. *See Elliott* v. *Pure Oil Co., supra.* The common lessee shall be presumed to have knowledge of the drainage upon first production from its offending well. However, this presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to notice of drainage.

[3] Having determined that the prudent operator rule does apply in the case of a common lessee, we turn to the test to be applied in such cases. The loss incurred by the lessor is an economic loss and, therefore, economics must govern the duty to drill. If the cost of drilling and operating the offset well is greater than the value of oil and/or gas recovered by such well, there would be no breach of the duty to protect against drainage. When entering into an oil and gas lease, the parties contemplate that a well will be drilled by or on behalf of the lessee if the lessee can recover his costs and make a reasonable profit on his investment. If this cannot be done, the prevention of drainage by drilling an offset well is uneconomic, and need not be attempted. [4]

Normally the application of the prudent operator rule to the duty to drill a well arises in two cases. The first is the case of the lessee's duty to develop the leasehold. The second case, such as that now before us, involves the duty to prevent drainage. As noted by Williams and Meyers, the application of the rule should be the same in both cases. If a lessee can make a profit by drilling the well, he should drill. *See* 5 Williams and Meyers, *Oil and Gas Law* § 815 (1986). Therefore, the test is applied looking to the reasonably anticipatable recovery from the *offset* well, and not the amount of oil and/or gas which would be

[4] It also stands to reason that when an offset well is drilled and proves to be uneconomic because the cost of operating the well is greater than the return from the well, the operator need not continue production from the well in order to avoid paying compensatory royalties. A determination that the well is uneconomic should be based upon production (or anticipated production in the case of the decision to drill) and not the loss of revenue to the lessor occasioned by drainage from an adjacent well. The "profitability" determination is therefore subject to constant review, as would be the case for a well drilled for any other purpose.

lost if the offset well is not drilled. The statements to the contrary in *Gulf Oil Exploration & Production, supra* at pages 368 and 370, are incorrect. However, recovery must be reasonably anticipatable, and the mere possibility of being able to recover additional product from other strata should be given very little weight.

A strict application of the duty to prevent drainage would require the lessee to commence drilling an offset well at the same time an offending well is being drilled. If he did not, the lessee would be required to pay compensatory royalties during the period the offset well is being drilled, *i.e.*, commencing with first production from the offending well. Such anticipatory drilling is contrary to sound business judgment, and would prove wasteful in many cases. If the "offending" well is a dry hole, there would be no need to drill an offset well. As set forth in *Ptasynski*, the obligation to pay compensatory royalties commences only when a lessee fails to offset an offending well within a reasonable time after notice of drainage. Because the decision of the Montana State Office assessed royalties from the date of first production from the Hoffelt #2 well, that decision must be set aside. Compensatory royalties would begin to accrue only upon the expiration of a reasonable period of time after notice of drainage. [5] *See Bruce Anderson*, 80 IBLA 286 (1984), and *Nola Grace Ptasynski, supra*. As noted above, in the case of a common lessee, notice is presumed at the time of first production from the offending well.

BLM's decision is also flawed in its application of the prudent operator rule. The record reveals that BLM based its conclusion that a prudent operator would drill an offset well on the anticipated recoverable reserves as of January 1, 1985. [6] BLM should have used the anticipated recoverable reserves remaining at the conclusion of the reasonable period allowed for drilling the offset well. The recoverable reserves used by BLM when making its prudent operator determination will have been partially depleted during the interim, and the use of the higher figure casts doubt on this determination. The drilling costs used for the determination should also be the costs on the date a prudent operator would have commenced drilling and not the costs on the date of first production from the offending well.

The record further reveals that appellant and BLM are not in agreement regarding reserves in lease M-60749 which could be recovered by an offset well. The anticipated annual decline rate for the offset well will be a key factor in this determination. By setting aside

[5] The time it would take to complete a well is dependent upon a number of factors such as the depth of the well, the ability to obtain necessary permits, and the availability of equipment. For example, if an environmental impact statement were required prior to the issuance of a permit to drill a deep well, to commence compensatory royalties 6 months after completion of the offending well might be very unreasonable. Thus, the determination of what is a reasonable time must be made on a case-by-case basis.

[6] *See* Memorandum to Drainage File, dated June 17, 1986, and Reserve Analysis Report, dated Sept. 16, 1986, each by Jamie E. Connell, BLM petroleum engineer, at tabs F and K respectively.

the decision we are affording appellant and BLM an opportunity to resolve their differences on this issue.

The parties appear to be in agreement that 4.4 percent of the total production from the Hoffelt #2 well comes from the tract of land subject to lease M-60749. *See* Statement of Reasons, December 29, 1986, at pages 7 and 13. We believe that, as a starting point, BLM should determine what was a reasonable time from the date of completion of the offending well for completion of an offset well. After that determination is made, BLM should determine the amount deemed owing as compensatory royalties. [7] If appellant is of the opinion that a prudent operator would not drill an offset well because such well would not be economically feasible, it should then submit evidence in support of that contention as well as any other evidence it believes will have a bearing on the date of notice, the prudent operator determination, or the amount of the compensatory royalty. BLM should then make its final determination of whether compensatory royalties are due based upon its information and the evidence submitted by appellant. The decision should clearly set forth the methods and assumptions used as well as an explanation of its rejection of any of the evidence submitted by appellant. That determination will be appealable to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is set aside and remanded.

R. W. MULLEN
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Administrative Judge

HIRAM WEBB *ET AL.*

105 IBLA 290 Decided: *November 8, 1988*

Appeal from a decision of the Arizona State Office, Bureau of Land Management, partially rejecting an Affidavit of Labor Performed and Improvements Made for assessment year 1984-1985. A MC 86948, A MC 86949, A MC 86952 - A MC 86958, A MC 86960, A MC 86962, and A MC 86963.

Affirmed in part; reversed in part.

[7] The amount of the compensatory royalty should be based upon the amount of drainage that could be prevented, not the anticipated recovery from the offset well. The effect of factors limiting a lessee's ability to recover product being drained by the offending well (*e.g.*, well-spacing requirements or geography) should also be considered. *See* 5 Williams and Meyers, *Oil and Gas Law* § 825.2 (1986).

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Possessory Right

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), apply to claims which rely on the provisions of 30 U.S.C. § 38 (1982), to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Possessory Right

The provisions of 30 U.S.C. § 38 (1982), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving recording and posting. Where, however, placer rights are asserted under this statute, such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to lode locations.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for Hiram Webb; David M. Donovan, Esq., Phoenix, Arizona, for Bruce Balls and Everett Warner; Fritz L. Graham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This case involves a group of mining claims situated near Phoenix, Arizona, collectively known as the Turkey Track Granite Quarries. On December 20, 1985, Bruce Balls filed an Affidavit of Labor Performed and Improvements Made (affidavit) for assessment year 1984-85 with BLM for the 16 mining claims which comprise the Turkey Track Granite Quarries. This filing was made pursuant to the provisions of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982). On February 10, 1986, the Arizona State Office, Bureau of Land Management (BLM), issued a decision rejecting the affidavit as to the following 12 claims within the Turkey Tract Granite Quarries:

Name of claim	Serial number
Leo #1 Lode	A MC 86952
Leo #2 Lode	A MC 86953
Leo #3 Lode	A MC 86954
Leo #4 Lode	A MC 86955
Alta Vista #1 Lode	A MC 86956
Alta Vista #2 Lode	A MC 86957
Turkey Track #1 Placer	A MC 86958
Turkey Track #3 Lode	A MC 86960
Turkey Track #5 Lode	A MC 86948
Turkey Track #6 Lode	A MC 86949

Name of claim	Serial number
Minnie Lode	A MC 86962
Victor Lode	A MC 86963

The BLM decision stated it would not accept filings for the 12 claims listed above[1] for the following reasons:

> [BLM] recordation records pertaining to the subject claims have been closed as the claims were voided by prior administrative actions. The Affidavit of Labor Performed and Improvements Made was informally returned on January 27, 1986 because the claims referenced herein had been closed out. The filing of the subject Affidavit as it pertains to the mining claims identified in this decision is hereby rejected.

(BLM Decision at 4). The BLM decision then pointed out "[f]ormal adjudicative action was taken through contest Nos. 10009, A 9700, AR 032789, AR 034090, and AR 10013, which led to the final disposition of these mining claims and the closure of the records" (BLM Decision at 3). Hiram Webb, Bruce Balls, and Everett Warner filed timely appeals from this decision.[2]

Before considering further BLM's rationale for rejecting the filing and the arguments against the decision asserted by appellants, we will first review the history of the claims at issue. These claims are all situated in secs. 21 and 22, T. 4 N., R. 3 E., Gila and Salt River Meridian in Maricopa County, Arizona.[3] Because the Turkey Track #1 lode and placer claims raise issues distinct from those presented by the other 11 claims, they will be discussed separately below.

Lode mining location notices were filed in the Maricopa County Recorder's Office by Webb on July 1, 1954, for the Minnie claim, on April 2, 1954, for the Victor claim, on August 12, 1954, for the Leo #1 through #4 claims, on October 7, 1954, for the Turkey Track #3 claim, and on April 25, 1955, for the Alta Vista #1 and #2 claims. These nine lode claims, together with the Turkey Track #1 lode claim (discussed separately below), were the subject of mineral contest AR 10013 in 1957. By decision dated December 23, 1957, the hearing examiner found the Turkey Track #1 lode and the Minnie and Victor

[1] The BLM decision states that for the remaining four claims in the Turkey Track Granite Quarries, the Turkey Track #2, #4, #7, and #8 lode claims, the affidavit had been accepted.

[2] To best understand appellants' respective ownership interests in the claims, a partial conveyance history of these claims is briefly set forth. According to counsel for Webb, in a sale agreement dated Nov. 13, 1978, Webb transferred the Turkey Track #1 and #3, Minnie, and Victor claims to Gerald L. Lomker and Patsy A. Lomker (now Patsy A. Brings). Counsel states that the terms of the sales agreement were not fully met and the "Lomkers are in default," and further reports that on "March 24, 1986 in the Superior court of Arizona in C-570017, the court granted the Lomkers Turkey Track #1 and forfeited her [sic] out of Turkey Track * * * #3 * * * and the Minnie and the Victor [claims]" (Webb SOR at 9). No further action in this State court proceeding has been reported by appellants to the Board. According to counsel for Balls and Warner, Balls and Warner have an interest in the claims subject to the Webb-Lomkers sales agreement "by virtue of a 'Mining Lease and Option' dated May 15, 1985. The conveyance purports to grant [to Balls and Warner] Mr. Webb's 'interest as seller' under [the sales agreement]" (Balls and Warner SOR at 5). In a notice attached to a memorandum, dated Feb. 11, 1988, to the Board from the BLM acting Deputy State Director, counsel for Balls and Warner have no interest in Turkey Track #1 and are not seeking to have the claims with respect to Turkey Track #1 adjudicated in this appeal." No appeal from the BLM decision presently under review was filed by the Lomkers.

[3] The land in question was segregated from mineral entry on Apr. 26, 1973, by the filing of Recreation and Public Purposes Act application A 6390 by the City of Phoenix.

lode claims null and void. The complaint was dismissed with respect to the other seven lode claims. No appeal was taken from the decision of the hearing examiner.

Recordation of amended notices of lode mining location for the four Leo, Turkey Track #3, and the two Alta Vista claims was made with the county recorder on February 14, 1961. In 1963, these seven claims were part of a patent application made by Webb. As a result of the patent application, BLM initiated another contest against these claims on May 17, 1965, under contest Nos. AR 032789 and AR 034090. The hearing examiner declared the lode mining claims null and void and rejected the mineral patent applications on March 29, 1967. This decision was ultimately affirmed by the Board in *United States* v. *Webb*, 1 IBLA 67 (1970). Webb did not seek judicial review of this decision when it became final in 1970.[4]

For the Turkey Track #5 and #6 claims, lode mining location notices were allegedly posted on the claims on October 4, 1958. However, these claims were not recorded with the county until August 27, 1976. Relying on a classification of the lands as suitable for purchase by the City of Phoenix, under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), BLM declared these lode claims null and void by decision dated October 5, 1976. This decision was affirmed by the Board in *H. B. Webb*, 34 IBLA 362 (1978). No appeal was taken from this final administrative decision.

We turn now to certain notices and documents that Webb filed with BLM on October 22, 1979, pursuant to the recordation provisions in section 314(b) of FLPMA. This section required the owner of a mining claim located before October 21, 1976, to file, on or before October 22, 1979, a copy of the claim's location notice with the proper office of BLM. Section 314(c) further provides that failure to comply with section 314(b) would "be deemed conclusively to constitute an abandonment of the mining claim." 43 U.S.C. § 1744(c) (1982). The constitutionality of these provisions was upheld in *United States* v. *Locke*, 471 U.S. 84 (1985).

On October 22, 1979, Hale C. Tognoni filed with BLM copies of the official record of all notices and amended notices of these lode mining claims that had been filed in the Maricopa County recorder's office. These filings were made in two separate groups. Thus, Tognoni filed

[4] In 1978, the Government brought an action against Webb seeking recovery of possession of the land within the claims found to be void in contest Nos. AR 032789 and AR 034090, and a judicial declaration that Webb was without right, title, or interest in the property. In 1979, after the Government filed a motion for summary judgment 12 months after the original pleadings, Webb sought leave of the court to amend his pleadings to allege valid placer claims and to request judicial review of the 1970 Board decision. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government. On appeal, the Ninth Circuit vacated the district court's ruling on the motion and remanded for further consideration of Webb's request to amend his pleadings. The court also held that there was no statute of limitations for judicial review of an administrative decision of the Board finding mining claims null and void. *United States* v. *Webb*, 655 F.2d 977 (9th Cir. 1981). Counsel for Webb reports that on remand, the district court "separated the placer mining rights out of the proceedings, left Webb in possession, but granted the BLM's new motion for summary judgment" on the lode claims found to be void in the Board decision (Webb SOR at 21).

documents for 10 claims consisting of the Turkey Track #5 through #8, the Leo #1 through #4, and the Alta Vista #1 and #2 lode, on behalf of a Ronald Linderman, "under a purchase contract from Hiram B. Webb."[5] These claims were assigned serial numbers A MC 86948 through A MC 86957. The second group consisted of six claims, the Turkey Track #1 and #2 placers, the Turkey Track #3 and #4, and the Minnie and the Victor lodes, which were filed on behalf of Gerald L. Lomker and Patsy A. Lomker (the Lomkers), "under a purchase contract from Hiram B. Webb."[6] These claims were assigned serial numbers A MC 86958 through A MC 86963.

In addition to filing the various location notices, for the Leo #1 through #4, Alta Vista #1 and #2, and Turkey Track #3 lode claims, Tognoni submitted copies of a "Notice of Intention to Hold Mining Claim through Work and Possession (Pedis Possessio) Title 30, Section 38, USCA" which had been filed with the county recorder's office on November 9, 1976. These documents were placed in the BLM records according to each claim's respective BLM claim file number. The effect of this filing is central to the issues in this appeal.

In its February 10, 1986, decision partly rejecting the 1985 affidavit of assessment work, BLM addressed the issue of the recordation filings submitted by Webb in October 1979. The decision stated that "[i]f it was the intent of the mining claimant to amend some of the prior void [lode] locations * * * and record them under the recordation statute," then *Jon Zimmers*, 90 IBLA 106 (1985), the Board precedent holding that amendments of void locations may not properly be considered amended locations would apply. BLM thus concluded that, because of the prior decisions invalidating the claims at issue, the filings made by Webb in 1979 to comply with section 314 of FLPMA were without legal effect.

On appeal, appellants claim that BLM, in rejecting the affidavit, completely failed to consider their entitlement to the claims through the statutory provisions of 30 U.S.C. § 38 (1982). This statute provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto * * *

Appellants assert placer rights under 30 U.S.C. § 38 (1982), and claim that there rights "remain valid existing mineral rights that have not been contested" in any of the decisions cited by BLM as dispositive of the mining claims' validity (Webb Statement of Reasons (SOR) at 2).

Appellants' argument that they are entitled to the claims in question under 30 U.S.C. § 38 (1982), is necessarily intertwined with BLM's

[5] We note that the Turkey Track #7 and #8 are not involved in the instant appeal.

[6] Neither the Turkey Track #2, which is a placer claim, nor the Turkey Track #4, which is a lode claim, is involved in this appeal. With respect to the Turkey Track #1, it is important to note that appellant had located two Turkey Track #1 claims, one as a lode and the other as a placer. The relevance of this point is discussed *infra* in our discussion of the Turkey Track #1 placer.

conclusion that appellants' recordation filings made with BLM on October 22, 1979, did not preserve appellants' asserted placer rights. As will be more fully explained below, the filings which appellants made are fatally flawed insofar as the preservation of any asserted placer rights flowing from the lode claims is concerned.

[1] Initially, we note that, section 314(b) and (c) of FLPMA provides in pertinent part:

> (b) The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to [October 12, 1976,] shall, within the three-year period following [October 21, 1976,] file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim * * * sufficient to locate the claimed lands on the ground.
>
> (c) The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner.

The Board has had occasion in the past to consider the applicability of these provisions to claims asserted under 30 U.S.C. § 38 (1982), beginning with its decision in *Philip Sayer*, 42 IBLA 296 (1979). The appellant in *Sayer* had filed copies of recorded, amended location certificates with BLM on July 21, 1977, which stated that the claims were originally located in 1908 and that the official records were "imperfect, incomplete or nonexistent." 42 IBLA at 298. The Alaska State Office, BLM, rejected the filings and declared the claims null and void because, among other reasons, copies of the original recorded location notices were not filed as required by the language of section 314(b) and the regulations then in effect.

On appeal, Sayer asserted that BLM's decision was improper since the regulations promulgated to implement section 314(b) of FLPMA did not specifically address the situation where a claimant intends to rely on 30 U.S.C. § 38 (1982). In reviewing appellant's allegations, the Board explained that where a claimant was attempting to record claims being held under 30 U.S.C. § 38 (1982), the problem becomes what must be shown to meet the FLPMA recordation requirements. In reversing BLM, the Board found:

> Because there is a gap in the recording statute and the regulations currently concerning proof that a claim is being held under this provision of the mining laws, BLM should liberally consider attempts by claimants to record evidence of such claims. We agree with appellant that it was premature for BLM to take the action it did in rejecting the notices filed by claimant where BLM had been informed claimant was relying on 30 U.S.C. § 38 (1976).

Id. at 301.

In light of this regulatory hiatus, the Board then addressed the issue of what was necessary to meet the recordation requirements:

> [T]he purpose of the recording provisions in FLPMA is essentially to give notice to BLM of the existence of mining claims on Federal lands so that this information may be considered in the land use planning and management of those lands. To serve this

purpose then, *there is some essential information that would be necessary where a claimant cannot show proof that a notice of location was recorded.* This would include the following: (1) the name under which the claim is presently identified and all other names by which it may have been known to the extent possible; (2) the name and address of the present claimants: (3) an adequate description of the claim; (4) type of claim; (5) information concerning the time of the state's statute limitations and a statement by the claimant as to how long the claim had been held and worked, giving, if possible, the date (or least the year) of the origin of the claim; and (6) any other information the claimant would have showing the chain of title to him and bearing upon the possession and occupancy of the claim for mining purposes. Other information which BLM deems essential to meet its purposes may also be required. The above information would set the minimal requirements to be satisfied. * * *. [Italics supplied, footnote omitted.]

Id. at 302-03. As noted in *Sayer*, recording with BLM under section 314(b) was necessary to establish an official Federal record of *all* extant mining claims. The types of information outlined by the Board in that case ensured that any filing made for a claim held under section 38 met the statutory intent of the recording provisions, namely, identification of the mining claims. Thus, to ensure that the statutory requirement has been met, all filings made to record claims asserted under section 38 by appellants with BLM must be judged by the "minimal requirements" set forth in *Sayer*.

The necessity that some filing be made within the statutory deadline was reemphasized in *United States* v. *Haskins*, 59 IBLA 1, 88 I.D. 925 (1981), *aff'd, Haskins* v. *Clark*, No. CV-82-2112-CBM (D.C. Cal. Oct. 30, 1984). In that decision, which dealt with a fact situation similar in certain respects to the instant case, we expressly noted that "[t]he recordation provisions of FLPMA required the recordation of all claims located prior to Oct. 21, 1976, *no matter how located*, on or before Oct. 22, 1979, or the claims would be deemed conclusively to be abandoned and void." *Id.* at 105, 88 I.D. at 978 (italics supplied).

In another Board decision, *Paul Vaillant* 90 IBLA 249 (1986), BLM declared six unpatented lode mining claims null and void ab initio because the claims had been located in 1978 after the lands therein had been withdrawn from mineral entry on February 27, 1975. Appellants, while acknowledging that the withdrawal negated four of their claims, asserted that the remaining two lode claims found invalid by BLM were 1978 amendments of an earlier placer claim located in 1970. Rejecting this argument, the Board initially pointed out that "[a] miner cannot amend a placer location by filing a lode location. The two claims are located for altogether different reasons." *Id.* at 253, *citing R. Gail Tibbets*, 43 IBLA 210, 86 I.D. 538 (1979). *Accord Cole* v. *Ralph*, 252 U.S. 286 (1920); *United States* v. *Haskins, supra*. Thus, the 1978 locations were treated as relocations or new locations. As a result, the Board concluded the "appellants' lode locations made in 1978 were invalid because they were located upon land previously withdrawn from location under the mining law." *Id.* at 253. As to the placer mining claim located in 1970, the Board explained that it was abandoned in 1979 "since appellants failed to comply with FLPMA

mining claim recordation requirements on or before October 22, 1979." *Id.* at 253.

The appellants in *Vaillant*, however, sought to "avoid total invalidation of their claims by another possible theory." Thus, they alleged that they had worked their claims diligently since 1970, developing their discovery and determining the extent of the minerals claimed. The Board noted that "their arguments indicate they may be asserting what amounts to a claim of right under provision of 30 U.S.C. § 38 (1982)," but this argument was also rejected. Relying on the holding in the Supreme Court decision *United States* v. *Locke, supra*, that "Congress intended in § 314(c) to extinguish those claims for which timely filings were not made," the Board reasoned:

> This analysis applies equally to the claims held in this case by appellants. The *Locke* claims also were being actively prosecuted up until the time they were declared invalid, and were in fact the basis for a going business. While section 314 had not repealed the provisions of 30 U.S.C. § 38, it is now clear that in order to have a valid claim under 30 U.S.C. § 38, a claimant must also have complied fully with section 314 of FLPMA. In this case, *there was an abandonment of the placer claim as a matter of law when the appellants failed to make timely filings for their placer claim under the recording provisions of section 314 of FLPMA.* The void lode locations, made after the lands upon which the placer was first located were withdrawn, could not be considered to be valid as amendments of the placer claim * * *. As a consequence, the placer claim was extinquished. [Italics supplied.]

Id. at 254. Thus, the law is clear that all claims asserted under 30 U.S.C. § 39 (1982), were subject to the recordation reuqirements of FLPMA.

Finally, we wish to address appellants' contention that there was "no provision under FLPMA providing for recording rights claimed under 30 USCA 38 for the preservation or loss of 30 USCA 38 rights." It is true, as pointed out in *Philip Sayer, supra* at 300, that the regulations as *originally* promulgated to implement section 314 of FLPMA did not "specifically [address] the situation where a claimant intends to rely on 30 U.S.C. § 38." However, the definition of the term "copy of the official record" was amended to permit filing of "other evidence, acceptable to the proper BLM office, of such instrument of recordation." 43 CFR 3833.0-5(i) (1979); 44 FR 9722 (Feb. 14, 1979). In *Cleo May Fresh*, 50 IBLA 363, 365 (1980); when an appellant sought to invoke this definition to include the filing of a copy of a quitclaim deed as a copy of the "official record," the Board pointed out that the "provision of the regulations concerning the submission of 'other evidence' only applies when the notice of location is no longer obtainable *or when a claimant purports to hold a claim under 30 U.S.C. § 38.*" (Italics supplied.) *Accord Marvin E. Brown*, 52 IBLA 44 (1981). Thus, there is no basis for an assertion by appellants that there was no mechanism by which they could record a claim based on 30 U.S.C. § 38 (1982).

From the foregoing, it can be seen that any claim asserted under the provisions of 30 U.S.C. § 38 (1982), must have been recorded pursuant to section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1982), or it will be deemed conclusively to be abandoned and void. Appellants assert that they recorded their placer "rights" in 1979. Thus, counsel for appellant Webb asserts that Webb

> complied with the recordation requirements of FLPMA by filing either copies of the notices of intention to hold or previously recorded notices of mining locations and obtained a BLM serial number for each claim of right under 30 USCA 38 and Affidavits of Labor have been filed with the BLM for every year required by FLPMA.
>
> Webb filed notices of intention to hold for the Leo #1-4, Alta Vista #1 and 2, and the Turkey Track #3, declaring his intention to hold under 30 USCA 38. *The BLM assigned the intentions to hold the same BLM serial numbers as the lode claims.*
>
> Webb filed previously recorded lode notices of mining location of the Minnie, Victor and Turkey Track #5 and 6 lode mining claims, giving the BLM notice of its intention to hold the remaining placer rights. *The lode rights under these notices of mining location had been previously invalidated by Department (ALJ and IBLA) decisions, but the placer rights under 30 USCA 38 remain intact unless they fail for lack of discovery* under *Cole v. Ralph*, 252 U.S. 286. The recording of the notices of mining location with the BLM merely established "color of title" for the 30 USCA 38 rights held by Webb and notice to the BLM that Webb claimed 30 USCA placer mining rights. In fact, there is no provision under FLPMA providing for recording rights claimed under 30 USCA 38 or for the preservation or loss of 30 USCA 38 rights. [Italics supplied.]

(Reply Brief at 3-4).

A close examination of the foregoing discloses that appellants' arguments do not withstand analysis. Appellants refer variously to "each claim of right," "remaining placer rights," and "color of title," in relation to 30 U.S.C. § 38 (1982). As we shall show, the use of these terms displays a fundamental msiconception of the nature of that statute.

Not a single court decision, including both *United States* v. *Haskins*, 505 F.2d 246 (9th Cir. 1974), and *United States* v. *Webb*, 655 F.2d 977 (9th Cir. 1981), on which appellants purport to rely, has ever suggested that placer "rights" can flow from invalid lode locations. As the Supreme Court noted long ago in *Cole* v. *Ralph, supra* at 295, "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location." Moreover, to the extent that appellants are contending that placer "rights" can inure to a lode location through the auspices of 30 U.S.C. § 38 (1982), they are equally wrong.

What the Ninth Circuit Court of Appeals ruled in *United States* v. *Haskins, supra*, was *not* that a claimant could assert placer "rights" to a lode location by showing compliance with the provisions of 30 U.S.C. § 38 (1982), but rather that a claimant, upon such a showing, "may assert placer *locations* without proof of recording and posting." *Id.* at 251 (italics supplied). This is consistent with a long train of Supreme Court decisions which have noted that "the right to possession comes only from a valid *location*." *Belk* v. *Meagher*, 104 U.S. 279, 284 (1881) (italics supplied).

The Ninth Circuit decision in *United States* v. *Webb, supra*, which actually dealt with the claims involved herein, is clearly in accord with this analysis. Thus, the court noted:

> In 1979, after the Government filed a motion for summary judgment twelve months after the original pleadings, Webb sought leave to amend his pleadings to allege *valid placer claims* (as contrasted with lode claims) and to request judicial review of the 1970 administrative decision that his lode claims were null and void. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government. [Italics supplied.]

Id. at 979.

The Court of Appeals vacated the District Court's refusal to permit Webb to amend his pleadings because the absence of a finding by the District Court that either bad faith was involved or that prejudice would result prevented the Court of Appeals from determining whether the District Court's actions were an abuse of discretion under Fed. R. Civ. P. 15, which covers permissive amendment of pleadings. Thus, the Court of Appeals directed the District Court to reconsider its ruling that appellant could not amend his pleadings by alleging valid placer claims. By no means, however, did the court countenance appellant's assertion herein that placer rights could flow form the lode locations, themselves. Indeed, if such were the case, there would have been no need for Webb to attempt to amend his pleadings since he had originally asserted lawful possession of the property under the lode mining claims, and would have, perforce of appellants' present theory, been able to assert placer rights as an incidence of those lode mining claims.

The importance of this point is not merely theoretical. While the provisions of 30 U.S.C. § 38 (1982), do permit the assertion of a location without proof of posting or recording, appellant is still required to comply with all other substantive provisions of the mining laws, including recordation of the claim under FLPMA. Appellants' repeated reference to rights and color of title is simply a smokescreen designed to obscure the fact that appellants never recorded placer *locations* with BLM for these 11 claims.

For four of the claims at issue, the Minnie, Victor, and Turkey Track #5 and #6, the only documents submitted were copies of the lode location notices which had been filed with the Maricopa County Recorder's Office. As indicated above, this was clearly inadquate to record any placer *claims* asserted under 30 U.S.C. § 38 (1982). With respect to the remaining claims under discussion, appellant filed, in addition to the lode notices of location,[7] an additional document for each claim, captioned "Notice of Intention to Hold Mining Claims

[7] We note that for the Turkey Track #3, no copy of the lode location notice was submitted. Only a copy of the "Notice of Intention to Hold Mining Claims through Work and Possession (Pedis Possessio)" was filed for that claim.

through Work and Possession (Pedis Possessio) [8] Title 30, Section 38, USCA." Because of the arguments which appellants premise on the contents of this document, an example of the form, this one filed for the Leo #3, is reproduced below:

TO ALL WHOM IT MAY CONCERN:

This mining claim, which was named Leo #3, situate on lands belonging to the United States of America, and being a form of valuable mineral deposit, was entered upon by Rachelle Lora Landriault on the 12th day of August, 1954 for the purpose of working and producing Gold and other valuable minerals from the same through acquisition of the mineral rights of previous owners and through work and possession have acquired the right to patent, subject to the discovery of an economic mineral deposit, under Title 30, Sections 11, 23 & 35 thru 38, USCA.

Hiram B. Webb as the (purchaser, * * *) from Rachelle Lora Landriault, who relocated a previously existing mining claim on the same ground, hereby gives notice that he and said owners or locators and as locator himself have held and worked the Leo #3 for a period equal to the time prescribed by the statute of limitations for mining claims of the State of Arizona, where the same is situated.

The Leo #3 mining claim is located in the Winifred Mining District, County of Maricopa, State of Arizona approximately 2 miles East of Deer Valley Airport and is more particularly described as follows:

BEGINNING at the corner of sections 15, 16, 21 & 22, T4N, R3E, G&SRB&M, thence S 87° 45' E, 600 feet to corner No. 2, thence S 0° 45' E 1500 feet to corner No. 3, thence N 87° 45' W, 600 feet to corner No. 4, thence N 0° 45' W, 1500 feet to corner No. 1.

The original location notice of above said claim is recorded in Book 1413 Page 491 in the Maricopa County Recorder's Office.

[8] As pointed out by counsel for BLM, the doctrine of "pedis possessio," has no relevance to the application of 30 U.S.C. § 38 (1982). *Pedis possessio* applies only to prediscovery locations (*see generally Union Oil Co. of California* v. *Smith*, 249 U.S. 337 (1919); *United States* v. *Haskins*, 59 IBLA at 53 n.36, 88 I.D. 951 n.36). Therefore, any rights which were based solely on *pedis possessio* would have been terminated by the withdrawal of the land in 1973, since pedis possessio does not apply against the United States and only claims supported by a discovery of a valuable mineral deposit would have been protected from the effect of the withdrawal. *See Cameron* v. *United States*, 252 U.S. 450, 456 (1920).

All done under the provisions of Chapter 6 of Title XXXII of the revised statutes of the United States and Title 30, Sections 22, 23 & 35 thru 38, USCA .

Certain observations are in order. Appellants assert that the intent of this document was to record their placer "rights." As we discussed above, however, absent the assertion of a placer *claim* under 30 U.S.C. § 38 (1982), appellants had no placer rights to the land. Moreover, their contention that the entire purpose of this document was to assert placer rights is undermined by the fact that the document cites not only 30 U.S.C. § 35 (1982), which deals with location of placer mining claims, but also 30 U.S.C. § 23 (1982), which authorizes the location of lode mining claims. A perusal of the document makes it clear that, rather than attempting to assert a placer *claim* based on 30 U.S.C. § 38 (1982), the claimants were reasserting their mistaken view that placer *rights* could attach to a lode *claim* by virtue of 30 U.S.C. § 38 (1982).

Appellant Webb's belated attempt to suggest that BLM erroneously assigned these documents the same recordation numbers as the lode claims does not bear scrutiny. Viewing the record in the light most favorable to appellants, the claimants were attempting to record seven placer claims *in addition to* their seven lode claims.[9] Thus, under the filing which counsel for Webb made on behalf of Ronald Linderman, which listed the Turkey Track #5 through #8, the Leo #1 through #4 and the Alta Vista #1 and #2, appellant would have been recording 10 lode claims *and* eight placer claims, since "Notices" were submitted for all of these claims except the Turkey Track #5 and #6. Yet, appellant submitted only $50 in filing fees, sufficient funds (at the rate of $5 per claim, *see* 43 CFR 3833.1-2(d) (1979)) to record only 10 mining claims. Appellant's tender of $50 at the time he recorded theses claims is inconsistent with any present contention that he intended to record *both* lode and placer claims in 1979.

With respect to the second group of filings made on behalf of the Lomkers, six claims (Turkey Track #1 through #4, Minnie and Victor) were listed. Of these, two were actually located as placers (Turkey Track #1 and #2),[10] and of the remaining four claims, a "Notice of Intention to Hold * * * (Pedis Possessio)" was submitted only for the Turkey Track #3. This claim, however, presents an

[9] That the claimants intended to record their lode claims cannot be gainsaid. Thus, when counsel for appellant Webb argues that "BLM assigned the intentions to hold the same BLM serial numbers as the lode claims," he implicitly recognizes that claimants were intending to record the lode claims in 1979. Indeed, since Webb was, at that time, litigating the correctness of the Department's invalidation of the lode claims in Federal court, it was essential that he record them in order to maintain his challenge to the Department's determination of validity, since a failure to comply with sec. 314(a) and (b) would result in a conclusive finding of abandonment. *See United States* v. *Locke, supra*; *Andrew L. Freeze*, 50 IBLA 26, 87 I.D. 396 (1980).

[10] Actually, counsel submitted both a lode location notice and a placer location notice of the Turkey Track #1. This is a matter of some confusion since the Turkey Track #1 *lode* mining claim had been invalidated in contest AR 10013, which decision had never been appealed. In this appeal, appellants have essentially abandoned any arguments that the Turkey Track #1 *lode* claim has any validity. The Turkey Track #1 *placer* mining claim is discussed separately *infra*.

unusual problem. As discussed above at footnote 8, no location notice was submitted for this claim. In the papers accompanying the filing made on behalf of the Lomkers, there was a document, denominated as Exhibit A, which listed the six claims involved in the agreement between Webb and the Lomkers, together with the date of filing of each notice of location and also including various recording data. The entry adjacent to the Turkey Track #3 is as follows:

Date	Type notice	Recording book	Data page
10/7/54	Original—Placer	1443	72
2/14/61	Amended—Placer	3616	398
11/9/76	Notice of intent to hold . . work and possession.	11938	725

This document asserts that the Turkey Track #3 was originally located as a placer claim. This is not correct. Both the original and amended notice of location related to *lode* claims. *See United States* v. *Webb*, 1 IBLA at 74; Appellant Webb's SOR at 12. Moreover, since the Turkey Track #3 was part of the ongoing litigation leading to the decision in *United States* v. *Webb*, 655 F.2d 977 (9th Cir. 1981), it is clear that the claimant intended, consistent with the approach utilized for all of the other claims, to record the lode claim and assert placer rights as an incidence of that lode claim (*see* note 9, *supra*). Had the claimant intended to record both a lode and a placer claim for the area covered by the Turkey Track #3, a total of seven claims would have been involved in the Lomker filing.[11] The $30 filing fee submitted was sufficient to record only six claims. This lends further support to our conclusion that, in line with the consistent course of conduct of the claimants herein, placer rights deriving from holding and working under 30 U.S.C. § 38 (1982), were viewed as accruing to the lode locations and, therefore, only the lode claims were being recorded. But, as we have explained above, placer *rights* emanating from holding and working under 30 U.S.C. § 38 (1982), can only be asserted in the context of a placer *claim*.

We hold, therefore, that appellants' affidavits of labor were properly rejected as to the Turkey Track #3, #5, and #6, the Leo #1 through #4, the Alta Vista #1 and #2, the Minnie, and the Victor lode mining claims on the ground that those claims had been declared null and void. Further, these affidavits were correctly rejected in reference to appellants' assertion of placer *rights* appertaining to these lode locations as no such rights exist. Finally, these affidavits were also properly rejected insofar as any asserted placer *claims* based on the provisions of 30 U.S.C. § 38 (1982), are concerned, since such claims were not recorded as required by section 314(b) of FLPMA, 43 U.S.C.

[11] We are leaving aside for the present the problems associated with the Turkey Track #1 claim, wherein the claimant actually submitted both lode and placer location notices, *see* note 10, *supra*.

§ 1744(b) (1982), and must be conclusively deemed to be abandoned and void.

We turn now to consideration of the Turkey Track #1 placer and lode claims. The BLM decision noted that, for these claims, Webb filed with BLM on October 22, 1979, copies of the following documents:

Notice of Mining Location Placer, recorded September 1, 1954;
Notice of Mining Location Lode, recorded January 30, 1957;
Notice of Mining Location, Amended Placer Claim, recorded January 30, 1957;
Notice of Mining Location, Amended Placer Claim, recorded February 14, 1961.

As an initial matter, we note that while counsel for appellant filed both lode and placer notices of location for the Turkey Track #1, he accompanied the submission with only enough money (considering the other claims for which recordation was sought) to record one claim. BLM, clearly proceeding in the view that there was only one claim involved, assigned a single recordation number. The question arises, therefore, as to which claim was recorded since appellant by his actions clearly did not intend to record both. The nature of appellant's subsequent actions and the arguments presented both in this appeal and that of *Patsy A. Brings*, 98 IBLA 385 (1987), a decision which is examined in detail, *infra*, leads necessarily to the conclusion that counsel intended to preserve the placer mining claim and recorded the lode location (which had already been declared void in contest AR 10013) for informational purposes. Therefore, we will treat the Turkey Track #1 *placer* claim as duly recorded.

On appeal, Webb asserts that the default decision in contest No. 10009 should be set aside since the mining claim had not been abandoned, and Webb, as owner of the claim at the time the contest issued, did not receive notice of the contest or the result thereof until 1985. The record indicates that the contest complaint was served only upon Webb's predecessor-in-interest, Rachelle Lora Landriault, who had transferred the Turkey Track #1 placer claim to Webb by quitclaim deed on February 29, 1956.

In fact, the issue of whether the default judgment in contest No. 10009 was binding on Webb or his successors-in-interest was resolved in the Board decision *Patsy Brings, supra*. In *Brings*, the appellant, a successor-in-interest to Webb,[12] had filed a mining plan of operations with BLM for the Turkey Track #1 claim. BLM rejected the plan of operations on the grounds that the default judgment in contest No. 10009 had rendered the claim null and void. Appellant on appeal raised essentially the same argument Webb raises herein. After reviewing the circumstances surrounding the issuance of the contest complaint and the default judgment, the Board agreed that

> BLM should have served Webb with the complaint and that its failure to do so was fatally defective to contest No. 10009. The default judgment in that contest is, therefore,

[12] The ownership interest of Patsy Brings in the Turkey Track #1 placer claim is discussed in note 2, *supra*.

not binding on Webb or his successor-in-interest, and BLM's null and void determination in contest No. 10009 may not be utilized as a basis for rejecting the mining plan of operations * * *

98 IBLA at 390. Because, therefore, the issue concerning the validity of contest No. 10009 has been finally resolved, the reasoning and holding of the Board in *Brings* is controlling in this case. Just as BLM could not use contest No. 10009 as the basis for rejecting a plan of operations, it likewise cannot serve as the basis for rejecting the filing of the affidavit of assessment work performed. BLM's rejection of the affidavit must be reversed since as explained above, a properly filed affidavit was filed in order to preserve the validity of the claim.[13]

In light of our finding that the rejection of the affidavit as to the Turkey Track #1 placer claim was in error, we need not further consider the validity of this claim, since, nothing in the BLM decision appealed from put the substantive validity of the claim at issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as to the Turkey Track #1 placer claim and affirmed as to all other claims for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

DAVID L. HUGHES
Administrative Judge

[13] This result is mandated regardless of who presently holds the ownership interest in this claim. A timely filing of the affidavit must be on record in order to preserve the claim itself.

GPO : 1989 0 - 240-940 (2) : QL 3

APPEAL OF PHILOMATH TIMBER CO.

IBCA-2409 Decided: *December 12, 1988*

Contract No. OR090-TS84-22, Bureau of Land Management.

Government motion to dismiss denied.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Motions

A Government motion to dismiss an appeal for lack of jurisdiction over the claims asserted is denied where the Board finds on the basis of controlling precedents that under the Contract Disputes Act the Board has jurisdiction over an appeal from a default termination absent a monetary claim by the parties and that it is not precluded from exercising jurisdiction over such an appeal by the failure of the contracting officer to issue a requested final decision where the record shows that the contracting officer gave *de facto* consideration to the claims and in effect denied them.

APPEARANCES: Galen L. Bland, Attorney at Law, Portland, Oregon, for Appellant; Roger W. Nesbit, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal on the general ground that the Board is without authority to grant the equitable relief requested. In connection therewith it has also stated a number of specific grounds. The Government has renewed its motion to dismiss in which it has assigned an additional ground. The Government motions are accompanied by supporting briefs. Appellant opposes the Government motions to dismiss and has filed memorandums in support of its position. Appellant has also filed an amended complaint to which the Government has filed an amended answer.

Background

The instant contract calls for appellant to complete the cutting and removal of the timber covered thereby over a 3-year period with an expiration date of April 20, 1987. Approximately 6 months before the scheduled expiration date, a landslide occurred on Road 16-1-21 Improvement which blocked access to unit No. 4, the final unit to be harvested (Appeal File (AF) 31, 46). The landslide occurred in the vicinity of station 100+00. In a visit to the site on December 1, 1986, the Bureau of Land Management (BLM/Government) discovered that at station 98+00 a 20-foot-long section of the shoulder had slipped out taking almost half of the roadbed and making it impassable for anything bigger than a pick-up and that maybe risky (AF 37).

Upon a visit to the site on December 9, 1986, a BLM investigation team found that there were no indications of poor groundwater drainage or tension cracks in the logging road. The cause of the instability was attributed to the loss of support for the soil and rock uphill brought about by the excavation for the road improvement work the previous summer. The BLM investigators recommended that the slide material be left in place until excavation work for the entire site could begin. As for the nearby fill failure of the road, they recommended that the road be moved into the hill in order to attain proper subgrade width (AF 41).

By letter dated December 15, 1986, the contractor requested that the expiration date of the contract be extended by one full year[1] or to April 20, 1988, in order to enable the contractor to deal with most unforeseen problems in the repair and stabilization of the road (AF 40). The contracting officer (CO) considered that an extension of time until October 30, 1987, should be sufficient and so advised the contractor in a February 2, 1987, letter (AF 44). The 6-month time extension was not acceptable to the contractor who wrote on April 29, 1987, to say that because of unstable soils in the area of the slide both its road building contractor and its logging contractor were refusing to proceed with the work. The letter requested BLM to look for an alternate way to secure access to unit No. 4 or to rescind the contract (AF 46).

In a meeting at the site on May 15, 1987, BLM representatives proposed that the contractor only excavate the slide material and such other materials as was necessary to secure access to unit No. 4 and that in reference to the fill failures the contractor only excavate whatever yardage of material was necessary to attain proper road width (AF 48). In a letter of May 26, 1987, pertaining to the May 15 meeting, the contractor objected to the Government's proposal for dealing with the slide and stated that the contractor and its subcontractor "are not willing to risk injury or death for a band-aid fix" (AF 49). Modification No. 6, dated June 2, 1987, extended the time for cutting and removing the remaining timber to October 30, 1987. The modification states (i) that Road 16-1-21 was the only reasonable access to the timber in unit No. 4; (ii) that BLM's geologist and its engineering staff believe that the slide presents no extraordinary safety problems; (iii) that BLM was only requesting the contractor to remove that portion of the slide mass which was preventing the removal of timber from unit No. 4;[2] (iv) that with a diligent operator

[1] Sec. 9 (Extension of Time and Reappraisal) provides that an extension of time may be granted, not to exceed one year, upon the written request of the purchaser, if the purchaser shows that delay in cutting and removal (of timber) was due to causes beyond his control and without his fault or negligence. The section specifically provides, however, that "[m]arket fluctuations shall not be cause for consideration of contract extensions" (AF 1; the contract).

[2] Under Sec. 19 (Cost Adjustment for Physical Changes) the Government is responsible for any estimated costs above the amounts specified in the section provided the costs involved stem from a major physical change, caused by a single event, which is neither due to the negligence of the purchaser nor imputable to him. The section specifically refers to the "estimated cost of additional work" and in connection therewith states " '[s]uch costs shall include the cumulative estimated costs of repairing damage from slides, washouts, landslips, fire, etc. caused by said event' " (AF 1; the contract).

and proper equipment, it should take only 4 or 5 days to remove the amount of material indicated; and (v) that it was not in the best interest of BLM to cancel the contract (AF 50).

The contractor refused to sign Modification No. 6 and in a letter to the CO under date of July 15, 1987, set forth the reasons for its refusal. The letter requested that it be considered a claim for adjustment of the contract terms within the meaning of Section 37 of the contract.[3] Accompanying the letter was a report from Mr. Robert Strazer of Kelly Strazer Associates, Inc. (identified as experts on landslides). The letter calls attention to Mr. Strazer's assessment that the minimal clearing operation proposed by BLM poses a substantial hazard of future landslides and to his conclusion that in order to repair the site so that the risks are similar to those existing before the slide, a full regrading program was absolutely essential. Thereafter, the letter states that in the absence of reasonably safe road conditions, comparable to those existing before the slide, the contractor had no duty to proceed with the contract. The contractor requested that the letter be treated as a formal request for a decision pursuant to Section 37 of the contract and 41 U.S.C. § 605 (AF 54).

The CO's letter response of August 7, 1987, adhered to the positions BLM had maintained for several months with respect to the extent of clearing required to assure relatively safe access to unit No. 4 and in regard to the time extension needed to accomplish such work. The letter rejected the claim under Section 37 of the contract as premature on the ground that no work had been done on which to base such a claim. The contractor was given 5 days from the date of receipt of the letter to return Modification No. 6 duly signed or to pay the unpaid balance of $123,381.91, plus accrued interest (AF 57). The contractor failed to meet either one of these conditions and by the CO's letter of August 18, 1987, the contractor was declared to be in default (AF 61). In its letter of October 20, 1987, the contractor appealed to the Board citing the CO's letter of August 7, 1987, and requesting an oral hearing.

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[3] "Sec. 37, Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. § 601, *et seq.*). If a dispute arises relating to the contract, the Purchaser may submit a claim to the Contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1-314 (FPR 1-1.38).

(b) 'Claim' means:

(1) A written request submitted to the Contracting Officer;

(2) For payment of money, adjustment of contract terms, or other relief;

(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer's decision is demanded.

* * * * * * *

(f) The Purchaser shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action related to the contract, and comply with any decision of the Contracting Officer." (AF 1; the contract).

Contention of the Parties

The Government has moved to dismiss the instant appeal on the specific grounds (i) that in exercising its jurisdiction, the Board has the same authority and limitations of authority as the Claims Court has in providing relief to litigants asserting a contract claim in that forum (citing 41 U.S.C. § 607(d) and *United States* v. *King*, 395 U.S. 1 (1969); (ii) not even the decision to terminate made in the August 18, 1987, letter (AF 61) would be appealable to the Board until the CO decides to pursue the Government's contractual rights to money damages as a result of the failure to timely perform the contract (citing *Gunn-Williams* v. *United States*, 8 Cl. Ct. 531 (Cl. Ct. 1985); (iii) appellant has failed to certify its claim to a contract right which is in excess of $50,000 in value; (iv) the requested equitable remedy of extending the time for completion of the contract obligation is not available under the Contract Disputes Act; (v) the requested remedy is not possible to grant without reinstating a terminated contract, which is not within the authority of the Board to grant; (vi) the requested remedy is not possible to grant without cancelling the contract which was resold to Bohemia, Inc., on July 21, 1988, which is not within the authority of the Board to grant; and (vii) the August 7, 1987, letter from the CO upon which appellant bases its appeal is not a final decision upon a claim under the Contract Disputes Act (CDA).

Appellant's opposition to granting the Government's motion to dismiss is grounded principally upon its amended complaint to which (without filing any objection) the Government has filed an amended answer. Succinctly stated, appellant's position is that the Board has the power to rule that the Government materially breached the contract and to order its rescission, citing *Seneca Timber Co.*, AGBCA Nos. 83-228-1, 84-175-1 (Oct. 30, 1985), 86-1 BCA par. 18,518 or, alternatively, to reform the contract, citing *United States* v. *Hamilton Enterprises Inc.*, 711 F.2d 1038 (Fed. Cir. 1983). As to the question of whether a final decision has been rendered by the CO, appellant disputes the Government's position that only claims for money damages can be pursued before the Board. In this regard, appellant calls attention to the fact that in the final paragraph of its letter of July 15, 1987 (AF 54), the contractor expressly requested a formal decision under Section 37 of the contract which defines "claim" as a written request for "payment of money, adjustment of contract terms, or other relief."

The Government's objections to the Board's assumption of jurisdiction over the instant appeal are considered seriatim below.

As to item (i) (jurisdiction of boards of contract appeals (BCA's) being identical to that of the Claims Court), precisely the argument advanced by the Government in this case was made to the Armed Services Board of Contract Appeals (ASBCA) in the case of *McDonnell Douglas Corp.*, ASBCA No. 26747 (Feb. 28, 1983), 83-1 BCA par. 16,377. There the ASBCA stated:

We are unable to agree with the Government's position that the Board is subject to the same jurisdictional limitations as the Court of Claims (U.S. Claims Court).

* * * * * * *

In our opinion, therefore, the authority to grant equitable relief in the form of reformation and rescission and to award damages in "pure" breach of contract cases, pursuant to section 8(d) of the Act, supplements and is in addition to the authority the Board already possessed under the "Disputes" clause and the practice developed thereunder. Accord, Robert J. Di Domenico, GSBCA No. 5539, 80-1 BCA par. 14,412 at 71,040.

Finally, as pointed out by appellant, historically and traditionally the Board has assumed jurisdiction over issues involving disputes as to the interpretation of contract provisions and determination of the rights and obligations of the parties under the provisions of a contract even though the Court of Claims might have declined jurisdiction on the ground that declaratory judgment would be involved.

(83-1 BCA at 81,420-21).

The ASBCA decision in *McDonnell Douglas, supra*, was affirmed in part and rejected in part on other grounds in *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365 (Fed. Cir. 1985). The decision of the ASBCA in *McDonnell Douglas* continues to be cited as precedent for the proposition that the Board has jurisdiction to determine the rights and obligations of the parties under a contact even though no monetary relief is sought. *Systron Donner, Inertial Division,* ASBCA No. 31148 (July 21, 1987), 87-3 BCA par. 20,066; *General Electric Automated Systems Division,* ASBCA No. 36214 (Sept. 2, 1988).[4]

To the same effect are decisions of other BCA's. *See,* for example, Robert J. DiDomenico, GSBCA No. 5539 (Apr. 23, 1980), 80-1 BCA par. 14,412 at 71,040; *Smith's Inc. of Dothan*, VABCA No. 2198 (May 14, 1985), 85-2 BCA par. 18,133 at 91,016-18; and *Husky Oil NPR Operations, Inc.*, IBCA-1792 (Nov. 20, 1985), 92 I.D. 589, 597-98, 86-1 BCA par. 18,568 at 93,243-44. *But see Rough & Ready Timber Co.*, AGBCA Nos. 81-171-3 *et al.* (June 11, 1981), 81-2 BCA par. 15,173, at 75,098-99, and *Guy F. Atkinson Co.*, ENG BCA No. 4785 (Mar. 28, 1983), 83-1 BCA par. 16,406 at 81,593-94.

Concerning item (ii) (no jurisdiction in Board over a default termination unless the appeal from the default termination is accompanied by a monetary claim), it is noted that the rationale of the decision in *Gunn-Williams, supra* (simple default termination is not a Government claim),[5] was rejected by the Engineer Board in *Almeda Industries, Inc.*, ENG BCA No. 5148 (Oct. 23, 1986), 87-1 BCA par. 19,401 at 98,104-06, which held that a default termination is, in effect, a Government claim from which a contractor can take an

[4] In *Brener Building Maintenance Co.*, ASBCA No. 35726 (May 25, 1988), 88-2 BCA par. 20,786, the ASBCA deemed that the issuance of an advisory opinion in that case would be premature and inappropriate. It noted, however, that in *Arctic Corner, Inc.* v. *United States*, Nos. 87-1617, 87-1618, slip op. at 4 n.2, the Court of Appeals for the Federal Circuit had stated that while it was constitutionally prohibited from issuing advisory opinions, such a limitation did not apply to the Board which could render advisory opinions "under such circumstances it may deem appropriate" (88-2 BCA at 105,013).

[5] For a contrary holding by the Claims Court, see *Z.A.N. Co.* v. *United States*, 6 Cl. Ct. 298, 305-06 (1984) (default termination found to be a Government claim).

appeal. A later decision of the Claims Court in *Industrial Coatings, Inc.* v. *United States*, 11 Cl. Ct. 161, 162-64 (1986) (direct access suit concerning propriety of default termination is a request for declaratory relief over which Claims Court has no jurisdiction), was not accepted as persuasive authority by the Transportation Board in *Varo, Inc.*, DOT BCA No. 1695 (Nov. 13, 1986), 87-1 BCA par. 19,430.[6] There, in the course of denying a Government motion to dismiss, the Board found that an appeal from a termination for default unaccompanied by any monetary claim was not a request for declaratory judgment (87-1 BCA at 98,231-32).

Very recently in *Emily Malone d/b/a Precision Cabinet Co.* v. *United States*, 849 F.2d 1441 (1988), the Court of Appeals for the Federal Circuit in a case involving a decision of the ASBCA had occasion to consider the same type of jurisdictional question as had been raised in *Almeda Industries, supra*, and in *Varo, Inc., supra*. While refraining from expressing any opinion with respect to the jurisdiction of the Claims Court over a termination for default unaccompanied by any monetary claim,[7] the Court noted that the BCA's have historically accepted appeals from a CO's decision terminating a contract for default before either the Government or the contractor submitted a monetary claim related to the termination. Then the Court stated:

> There is nothing in the CDA or its legislative history to suggest that Congress intended to restrict this practice. In fact, Congress in the CDA actually expanded the BCAs' jurisdiction. Formerly, the BCAs only had jurisdiction to hear disputes concerning contract interpretation and could not decide breach of contract issues. The CDA, however, broadened the BCAs' jurisdiction to permit those tribunals to hear all disputes relating to a contract, including breach of contract issues. * * * Far from supporting the government's view that Congress intended to restrict the BCAs' prior exercise of jurisdiction, this evidence suggests that Congress countenanced an expansion of the BCAs' jurisdiction.
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> * * * * * * *
>
> For the stated reasons, we hold that the ASBCA had jurisdiction to consider the validity of Malone's default termination apart from any monetary claim by either Malone or the government relating to the termination. [Citations omitted.]

(849 F.2d at 1444-45).

In regard to item (iii) (need for certification of claim), appellant cites the case of *Introl Corp.*, ASBCA No. 27610 (Nov. 16, 1983), 84-1 BCA par. 17,000 in support of its position that there is no need for certification where the claim is seeking non-monetary relief. The rationale for not requiring certification in termination for default cases was articulated in *Almeda Industries, supra*, where the Engineer Board stated that since a default termination is treated as a Government

[6] After noting that sec. 14(i) of the CDA specifically amended the Tucker Act (28 U.S.C. § 1491), the statute providing the Claims Court with its jurisdiction, the Transportation Board stated that on its face the CDA gives the Court of Claims (Claims Court) jurisdiction, like that of the boards, over all disputes under the Act (87-1 BCA at 98,232).

[7] The Court made clear that it was only deciding the question of whether the CDA gives the BCA's jurisdiction over default termination absent a monetary claim by the parties and that it was not ruling upon the validity of the Claim Court precedents to which it had referred in its opinion (849 F.2d at 1444).

claim, the contractor need not certify its appeal therefrom (87-1 BCA at 98,105).

The Government's contentions identified above as item (iv) (no power in Board to grant time extensions), item (v) (no authority in Board to reinstate a terminated contract), and item (vi) (Board without authority to cancel contract let to Bohemia, Inc.) are closely related and will be considered together. Concerning item (iv), the Board notes that while generally the BCA's have authority to rule upon a request for a time extension apart from any monetary claim, they have no such authority where the contract has been terminated. This is because the BCA's do not have injunctive authority and, consequently, cannot order reinstatement of a terminated contract, even if it were to be found that the termination was improper, *EGA Products, Inc.*, PSBCA No. 1082 (Feb. 16, 1983), 83-1 BCA par. 16,303 at 81,009 (citing *Nathan Dal Santo*, PSBCA No. 1094 (Feb. 9, 1983), 83-1 BCA par. 16,292 and *Arcon/Pacific Contractors*, ASBCA No. 25057 (Sept. 18, 1980), 80-2 BCA para. 14,709). For the same reason (*i.e.*, absence of injunctive authority), the Board is without authority to order cancellation of the contract with Bohemia, Inc.

Remaining for consideration is item (vii) of the Government's contentions (CO's letter of Aug. 7, 1987, was not a CO's decision for purpose of the CDA). In a letter to the CO under date of July 15, 1987 (AF 54), the contractor specifically requested that its letter be treated as a formal request for a decision pursuant to Section 37 of the contract. That section defines "claim" as a written request submitted to the CO "[f]or payment of money, adjustment of contract terms, or other relief" (AF 1). In refusing to accede to the contractor's request for a decision on the claims presented, it appears that the CO proceeded on the assumption that non-monetary claims unaccompanied by a monetary claim were not claims which were cognizable under the CDA.

Prior to the enactment of the CDA, the BCA's often entertained appeals where no monetary claims were involved or would only be involved later dependent upon the outcome of some future event (*e.g.*, excess reprocurement costs). *See* the discussion of pre-CDA jurisdiction of BCAs in *Varo, Inc., supra*, 87-1 BCA at 98,227-28. As is reflected in cases cited in the text, *supra*, there is no unanimity among BCA's concerning their authority to issue declaratory judgments. Boards that have exercised (or are perceived to have exercised) declaratory judgment authority have proceeded somewhat gingerly, except in a relatively few well defined areas (*e.g.*, rights in data disputes). While the law on the question of the jurisdiction of BCA's in regard to declaratory judgments appears to be in a state of flux,[8] the decision of

[8] Noted in the text *supra* is the fact that the BCA's are apart on the question of whether boards have any declaratory judgment authority. BCA's which claim such authority differ as to the criteria to be applied in

Continued

the Federal Circuit in the case of *Emily Malone, supra,* has removed any doubt about the jurisdiction of BCA's to entertain appeals from terminations for default apart from any accompanying monetary claim and has thus confirmed our subject matter jurisdiction over the instant appeal. Thus, to rule in this case, there is no need for the Board to undertake to determine the scope of our declaratory judgment authority.

We turn now to examination of the specific question of whether the CO issued a decision from which an appeal could be taken to this Board. The notice of appeal is dated October 20, 1987. This is almost 2-½ months after the issuance of the CO's comprehensive letter of August 7, 1987 (AF 57), and approximately 2 months after the dispatch of the CO's three-sentence letter of August 18, 1987 (AF 61), in which the contractor was declared to be in default. The issues between the parties were clearly defined in the correspondence exchanged between them extending over a period of months which culminated in the detailed presentation of the contractor's claims in its letter of July 15, 1987, and the consideration and, in effect, denial of such claims in the CO's letter of August 7, 1987.

The August 18, 1987, letter declaring the contractor to be in default specifically relates the declaration of default to the contractor's failure to sign Modification No. 6 (AF 50). The proposed modification incorporated the Government's position as to what would be required to provide the contractor with a relatively safe access road to unit No. 4 so that the remaining timber could be harvested and the Government's position as to what would be an appropriate time extension for performing the necessary clearing and completing the contract work (cutting and removing the timber from unit No. 4). The record shows that since early June BLM had attempted to secure the contractor's signature on Modification No. 6 without success and in connection therewith had repeatedly threatened the contractor with default if it failed to sign and return the modification.

Since there already has been a *de facto* consideration of all of the claims involved in the appeal by the CO, no useful purpose would be served by dismissing the appeal and remanding the claims to the contracting officer for further consideration, *Southland Construction,* ASBCA No. 32677 (Mar. 17, 1987), 87-1 BCA par. 19,672 at 98,589; *Clark Enterprise,* ASBCA No. 24306 (June 20, 1980), 80-2 BCA par. 14,548 at 71,713; *Cincinnati Electronics Corp.,* ASBCA No. 23742 (Oct. 19, 1979), 79-2 BCA par. 14,145 at 69,612.[9]

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determining whether a particular action requires invoking the declaratory judgment authority. For example, on the question of whether entertaining an appeal from a default termination apart from any monetary claim requires the exercise of declaratory judgment authority, compare the decision in *Smith's, Inc. of Dothan,* 85-2 BCA at 91,017 (involves the exercise of declaratory judgment authority) with *Varo, Inc., supra,* 87-1 BCA at 98,231-32 (does not involve the exercise of declaratory judgment authority).

[9] The failure to refer to the CO's Aug. 18, 1987, letter in the Notice of Appeal of Oct. 20, 1987, may have been due to inadvertence. Whatever the reason for the failure, it is clear that the Board's jurisdiction is *de novo* (*Space Age Engineering Inc.,* ASBCA No. 26028 (Apr. 22, 1982), 82-1 BCA par. 15,766 at 78,032-033) and that a claimant's "failure to analyze with greater nicety the appropriate theory for its claim should not have the effect of a forfeiture of its rights." (*John A. Johnson Contracting Corp.* v. *United States,* 132 Ct. Cl. 645 at 656).

December 14, 1988

Decision

For the reasons stated and on the basis of the authorities cited, the Government's motion to dismiss the instant appeal is denied.

WILLIAM F. MCGRAW
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

RUSSELL C. LYNCH
Chief Administrative Judge

MARATHON OIL CO. *v.* MINERALS MANAGEMENT SERVICE

106 IBLA 104 Decided: *December 14, 1988*

Appeal from a decision of Administrative Law Judge Joseph E. McGuire affirming issuance by Minerals Management Service of a Notice of Noncompliance/Penalty Notice and the civil penalty assessment proposed for knowingly and willfully failing to comply with royalty payment orders.

Affirmed as modified.

1. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Assessment of a civil penalty pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 for knowingly or willfully failing to timely make a royalty payment as specified in an administrative order will be affirmed on appeal after a hearing where it is established that the party either knew or showed reckless disregard of whether its actions violated the order.

2. Alaska: Oil and Gas Leases--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third Party Interests--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

3. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

December 14, 1988

Decision

For the reasons stated and on the basis of the authorities cited, the Government's motion to dismiss the instant appeal is denied.

WILLIAM F. MCGRAW
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

RUSSELL C. LYNCH
Chief Administrative Judge

MARATHON OIL CO. *v.* MINERALS MANAGEMENT SERVICE

106 IBLA 104 Decided: *December 14, 1988*

Appeal from a decision of Administrative Law Judge Joseph E. McGuire affirming issuance by Minerals Management Service of a Notice of Noncompliance/Penalty Notice and the civil penalty assessment proposed for knowingly and willfully failing to comply with royalty payment orders.

Affirmed as modified.

1. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Assessment of a civil penalty pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 for knowingly or willfully failing to timely make a royalty payment as specified in an administrative order will be affirmed on appeal after a hearing where it is established that the party either knew or showed reckless disregard of whether its actions violated the order.

2. Alaska: Oil and Gas Leases--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third Party Interests--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

3. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Assessment of a civil penalty for knowingly and willfully failing to comply with a final royalty payment order pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 pending judicial review of the propriety of that order will be affirmed as not violating constitutional due process restrictions by impairing the right to judicial review where the lessee assessed has failed to avail itself of the opportunity to obtain a stay of the royalty payment order conditioned upon the tender of acceptable security for the obligation at issue.

4. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

The exercise of the Secretary's discretion to set the amount of a civil penalty assessed pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 after a hearing properly requires the exercise of reasoned discretion on a case-by-case basis. Factors properly considered in deciding the amount of the penalty include the good or bad faith of appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter such conduct and to uphold the authority of the Minerals Management Service.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for Marathon Oil Co.; Peter Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service; and William D. Temko, Esq., Los Angeles, California, for Cook Inlet Region, Inc., amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Marathon Oil Co. (Marathon) has brought this appeal from an April 23, 1986, decision of Administrative Law Judge Joseph E. McGuire, rendered after a hearing, upholding the issuance by the Minerals Management Service (MMS) of a Notice of Noncompliance/ Penalty Notice dated September 29, 1984. The decision also upheld the civil penalty assessment proposed therein in the amount of $70,000 per day for "knowingly or willfully" failing to pay royalty on certain oil and gas leases in accordance with the requirements of royalty payment orders issued by MMS. The assessment of the penalty was upheld for the period from July 13, 1984, through April 30, 1985, in the cumulative amount of $20,440,000.

The statutory authority pursuant to which the civil penalty was assessed is found at section 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719(c) (1982). Subsequent to receipt of the civil penalty notice, Marathon filed a timely request for a hearing in accordance with section 109(e) of FOGRMA. The hearing was held before Judge McGuire on June 3 and 5, 1985.

An understanding of the issues in this case is aided by a review of the somewhat complex factual background. The leases at issue in this controversy were issued by the United States Government for public lands in Alaska and are designated A-028055, A-028056, A-028103, A-028140, A-028142, and A-028143 (Joint Statement of Material Facts Not

In Controversy (hereinafter Joint Statement) at 1). From October 1955 to November 1958 Marathon acquired interests in the subject leases which would become part of the Kenai Field with the result that Marathon and Union Oil Co. of California (Union) each own a working interest of approximately 50 percent of Kenai Field production (*Id.* at 2). The decision of the Administrative Law Judge relates additional factual background:

In return for removing oil and/or gas from the leased lands covered by the subject leases, each of which was prepared on that format known as the fourth or fifth edition of BLM Standard Form No. 4-1158, Marathon agreed to pay MMS a 12-½ percent royalty on the production which Marathon removed or sold, according to the identically worded provision contained in all of the subject leases (Exh. 14): "Royalty on production. - To pay the lessor 12-½ percent royalty on the production removed or sold from the leased lands computed in accordance with the Oil and Gas Operating Regulations (30 CFR Pt. 221) [presently codified at 30 CFR Part 206, Subpart C]."

On the dates the subject leases were entered into the relevant section of the Oil and Gas Operating Regulations, [presently codified at] 30 CFR 206.103, contained these provisions for use in determining the value of production for the purpose of computing Marathon's royalty payments:

§206.103 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 Associate Director 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, 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 per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value. [Italics added.]

In mid-1959, with MMS' approval, the subject leases were unitized with other leases owned or held by Marathon and Union (Exh. 200). As part of that unit agreement, which covered only a portion of the Kenai Unit area, Marathon and Union agreed to share equally the costs of exploration, an endeavor which resulted in the discovery of gas later that year. The initial sales contract for Kenai Field gas was entered into by Marathon and Alaskan Pipeline Company (APL) on May 13, 1960 (Exh. 21 at 3) (APL I) and the sale of gas began in 1961, with deliveries to APL, then Marathon's only customer.

Since the supply of gas greatly exceeded demand, Marathon set about creating markets for its excess gas and it was joined in that undertaking by Phillips Petroleum Company (Phillips), which owned nearby gas reserves under leases Phillips had entered into with the State of Alaska involving submerged State lands located in the North Cook Inlet Field. One of those potential markets involved the sale of significant quantities of gas to Japanese utilities under a long term sales agreement. But the remoteness of that market militated against the gas being delivered in its natural, or gaseous, state through a pipeline. Instead, the gas had to be transposed from its wellhead configuration to liquid natural gas (LNG) by a process known as liquefaction and transported to Japan as a liquid in specially designed seagoing cryogenic tankers. Upon delivery in Japan the LNG was apparently regasified and utilized in its natural state (Tr. 139).

The gas liquefaction process does not alter the chemical properties of the wellhead gas nor does it result in a manufactured product. The process, simply stated, involves the dehydration of the gas at the lease and transporting the gas under pressure by pipeline

to a specially designed liquefaction plant, which in this case was located some 20 miles distant. At the plant, the gas is treated to remove carbon dioxide and traces of sulphur compounds; scrubbers remove liquid glycol, water, and heavy hydrocarbons; the methane content of the gas is increased to enhance its Btu rating and the gas is sent through a gas treater, dehydrated further, filtered, and cooled to a temperature of minus 260 degrees Fahrenheit. Following liquefaction the wellhead gas, in its transformed state, is then loaded onto the tankers for delivery. Through the hearing testimony of John A. Davis, Jr., the manager of Marathon's Natural Gas division, a position which also includes the overall supervision of the LNG operation at issue, it was shown that because of losses of gas product inherent in the liquefaction and tankering processes, some 1.23 units of gas are required to be produced at the wellhead in order to deliver 1 unit of LNG in Japan (Tr. 148). In replying to MMS' first request for admissions, Marathon, at page 2 of its response to those requests for admissions which were filed on March 18, 1985, further advised that it takes approximately 600 cubic feet of natural gas to produce one cubic foot of LNG.

On March 6, 1967, Marathon and Phillips entered into a LNG sales agreement (Exh. 20) with the Tokyo Electric Power Company, Inc. (Tokyo Electric), and Tokyo Gas Company Limited (Tokyo Gas) which provided for delivery by ship of very substantial amounts of LNG. Approximately 30 percent of the LNG delivered under that sales agreement was to have been furnished by Marathon from natural gas which it produced on the subject leases located in the Kenai Field Unit and 70 percent of the LNG was to have been supplied by Phillips from its leases with the State of Alaska covering wholly owned State submerged lands in the North Cook Inlet Field (Exh. 119 at 2). By the provisions of that contract, the term of which was June 1, 1969, to June 1, 1984, since extended to June 1, 1989, the LNG was to be delivered by tanker to the dock of Tokyo Gas' Negishi plant site in Yokohama, Japan, at the rate of 50 trillion 570 billion Btu's annually. The hearing testimony of John A. Davis, Jr., also established that for purposes of measuring quantities of gas 1 million Btu's (MMBtu's) is the equivalent of approximately 1,000 cubic feet (Mcf) of that product since the regasified product contains 1,010 Btu's per 1 cubic foot, or 1,010,000 Btu's for each 1,000 cubic feet (Mcf) (Tr. 139, 145). Accordingly, the annual delivery rate of LNG to Japan under the sales contract, expressed in 1,000 cubic foot units, converts to approximately 50 billion 570 million thousand cubic feet, or 50 billion, 70 million Mcf, less those product losses discussed earlier.

The price of the LNG so delivered in Japan in November 1969 was $0.52 per MMBtu's, or approximately $0.52 per Mcf. The price term of the sales agreement was amended on 11 occasions between June 1, 1969, and January 1, 1980, and those and other price term amendments resulted in the range of the price of the delivered LNG having been between $0.52/MMBtu's/Mcf at the outset of the deliveries in November 1969 to its highest price of $6.50/MMBtu's/Mcf on June 1, 1981 (Exh. 40 at 43, 44), and, according to the testimony of Mr. Davis, at the then current price on the June 5, 1985, hearing date of $4.776/Mcf (Tr. 139).

In order to supply the huge quantities of LNG which they had contractually agreed to deliver by the use of two oceangoing LNG tankers, each of which was some 800 feet long, had a loaded draft not in excess of 32-½ feet, and had a carrying capacity of 450,000 barrels of LNG (Exh. 20 at 2), Marathon and Phillips found it necessary to construct pipelines and related facilities in order to convey the separately situated wellhead gas supplies to a LNG liquefaction plant which also had to be built, as well as arranging for the construction of the two tankers to be used in delivering the LNG to the agreed upon delivery point, the flange connecting the unloading piping of the LNG tanker with the piping of Tokyo Gas in Yokohama, Japan (Exh. 20 at 2). The sale of the gas took place at that agreed upon delivery point, since the sales agreement further provided that title to the LNG purchased and sold thereunder would pass from Marathon and Phillips to Tokyo Electric and Tokyo Gas at that specific point (Exh. 20 at 3). Loading of the tankers at the LNG plant took 12 hours to 3 days, depending upon conditions, and the elapsed port-to-port shipping time was approximately 8 days.

On March 8, 1967, 2 days after Marathon and Phillips had entered into the LNG sales agreement with Tokyo Electric and Tokyo Gas, Marathon and Phillips entered into another written agreement for the construction of a LNG plant in or near Nikiski,

Alaska, on land which Marathon owned on the Kenai Peninsula. That liquefaction plant, which included a gas treater and compressors, attendant docking facilities for loading the LNG tankers, and a causeway, became known as the Nikiski LNG plant and was located close by the separately situated sources of natural gas. The dock and causeway which served the LNG plant were located on land which was owned by the State and leased to Marathon. In their March 8, 1967 agreement, Marathon and Phillips agreed that the Nikiski LNG plant would be owned by Kenai LNG Corporation, which was beneficially owned by Marathon and Phillips, and would be leased to Marathon and Phillips, who in turn designated Phillips as the operator of that facility, the role in which Phillips oversaw the construction of the LNG plant and dock. The necessary pipelines and related facilities were constructed by another corporate subsidiary and Marathon and Phillips arranged for the formation of two Liberian corporations, one on April 26, 1967, and the other on November 21, 1967, and those firms became the owners of the two newly constructed LNG tankers christened the Polar Alaska and the Arctic Tokyo, which were later placed in service, apparently under Liberian registration, in order to deliver the LNG to Yokohama, Japan (Exh. 40 at 46-51).

* * * * * * *

Before Marathon began delivering LNG at the initial sales price of $0.52/MMBtu/Mcf in November 1969, * * * officials [of Marathon and MMS] met for the purpose of establishing the royalty payments on the Federal share of Marathon's Kenai Field gas being liquified. Royalty payments on gas in fields surrounding the Kenai Field Unit were then being made on the basis of $0.15/Mcf. MMS proposed that if Marathon paid on the basis of $0.16/Mcf, a pipeline transportation allowance might be acceptable as a deduction (Exh. 211) but Marathon decided to pay royalties on the basis of $0.16/Mcf for the LNG feedstock gas and did not request a transportation allowance (Exh. 119 at 2).

That so-called "LNG feedstock gas," or that portion of Marathon's share of the natural gas produced from the subject leases which was delivered by the pipelines constructed by Marathon and Phillips from the Kenai Field to the nearby Nikiski LNG plant, comprises approximately 17 percent of the Kenai Field production and represents some 32 percent of Marathon's share of the gas produced and sold from the subject leases.

From the time gas was first produced in 1959 and initially delivered in 1961 on the subject leases in the Kenai Field Unit through 1974, Marathon continued to pay royalties on the LNG feedstock gas at the rate of $0.16/Mcf, or 12-½ percent of the sales price which Marathon received from APL under APL I, the agreement between Marathon and APL dated May 13, 1960, for the sale of other gas which was produced on the subject leases in the Kenai Field Unit. Meanwhile, the price paid for Marathon's LNG in Japan started at $0.52/MMBtu/Mcf on June 1, 1969, with increases to $0.57/MMBtu/Mcf in May 1972, $0.684/MMBtu/Mcf in March 1974, and $0.9999/MMBtu/Mcf in October 1974 (Exh. 40 at 43, 216). Thereafter, the field price for Kenai Field gas escalated and Marathon maintains that it voluntarily increased the amount of its royalty payments to MMS, although the documentary evidence is not instructive on that point.

* * * * * * *

Since the mid-1970's, Marathon and MMS have been involved in a dispute over the value of the Kenai Unit gas which is sold by Marathon in Japan as LNG, or the so-called LNG feedstock gas. MMS has contended that under the provisions of 30 CFR 206.103, *supra*, the royalty value of that gas cannot be less than Marathon's gross proceeds, that is, the sales price of the LNG in Japan, since the first sale of that gas did not occur until it was delivered in Japan, less the costs which Marathon had incurred in the liquefaction and transportation of that gas. Meanwhile, Marathon has continued to maintain that the value of the LNG, for purposes of computing royalty, should be that which reflects the price paid by APL for other gas produced from the subject leases. Moreover, Marathon had continually refused MMS' requests that Marathon furnish the liquefaction and transportation costs for the LNG sold in Japan and Marathon's refusal to supply that

data has effectively deprived MMS of the information which it must have had in order to have computed the gross proceeds of the sale of the LNG in Japan.

The origin of that dispute is most likely attributable to the fact that beginning in April 1975, the price of LNG delivered in Japan began to escalate beyond the prices which Kenai Field gas brought when sold in Alaska. As a result of that disparity, a dispute arose between Marathon and MMS concerning which method was to be employed in order to calculate the royalty value of the LNG feedstock gas. Resultingly, in letters dated October 21, 1977, and January 9, 1979 (Exh. 109), MMS maintained that the royalty value should be based upon the sales price of the LNG in Japan less expenses, using a workback method to arrive at the "gross proceeds" at the wellhead (Exh. 145 at 2).

Marathon objected to that method of determining the value of its Kenai Field LNG feedstock gas production, urging that that method improperly attributed to the wellhead value a portion of Marathon's return on its investment in the LNG plant and transportation facilities. In addition, that method also included incremental values resulting from factors present only in Japan which Marathon felt should not be considered in determining the wellhead value in Alaska. Finally, Marathon argued that the value basis to be utilized in computing royalties should be based on other arm's-length sales of Kenai Field gas, such as its gas sales to APL, the method which Marathon had employed previously in order to determine its royalty payments on the LNG feedstock gas.

On May 4, 1977 (43 FR 22610), MMS issued Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases (NTL-5) (Exh. 212).

Commencing in 1977, also, portions of the Federal interest in the subject leases began to be transferred to CIRI [Cook Inlet Region, Inc.], a for-profit Alaska Native regional corporation which had been created pursuant to the provisions of the Alaska Native Claims Settlement Act, *supra* (Exh. 14). In correspondence from MMS dated April 9, 1981, and August 25, 1982 (Exh. 15), Marathon was advised that a portion of six of the seven leases would be transferred to CIRI, but that MMS would continue to administer the leases, the lease records, and all pertinent documents. The entire Federal interest in the seventh of the subject leases, No. A 028142, was ceded to CIRI. In addition, Marathon makes royalty payments each month to MMS for the Federal Government's interests in the subject leases and at MMS' direction Marathon pays directly to CIRI all royalties due on CIRI's interests in the subject leases (Exh. 15). Marathon also submits monthly production reports directly to CIRI (Exh. 205) and submits reports of sales and royalties within 60 days of production to MMS (Exh. 305; J. Statement at II-7.-10).

As a result of the transfer of the Federal interests in the subject leases to CIRI, the current royalty ownership of the overall Kenai Field production, based upon February 1985 production figures, is approximately as follows: CIRI - 50.3 percent; Federal Government - 31.4 percent; State of Alaska - 15.5 percent; and private interests - 2.8 percent (Exh. 224).

However, both CIRI and the Federal Government are required to distribute to third parties most of the royalties they receive. CIRI is required to distribute 70 percent of the royalties it receives from the subject leases to the 12 Alaska Native regional corporations created pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1606(i) (1982) (J. Statement at II(11)) and the Federal Government is required to distribute 90 percent of its royalties to the State of Alaska (30 U.S.C. § 191 (1982)), which results in the net Federal interest in the Kenai Field being less than 3 percent.

During the period from April 1, 1975, through January 1, 1980, Marathon continued to calculate its royalty payments on the Kenai Field feedstock gas on the prevailing sales price it was then receiving from APL for Kenai Field gas under its May 13, 1960, gas sales contract with APL (APL I). Meanwhile, MMS continued to issue specific directives to Marathon during that same period in which it sought unsuccessfully to have Marathon base its royalty payments instead upon the sales price received by Marathon for the LNG in Japan, less liquefaction and tankering expenses.

On September 12, 1980, MMS advised Marathon by letter that a new formula for determining the value of its LNG feedstock gas had been adopted. That new formula, the so-called "Phillips Formula," would coincide with that which was then being used to establish the price of Phillips' LNG feedstock gas then being furnished to the Nikiski

LNG plant and which Phillips was producing under State leases in the North Cook Inlet Field, *i.e.*, 36 percent of the LNG contract price delivered in Japan, less $0.555/MMBtu/Mcf, adjusted for quality, as provided for in NTL-5. * * * MMS felt that the use of the "Phillips Formula" for purposes of determining the wellhead value of gas for purposes of royalty was more reflective of the market conditions then present in Alaska. Marathon agreed to the use of that method of evaluating production in computing royalty amounts due MMS beginning on January 1, 1980, and further agreed to calculate and pay all future royalty payments on its LNG feedstock gas based upon that method. The three-page written agreement, embodying that compromise settlement, was dated February 6, 1981 (Exh. 145). Marathon subsequently paid to MMS the sum of $1,834,160.83 in additional royalties due under the "Phillips Formula" for the period January 1, 1980, through February 1981.

The February 6, 1981, agreement (Exh. 145) also clearly provided that the "Phillips Formula" method of royalty determination would remain in effect "until such time as changes in market conditions, State or Federal law, or regulations adopted thereunder, or the occurrence of facts such as National Emergency or Act of God, necessitate a revision in the method used to determine the wellhead value."

(Decision of Administrative Law Judge at 4-12).

The events which form the focal point of the controversy in this case commenced with a letter dated January 6, 1983, from MMS to Marathon giving notice of an intent to determine the reasonable value for royalty computation purposes of LNG feedstock gas produced from the leases by a method other than the Phillips formula (Exh. 47). The letter explained that: "The basic netback valuation theory of this [Phillips] formula is sound, but adjustments to the formula are necessary to reflect changing costs and prices due to economic conditions." A new method of valuation was proposed for use commencing with production in May 1983 involving:

> [D]etermining the ratios of annual costs to total annual sales value and total annual sales volume respectively for the following categories:
>
> (1) Liquifying, storing, and tankering the natural gas, and
>
> (2) Transporting the gas via pipeline from the lease to the inlet of the LNG plant.
>
> The cost categories will consist of allowable yearly operating costs and yearly capital recovery costs, including a return on capital and development expenditures. [Footnote omitted.]

Exh. 47. Marathon was invited to submit written comments on the proposal to MMS and to appear at public hearing on the matter in Anchorage.

By letter dated February 28, 1983, MMS provided Marathon with further details on the procedures to be used for valuing gas from the leases used for LNG feedstock and notified it the valuation should be applied prospectively commencing with the July 1, 1983, royalty payment (Exh. 47). Appellant's response to the February 1983 letter was to commence court litigation and to cease paying current royalty obligations on the basis of the Phillips formula (Tr. 124).

On April 14, 1983, Marathon filed a suit in the U.S. District Court for the District of Alaska against the United States, CIRI, and the State of Alaska seeking a declaratory judgment regarding its royalty

obligations under Kenai Field leases (Exh. 209). John Davis, appellant's manager of LNG, responsible for the LNG project, testified for appellant that, subsequent to the filing of the lawsuit, appellant ceased computation of royalties on the LNG feedstock gas on the basis of the Phillips formula used from January 1980 through April 1983 (Tr. 114-15). After April 1983, royalties were "computed on the basis of the highest arm's-length contract for the majority of the gas sold from the field," the contract with Alaska Pipeline known as APL I (Tr. 115). Davis testified this latter action was predicated on the belief MMS had breached the earlier agreement to compute royalties on the basis of the Phillips formula (Tr. 124). Davis acknowledged that, subsequent to receipt of the February 1983 letter from MMS, Marathon made calculations to project the value of the gas at the well head for royalty computation purposes under the revised net-back formula, and he recollected the figure as being something in excess of $3 per Mcf (Tr. 125, 141, 144). Robert Boldt testified on behalf of MMS that the Phillips formula used between January 1980 and early 1983 produced a valuation for computation of royalty from $1.71 to $1.80 per Mcf, whereas after the rollback Marathon paid on the basis of $0.61 per Mcf up to the time of the hearing (Tr. 38-39). This was essentially confirmed by Davis who acknowledged that, despite a projected valuation for royalty purposes under the revised net-back formula of slightly over $3 per Mcf, Marathon reduced the valuation on which it paid royalties from something over $1.70 per Mcf to $0.61 per Mcf (Tr. 141).

Thereafter, on July 8, 1983, MMS issued a formal order requiring Marathon to calculate its royalty payments using the revised net-back formula as set forth in the January and February 1983 MMS letters (Exh. 8). The order directed Marathon to begin calculating royalties on this basis with the royalty period commencing August 1, 1983. Further, the order notified Marathon of its right to file an administrative appeal to the Director, MMS. The order also advised Marathon that the act of filing an appeal would not suspend the requirement of compliance with the order. A protective administrative appeal was subsequently filed with MMS on August 12, 1983, noting the existence of the pending litigation (Exh. 190). The management at Marathon made a conscious decision not to comply with the July 8, 1983, order (Tr. 127). The decision, recommended by counsel and concurred in by a senior vice president and by the manager of the natural gas division, was based on the fact that the issue was already being litigated in the U.S. District Court and on Marathon's concern that CIRI's obligation to disburse 70 percent of its royalty receipts to other Native corporations presented difficulty in recouping any overpayment should appellant be successful in the litigation (Tr. 127-28).

Subsequently, in an order dated October 5, 1983, MMS noted that Marathon (through its paying agent, Union) had ceased to pay royalty on the basis of the Phillips formula (which was in effect through July

1983), beginning in April 1983, and paid royalty on the basis of a value "less than the minimum value directed by MMS" (Exh. 9). The order billed appellant for additional royalties in the amount of $717,705; ordered the recalculation of royalties from April through July 1983 on the basis of the Phillips formula; and further ordered Union, as agent for Marathon, "to calculate and pay royalty due for periods after July 1983 consistent with the 'Phillips Formula' " (Exh. 9). Marathon filed an administrative appeal of this order on November 7, 1983 (Joint Statement at 6).

Appellant's failure to comply with these orders during the course of the litigation received attention at the highest level of the Department. By order dated June 11, 1984, the Assistant Secretary for Land and Minerals Management, acting on behalf of the Secretary, directed Marathon to comply with the terms of the orders of July 8 and October 5, 1983, and pay the royalties due for the period April through July 1983 as "prescribed in the letter [order] of October 5, 1983," and the royalties due after July 31, 1983, in accordance with the terms of the July 8, 1983, order. Further, Marathon was directed to pay the royalties due thereunder within 30 days or the Department would initiate proceedings in the district court to cancel the subject leases (Exh. 11). The order expressly noted that the requirement to pay royalties is not suspended by an administrative or judicial appeal of the orders.

Thereafter, the Director of MMS issued the September 29, 1984, notice to Marathon of its liability for civil penalties for failure to comply with the orders of July 8, 1983; October 5, 1983; and June 11, 1984 (Exh. 12). The notice explained that:

> Pursuant to section 109(c) of [FOGRMA] and 30 C.F.R. § 241.51(b)(2), MMS has determined that because of Marathon's willful and intentional disregard of the requirement to pay additional royalties as specified in the above-described MMS orders, Marathon is liable for a penalty of $10,000 per day on each of its seven leases, for a total of $70,000 per day.

Id. at 2. The notice further advised appellant that penalties would accrue from July 13, 1984, the date by which Marathon was required to comply with the royalty order of June 11, 1984. Marathon requested a hearing on the civil penalty and now brings this appeal from the decision of Judge McGuire upholding the penalty after the hearing.

Subsequent to issuance of the civil penalty notice and prior to the hearing before the Administrative Law Judge in this case, the U.S. District Court issued its decision on February 20, 1985, affirming the MMS orders to compute royalties at the well head on the basis of the net-back method and ordered Marathon to comply with the orders. *Marathon Oil Co.* v. *United States*, 604 F. Supp. 1375 (D. Alaska 1985), *aff'd*, 807 F.2d 759 (9th Cir. 1986), *cert. denied*, _____U.S._____,

107A S. Ct. 1593 (1987). [1] Testimony at the hearing disclosed that payment was made to MMS of additional royalties due under the MMS orders from April 1983 through June 3, 1985, in the amount of "about $8.1 million plus almost $1 million additional payment for interest" just prior to commencement of the hearing on June 3, 1985 (Tr. 131-33).

In the decision under appeal, the Administrative Law Judge found that the action of Marathon in refusing to comply with the MMS orders was "knowing and willful," regardless of the absence of any specific intent to violate the provisions of FOGRMA, where its conduct is characterized by a reckless disregard of whether its action is prohibited by statute. Judge McGuire further held that the record supports the assessment of the maximum penalty of $10,000 for each day of the violation for each lease over the 292-day period from July 13, 1984, to April 30, 1985, for which the penalty was assessed (*See* Joint Statement at 6). The Administrative Law Judge also found that the conveyance of part or all of the mineral interest under lease to CIRI did not render the civil penalty provision of FOGRMA inapplicable since the United States had not waived its right to administer the leases under section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(g) (1982). Finally, the Administrative Law Judge failed to find that the record supported the existence of a 90-day extension for compliance with the June 11, 1984, order which would either invalidate the penalty notice or toll the assessment of the penalty for the period thereof.

In its statement of reasons for appeal, Marathon argues that the record fails to establish the existence of a "knowing or willful" violation as required under section 109(c) of FOGRMA to support assessment of a civil penalty. Appellant argues that the proper standard of what constitutes willful conduct for purposes of assessment of a civil penalty is whether there was a reckless disregard of the governing statute, citing *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985). Marathon contends that this standard requires consideration of good faith and reasonableness in determining whether conduct is willful. Appellant asserts its refusal to comply with the MMS orders was reasonable in light of the pending litigation which it had initiated previously in order to determine the extent of its royalty obligation.

Marathon also argues that section 109(c) of FOGRMA authorizes imposition of penalties only for failure to pay royalties, which term is expressly defined to include payments to the United States, Indian tribes, or Indian allottees. Appellant contends that most of the payments at issue are due to CIRI as a result of the conveyance of the mineral interests embraced in the leases to the Native corporation

[1] Since the propriety of the royalty valuation method has been finally resolved between the parties as a consequence of the litigation, the merits of the royalty valuation orders are not before the Board in this case.

under ANCSA. Hence, Marathon asserts these payments do not qualify as royalty payments.

Further, appellant argues that the MMS royalty payment orders which were issued after the court had assumed jurisdiction of the dispute were ineffective until they were affirmed by the court. Marathon also argues that assessment of a penalty in the circumstances of this case is inconsistent with the purposes of FOGRMA where it was seeking to ascertain the extent of its royalty obligation rather than to evade that obligation. Marathon further notes that its motion for stay of the MMS orders was pending before the court for 107 days of the penalty period during which nearly $7,500,000 in penalties accrued. Appellant contends that payment of the amount assessed by MMS pending administrative and/or judicial review of the amount due has not been held by the courts or this Board to be indispensable to royalty collection activities, citing *Placid Oil Co.* v. *Department of the Interior*, 491 F. Supp. 895 (N.D. Texas 1980); *Conoco, Inc.* v. *Watt*, 559 F. Supp. 627 (E.D. La. 1982); *Marathon Oil Co.*, 90 IBLA 236, 93 I.D. 6 (1986).

Marathon further argues that the amount of the penalty assessed is not supported by the record. Appellant notes that the amount of the assessment was initially set by MMS at the statutory maximum without explanation and, hence, contends the assessment was arbitrary. Appellant asserts the Department is bound by regulation to base the penalty on the severity of the offense and the violator's history of noncompliance, citing 30 CFR 241.51(c) (1985). Additionally, Marathon contends the assessment improperly fails to consider mitigating factors including its prior history of compliance on these 30-year-old leases, the complexity of calculating the amount due under the net-back orders, and the pending litigation of the issue in court. Further, appellant points out that MMS stipulated in court to the jurisdiction of the court to review the royalty orders in question.

In its answer to appellant's brief, counsel for MMS argues that Marathon knowingly or willfully failed to comply with the MMS royalty payment orders. MMS contends the failure to comply was a considered and deliberate decision. Further, MMS asserts the filing of the lawsuit regarding the royalty determination did not excuse compliance with the MMS orders, noting that no stay of the orders was obtained from the court. MMS argues that appellant acted with a reckless disregard for compliance with the royalty payment orders. Marathon's lack of good faith is asserted by MMS to be manifested by its unilateral rollback of the valuation of the LNG feedstock gas in the face of the royalty orders.

Further, MMS contends that section 109(c) of FOGRMA applies to all of the leases at issue. MMS argues that the United States is still the lessor as to six of the leases for which a partial interest in the mineral estate has been conveyed to CIRI and that, with respect to the lease

embracing a mineral estate conveyed in its entirety to CIRI, the Secretary has retained rather than waived the right to administer the lease as authorized by section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982).

Counsel for MMS also asserts that the assessment of the penalty at the statutory maximum of $10,000 per day is supported by Marathon's conduct and the severity of its noncompliance. Finally, MMS argues that penalties were properly assessed for the entire period from July 13, 1984, to May 1, 1985.

Accordingly, the critical issues before the Board on review of this appeal are threefold. The first question to be answered is whether appellant "knowingly or willfully" violated the royalty payment orders within the meaning of section 109(c) of FOGRMA. If the first question is resolved in the affirmative, the next issue is whether FOGRMA authorizes assessment of civil penalties for failure to pay royalties due to Alaska Native regional corporations for lands embraced in an oil and gas lease issued by the United States the mineral estate in which was subsequently conveyed to the Native corporation pursuant to ANCSA subject to the existing lease. If both of these questions are answered in the affirmative, the remaining issue is the appropriate amount of the penalty to be assessed based on the record in this case.

[1] Section 109(c) of FOGRMA deals with liability for civil penalties and provides in pertinent part that: "Any person who--(1) knowingly or willfully fails to make any royalty payment by the date as specified by statute, regulation, order or terms of the lease * * * shall be liable for a penalty of up to $10,000 per violation for each day such violation continues." 30 U.S.C. § 1719(c) (1982). The statute has not defined the terms "knowing or willful," but the parties to this appeal have acknowledged the relevance of the recent Supreme Court case of *Trans World Airlines, Inc.* v. *Thurston, supra.* In considering whether the conduct violative of the Age Discrimination in Employment Act was "willful" and, thus, subject to the punitive sanction of double damages under section 7(b) of the Act, 29 U.S.C. § 626(b) (1982), the Court held that the issue was whether the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [Act]." 469 U.S. at 126. The Court declined to uphold an assessment of punitive damages merely on a finding that the charged party knew of the existence of the Act and of its potential applicability to its actions. *Id.* at 127-28. The Court reversed the punitive damage assessment on the ground the "record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the [Act]." *Id.* at 129 (citation omitted). We note that in interpreting the word "willful" in the context of the same Act the Court has recently reaffirmed the reckless disregard standard, declining to include therein actions taken without a reasonable basis for believing they were in compliance with the statute. *McLaughlin* v. *Richland Shoe Co.*, _____U.S._____, 108B S. Ct. 1677 (1988).

Section 109(c) of FOGRMA provides for a civil penalty for any person who knowingly or willfully fails to make a royalty payment by the date specified in an order. As noted above, Marathon was notified by letter of January 6, 1983 (Exh. 47), of the requirement, in light of changed market conditions, to apply a new net-back method of valuation of the LNG feedstock gas to replace the existing Phillips formula. Further details on the new net-back method of computation were provided in the MMS letter of February 28, 1983 (Exh. 47). The testimony reveals that Marathon made calculations of the effect of the new net-back method of valuing the LNG feedstock gas for royalty computation purposes and projected a value of something in excess of $3.00 per Mcf. In response to the MMS letter of February 1983, the testimony reveals that Marathon filed a lawsuit to ascertain its royalty obligation and unilaterally rolled back the valuation for royalty purposes of the LNG feedstock gas from the range of $1.71 to $1.80 per Mcf under the Phillips formula to $0.61 per Mcf.

Thereafter, when MMS issued the July 8, 1983, order formally requiring Marathon to calculate its royalty payments on the basis of the revised net-back method set out in the January and February 1983 letters commencing August 1, 1983, the testimony reveals that Marathon made a conscious decision not to comply with the order. John Davis testified that the decision was made, with the advice and participation of counsel, by the manager of Marathon's Natural Gas Division, the Senior Vice President of Production and Exploration, and himself (Tr. 126-27).

Subsequently, when the Assistant Secretary issued the June 11, 1984, order to Marathon directing it to comply with the July 8, 1983, order (and the October 5, 1983, order regarding Phillips formula royalties for April through July 1983) and pay the royalties due thereunder within 30 days, appellant was faced with another critical decision. Davis testified on behalf of appellant that at this point the participants in the decision included the manager of Marathon's Natural Gas Division, the Senior Vice President of Production and Exploration, the President of Marathon, and himself, along with counsel (Tr. 130). Davis acknowledged that the orders were considered seriously and the failure to pay at the higher rate was not an oversight (Tr. 142). He explained the failure to comply on appellant's belief that the "case was before the Federal Court in Alaska that was the proper forum to adjudicate the question" (Tr. 142).

Notwithstanding appellant's belief that the matter was properly before the district court, and, therefore, it was excused from compliance with the orders, we note that the Assistant Secretary's royalty order of June 11, 1984, explicitly advised Marathon that: "The obligation to pay royalties determined by MMS to be due and owing is not suspended by an administrative or judicial appeal of these orders"

(Exh. 11). This statement is supported by the relevant regulation governing compliance with royalty payment orders:

> Compliance with any orders or decisions, issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rents, bonuses, penalties or other assessments, shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, MMS, * * * and then only upon a determination, at the discretion of the Director * * * that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

30 CFR 243.2. [2] The efficacy of this so-called "pay-pending-appeal" regulation requiring immediate payment pending administrative review in the absence of acceptance of a bond adequate to indemnify the lessor from risk of loss and a finding that a suspension will not be detrimental to the lessor was recognized by this Board in *Marathon Oil Co.*, 90 IBLA at 236, 93 I.D. at 6. [3]

Although the June 11, 1984, order of the Assistant Secretary, unlike the July 1983 and October 1983 MMS orders, was a final Departmental decision not subject to further administrative review within the Department, *see Blue Star, Inc.*, 41 IBLA 333 (1979), compliance with the order was not excused pending judicial review. Statutory authority is provided for obtaining relief from an administrative decision pending judicial review:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (1982). The courts have recognized that the institution of a lawsuit for judicial review of an administrative action does not, by itself, stay the effectiveness of the challenged action in the absence of a stay granted pursuant to this statutory provision. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155-56 (1967) (effectiveness of a regulation);

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[2] Appellant points out that this regulation was promulgated subsequent to issuance of the royalty payment order of June 11, 1984. 49 FR 37353 (Sept. 21, 1984). Although the effective date of the revised regulations generally was Oct. 22, 1984, 49 FR at 37336, the preamble to the regulatory revision explained the basis for the retroactive effect of the regulation at 30 CFR 243.2:

"This provision is being made retroactive to orders and decisions issued by the Royalty Management Program after August 12, 1983. The retroactive effectiveness is necessary for consistent application of MMS's procedure because on that date 30 CFR Section 221.66, the predecessor to new Section 243.2, was unintentionally removed from MMS's regulations along with other rules which were removed by virtue of the transfer of MMS's onshore operational program to the Bureau of Land Management (48 FR 36582, August 12, 1983)." 49 FR at 37344. The former regulation at 30 CFR 221.66 (1982) imposed substantially the same requirements for suspension of an order, *i.e.*, a determination by the Director that suspension would not be detrimental to the lessor and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. Thus, it appears that even prior to the promulgation of 30 CFR 243.2, a suspension of the effect of the royalty payment order pending an administrative or judicial appeal was required to stay the obligation of payment pending review on appeal. *See Atlantic Richfield Co.*, 21 IBLA 98, 103, 82 I.D. 316, 318 (1975).

[3] In the *Marathon* case, the Board reversed an MMS decision denying a request to suspend payment of late payment charges on additional royalties pending administrative review of the pending appeals of appellant's liability for the charges. The Board's action was predicated on a finding that, given the statutory obligation of the lessee to pay interest on late royalty payments and the willingness of the appellant to comply with the requirement of filing a bond deemed adequate by MMS to protect against loss, no adequate basis had been shown in the record for finding a suspension would be detrimental to the interest of the lessor. 90 IBLA at 245-48, 93 I.D. at 11-13.

Winkler v. *Andrus*, 614 F.2d 707, 709 (10th Cir. 1980) (decision rejecting appellant's oil and gas lease application).

However, it was not until November 5, 1984, after receipt of the notice of civil penalties at issue here and the Department's counterclaim filed in the district court for cancellation of the leases, that Marathon filed a motion for preliminary injunction in the district court requesting a stay of the effect of the royalty orders. Subsequently, on February 20, 1985, the district court issued an opinion denying Marathon's motion for a stay, granting MMS' motion for summary judgment, and requiring an accounting. 604 F. Supp. 1390. [4]

In this case, appellant chose to ignore the explicit warning contained in the June 11, 1984, order of the Assistant Secretary that the effect of the decision was not stayed pending appeal. The testimony established that the failure to comply with this order was a conscious decision made at the highest levels of the corporation. In this context we must affirm the finding of the Administrative Law Judge that the failure to comply with the June 11, 1984, royalty payment order was knowing and willful. In view of the warning in the June 11, 1984, order that the requirement for compliance was not stayed pending administrative or judicial review, we have no trouble finding the failure to comply was willful and knowing. Appellant's conduct, at the very least, constituted a reckless disregard of whether compliance with the order was required by law. Any element of good faith in appellant's conduct relating to compliance with the order which might otherwise be argued was totally eviscerated by the unilateral rollback of royalty payments to a level less than that existing prior to the royalty orders and the steadfast refusal to pay further until ordered to do so by the district court.

We must also affirm the finding of the Administrative Law Judge that the record fails to support the existence of a 90-day extension for compliance with the June 11, 1984, order. It is true that the June 11 order was issued pursuant to a Secretarial decision of April 16, 1984, on the question of whether the Department should take further administrative action to collect the unpaid royalties from Marathon pending the outcome of the lawsuit (Exh. 38). This decision called for issuance to Marathon of a notice of lease cancellation with followup contact by the Department for negotiations and to relate conditions of settlement. The Secretarial decision further provided that, if no agreement was reached within 90 days, action would be taken to cancel the leases. The June 11, 1984, order (Exh. 11) was issued to implement this decision.

Hugh V. Schaefer, appellant's general attorney for domestic production, testified concerning a June 19 telephone conversation with

[4] An interim stay of the district court order was allowed pending appeal to the Ninth Circuit.

Associate Solicitor Larry Jensen, the Department's chief negotiator in this matter, regarding an extension of time for compliance with the June 11 order (Tr. 156). Schaefer testified that in response to Marathon's concern that negotiations might take longer than 90 days and it did not want the negotiations terminated, Jensen "replied by saying that he had no problem with that; he didn't want to leave things open ended; but, that if progress was being made at the end of 90 days, then he would not be--he would not terminate settlement discussions" (Tr. 156). A meeting was set for July 3 at the Department. On June 29, Jensen called Schaefer to reach an understanding of the topics to be discussed at the July 3 meeting and to set preconditions to the settlement negotiations, *i.e.*, that Marathon would value the natural gas for April 1 through July 31, 1983, under the Phillips formula and from August 1983 forward under the APL 2 contract price (Tr. 163). Schaefer testified that at the July 3 meeting, Jensen further specified the Department's preconditions to negotiation including renegotiation of royalty values on all Kenai field gas; inclusion of CIRI in the discussions; retroactive effect of renegotiated values for other Kenai field gas; and payment of royalties on LNG feedstock gas for the period from April through July 1983 under the "Phillips 1 formula" and thereafter under the "Phillips 2 formula" (Tr. 165). Marathon responded by indicating at the meeting that it would have to "take the list of preconditions back to [Marathon's] management" (Tr. 176). Schaefer acknowledged the July 11 deadline for a response to the preconditions at which point Interior would have to make a decision how to proceed (Tr. 177). Schaefer further testified that at the followup meeting between Marathon management and Interior officials on July 11, appellant advised Interior officials that it could not agree to the preconditions set for further negotiations (Tr. 167).

Jensen acknowledged in his testimony that an extension beyond 30 days to comply with the June 11 order was a possibility "if the negotiations were serious" (Tr. 188). Further, Jensen testified that in his June 29 telephone call he indicated that good faith payment of substantially higher royalties on LNG was a precondition to any negotiation, including extension of the 30-day timeframe for compliance with the June 11 order (Tr. 190-91). Good faith payment of the minimum amount owed was a precondition (Tr. 192). Further Jensen testified that the purpose of the July 11 meeting was to ascertain whether the preconditions for an extension to negotiate had been met (Tr. 193) and that after the meeting of July 11 he perceived that negotiations had broken off (Tr. 204).

It is clear from the factual record that no extension was granted for compliance with the June 11, 1984, order beyond the 30 days expressly provided therein. Although the Department was willing to continue negotiations if Marathon complied with certain conditions including payment of royalty in the interim at a higher rate, appellant was not willing to comply with the conditions. Thus, no extension was granted.

Having affirmed the finding of the Administrative Law Judge that Marathon knowingly and willfully failed to comply with the royalty payment order of June 11, 1984, in violation of section 109(c) of FOGRMA, we are presented with the question of the applicability of FOGRMA to royalties payable to an Alaska Native corporation for interests in oil and gas conveyed under ANCSA. Specifically, the issue is whether the civil penalty provisions of FOGRMA are properly applied to royalty payment obligations under the terms of a United States oil and gas lease where the royalties are payable to an Alaska Native corporation as a consequence of the conveyance (subsequent to lease issuance) of the subsurface estate in lands pursuant to the provisions of ANCSA.

As a threshold matter we recognize that of the seven leases at issue here, all except one (A-028142) still embrace in part public lands for which royalties on oil and gas are owed to the United States. Thus, for purposes of the applicability of the civil penalty provisions of FOGRMA under review here, the issue pertains only to lease A-028142.

Marathon points out that the term "royalty" is defined at section 3(14) of FOGRMA:

> (14) "royalty" means any payment based on the value or volume of production which is due to the United States or an Indian tribe or an Indian allottee on production of oil or gas from the Outer Continental Shelf, Federal, or Indian lands, or any minimum royalty owed to the United States or an Indian tribe or an Indian allottee under any provision of a lease[.]

30 U.S.C. § 1702 (14) (1982). The term "Federal land" is also defined in FOGRMA: "(1) 'Federal land' means all land and interests in land owned by the United States which are subject to the mineral leasing laws, including mineral resources or mineral estates reserved to the United States in the conveyance of a surface or nonmineral estate[.]" 30 U.S.C. § 1702(1) (1982).

[2] The record establishes that all of the seven oil and gas leases at issue in this royalty dispute were issued by the United States for public domain lands pursuant to the authority of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. §§ 181-287 (1982). There is no doubt that the rights of the lessee(s) are still governed by the terms of those leases and of the statutes and regulations pursuant to which they were issued, as well as amendments thereof which are not inconsistent with the lease terms. These valid existing rights were explicitly recognized in section 14(g) of ANCSA which provided in pertinent part:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease * * * and the right of the lessee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the * * * United States as lessor * * * in any such leases * * * covering the estate patented * * *. *The administration of such lease * * * shall continue to be by*

** * * the United States, unless the agency responsible for administration waives administration.* [Italics added.]

43 U.S.C. § 1613(g) (1982). The relevant regulation implementing this statutory provision provides in part:

> Leases * * * granted prior to the issuance of any conveyance under this authority shall continue to be administered by the * * * United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease * * * unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. In the latter event, the Secretary shall not renegotiate or modify any lease * * * or waive any right or benefit belonging to the grantee until he has notified the grantee and allowed him an opportunity to present his views.

43 CFR 2650.4-3.

In the absence of a waiver of administration of an oil and gas lease embracing lands conveyed under section 14(g) of ANCSA, the United States retains the right to administer the lease based on a finding it is in the interests of the United States to do so. In this context, the provisions of FOGRMA are properly applied to the lessee's royalty obligations under the lease. The royalty payment under this oil and gas lease issued by the United States pursuant to the Mineral Leasing Act of 1920, is still due to the United States as lessor, notwithstanding the subsequent conveyance of the mineral interest and assignment of the lessor's rights to CIRI. The fact the royalty payments were made directly to CIRI on the instructions of MMS does not alter this result. It is clear from the record that Marathon accounted for all production and royalty due thereon to MMS as well as to CIRI (Tr. 50). The continuing administrative responsibility of MMS over this lease was the basis for assessment of a civil penalty for failure to comply with the June 11, 1984, royalty payment order (Tr. 50, 55, and 58).

Appellant asserts, however, that administration of this lease was waived by the Department. Decisions to waive the administration of rights-of-way and airport leases under this regulation on lands conveyed to Native corporations have been upheld by this Board in the absence of a finding that the interests of the United States dictate retention of administration. *Ahtna, Inc.*, 103 IBLA 71 (1988) (power line right-of-way); *Kuitsarak, Inc.*, 102 IBLA 200 (1988) (airport lease).

Reference to the voluminous record amassed in this case file discloses no compelling evidence that the Department waived its statutory right under section 14(g) of ANCSA to continue to administer lease A-028142. The only document in the record which might suggest that conclusion is a copy of a letter of August 25, 1982, from the accounting operations division of MMS to Union, appellant's agent for royalty payment on the subject leases at the time. The subject of that letter was identified as "Federal Gas Leases Transferred in Part or in Whole to Cook Inlet Region, Inc., (CIRI), Oil and Gas Leases A-028047, A-028142, and A-028143." With respect to A-028142, the letter advised at page 2 that all of the lands embraced in the lease had been

conveyed to CIRI on July 20, 1982, pursuant to Patent No. 50-82-0088 and interim conveyance No. 519. With respect to the latter lease the letter further related:

> Lease A-028142 has been transferred in its entirety to the Cook Inlet Region Inc. Section 14(g) of the Alaska Natives Claims Settlement Act states that, upon issuance of patent, the patentee shall succeed and become entitled to any and all interest[s] of the United States as lessor, subject to the right of the lessee to the complete enjoyment of all rights, privileges, and benefits granted him under the lease. This section further provides that the United States may waive administration of a lease containing lands which have been conveyed in their entirety.
>
> Pursuant to the above, your case file will be transferred effective the first day of the month following receipt of this notice to [CIRI].

(Exh. 15).

Other evidence, however, indicates the Department did not waive administration of this lease. The testimony of the MMS Associate Director for Royalty Management noted the continuing administrative responsibility of MMS for this lease (Tr. 50, 55, and 58). The January and February 1983 letters to Marathon detailing the net-back method of valuation for royalty purposes, as well as the implementing order of July 1983, clearly related to all the LNG feedstock leases, although the lease numbers were not specified (Exhs. 8, 47). The attachments to the royalty payment order of October 5, 1983, regarding payment of additional royalties under the Phillips formula from the time of Marathon's unilateral rollback to the effective date of the new net-back method of calculation specifically referred to additional royalty owed for lease A-028142 (Exh. 9).

In the Memorandum of Understanding Between Minerals Management Service & Cook Inlet Region, Inc. (MOU I), signed January 3, 1983, by the Associate Director for Royalty Management, MMS, it was expressly recited that: "Administration of CIRI's interest as lessor in the leases [including A-028142] was reserved in the Secretary, now acting through MMS, in the conveyance to CIRI under ANCSA" (Exh. 17). In MOU I the Secretary made a "partial waiver," pursuant to 43 U.S.C. § 1613(g) (1982), of the authority to administer the leases at issue here for the purpose of allowing CIRI to negotiate royalty valuation issues concerning the leases for the period from April 1, 1975, to January 15, 1983 (Exh. 17). This agreement was followed by MOU II dated August 9, 1983 (Exh. 18). This latter agreement explained in some detail the responsibilities assumed by MMS in administering the subject leases. In MOU II it was again recited that the right to administer these leases was retained by the United States and MMS under section 14(g) of ANCSA. Thus, it becomes clear upon review of the entire record that the Secretary has not waived administration of the subject oil and gas leases. [5]

[5] We reach this conclusion on the basis of the record before us. While this same conclusion was reached by the district court in the litigation over the extent of Marathon's royalty obligation, 604 F. Supp. at 1390, we note that the

Continued

The remaining critical issue which this appeal poses is the amount of the civil penalty assessed for violating section 109(c)(1) of FOGRMA. That section provides that any person who "knowingly or willfully" fails to make any royalty payment by the required date as specified in an order "shall be liable for a penalty of up to $10,000 per violation for each day such violation continues." 30 U.S.C. § 1719(c) (1982). The civil penalty provision of FOGRMA further provides that "the Secretary may compromise or reduce civil penalties under this section" on a "case-by-case basis." 30 U.S.C. § 1719(g) (1982). Finally, the statute provides that: "In determining the amount of such penalty, or whether it should be remitted or reduced, and in what amount, the Secretary shall state on the record the reasons for his determinations." 30 U.S.C. § 1719(i) (1982).

The essence of appellant's argument regarding the amount of the penalty assessed is threefold. Marathon argues that the assessment of cumulative penalties in this case on a daily basis pending judicial review of the royalty payment orders violates constitutional due process restraints by inhibiting the exercise of the right to judicial review. Further, appellant asserts that both the statute and the regulations require the exercise of discretion in setting the amount of any penalty, and that the amount of the penalty was arbitrarily assessed at the statutory maximum amount without any analysis of mitigating factors. Marathon also contends the penalty levied is inconsistent with the Department's enforcement policy on civil penalties under FOGRMA approved by the Director, MMS, on April 1, 1986 (App. C to appellant's brief).

[3] The due process argument of Marathon has its foundation in the principle established initially in *Ex Parte Young*, 209 U.S. 123 (1908). In reviewing a challenge to the validity of a statute setting railroad rates and establishing substantial civil and criminal penalties for overcharging, the Court noted that if the penalties for disobedience of the rates are so "severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147. The Court found that to condition the right to judicial review of the validity of a rate upon the risk of substantial fines and imprisonment is effectively "to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts [are valid]" in holding the acts unconstitutional. 209 U.S. at 148. The doctrine was explained cogently by the court in *United States* v. *Reilly Tar & Chemical Corp.*, 606 F. Supp. 412 (D. Minn. 1985):

> The decisions of the Supreme Court in *Ex Parte Young* and its progeny clearly establish that a person has a due process right to challenge the validity of an administrative order

court of appeals held the district court did not need to decide the waiver issue because Marathon did not properly preserve the question at the administrative decision level. 807 F.2d at 762. Hence, appellant may also be collaterally estopped to argue administration of the leases was waived.

affecting his affairs without being forced to pay exorbitant penalties if the challenge is unsuccessful. *Ex Parte Young*, 109 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115 (2d Cir. 1975). The rationale of *Ex Parte Young* and its progeny is that the imposition of severe penalties effectively denies a person subject to the penalties the right to a judicial review of the validity of an order and that such a denial of judicial review is a violation of due process. However, *Ex Parte Young* and its progeny also establish that a statute imposing penalties for noncompliance with an administrative order will be constitutional if it is a defense to the imposition of penalties that the party disobeying the administrative order interposed a good faith defense to the validity of the order. It follows that a person will not be intimidated into not seeking judicial review if he knows that good faith is a defense to the imposition of penalties.

606 F.Supp. at 418. The *Reilly Tar* case involved a challenge to the constitutionality of the punitive damages provision of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(c)(3) (1982). In 1980 the United States had instituted suit seeking an injunction to force Reilly to take action to abate soil and groundwater contamination. During the pendency of the litigation in which Reilly contested the necessity of the expensive remedy sought, an administrative order was issued by the Environmental Protection Agency (EPA) requiring Reilly to construct and maintain a water treatment system for water withdrawn from local wells. The order subjected Reilly to treble damages for failure to comply without sufficient cause. In ruling on the motion of Reilly for a preliminary injunction to prevent the accrual of penalties pending judicial review of the propriety of the relief ordered, the court denied the motion on the ground that a good faith defense to the validity of an EPA cleanup order is sufficient to avoid imposition of punitive damages and, thus, upheld the punitive damages provision of CERCLA against the due process challenge. After noting that the "central teaching of the *Ex Parte Young* line of due process decisions is that a person has a right to challenge the validity of an agency order affecting his affairs without being forced to pay exorbitant penalties," the court found that a good faith defense to the validity of the EPA order is sufficient to avoid imposition of punitive damages. 606 F. Supp. at 421.

However, due process attacks on a civil penalty provision have generally been rejected by the courts where the appellant seeking judicial review has failed to avail itself of the opportunity to obtain a stay of the effect of the administrative order. In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Williams*, 251 U.S. 63 (1919), an early case applying the principle of *Ex Parte Young*, the Court was faced with a challenge to the constitutionality of an Arkansas statute regulating railroad rates based in part on the ground that it violated due process by imposing a penalty so severe as to preclude the railroad from exercising its right to judicial review in order to challenge the validity of the rate as confiscatory. The Court rejected the due process claim on the ground that if the railroad regarded the rate as

confiscatory "the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction." 251 U.S. at 65 (citations omitted). In *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300 (1937), the Court rejected a due process challenge by a pipeline company to a state administrative order on the ground of potential liability for cumulative penalties pending judicial review noting the company had failed to request a stay of the order:

> As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, *Ex Parte Young*, 209 U.S. 123, 147 * * *, but no reason appears why appellant could not have asked the commission to postpone the date of operation of the order pending application to the commission for modification. Refusal of postponement would have been the occasion for recourse to the courts. But appellant did not ask postponement. [Citations omitted.]

302 U.S. at 310. The Court noted that a temporary injunction was not necessary to protect the appellant from penalties pending final resolution of the suit, as the commission agreed (subsequent to commencement of litigation) not to enforce the order before issuance of the decision of the lower court on the application for injunction, and because the administrative order had been further stayed by process of the courts pending the decision on appeal.

The Court had further occasion to rule on the effect of due process limitations on the imposition of civil penalties for noncompliance with an administrative order pending judicial review of the order in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961). Noting that after entry of the notices of default by the Commission the petitioner might have sought relief itself before the penalties began to accrue, the Court held:

> As was said in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654 (1950), "we are not prepared to say that courts would be powerless" to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity. There the record did not present and the Court did not determine "whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order." Similarly, as this matter comes here now, the petitioner has pursued none of these remedies, and we could not therefore say that it had "no chance" to prevent the running of the forfeiture pending a test of the validity of the orders. Cf. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 310 (1937).

368 U.S. at 226-27.

Other courts have also recognized the availability of equitable relief. In *Floersheim v. Engman*, 494 F.2d 949 (D.C. Cir. 1973), a case cited by appellant in support of its due process objection, the court noted:

> It is by now settled doctrine that a person may have relief in equity to avoid invalid official action where the risk of penalties, if he is remitted to defense of enforcement

actions, is so coercive as to be a denial of due process. Ex Parte Young, [*supra*]. Equitable doctrine has been advanced with the presumptions of reviewability in the Administrative Procedure Act as to agency regulations or orders that have presently compulsive and coercive effects. Abbott Laboratories v. Gardner, [*supra.*]

494 F.2d at 954.

Applying these principles, we must reject the contention that assessment of a civil penalty for failure to comply with the royalty payment order of June 11, 1984, would be violative of due process where appellant has failed to do that which is necessary to obtain a stay of the decision pending judicial review. Prior to entry of the final Departmental order of June 11, 1984, the earlier orders of July and October 1983 were subject to administrative review within the Department. *See* 30 CFR Part 290. As noted above, such an order may be suspended pending appeal upon the written authorization of the Director, MMS, based on a finding that such a suspension will not be detrimental to the interests of the United States and the submission and acceptance of a bond deemed adequate to protect the United States from loss. 30 CFR 243.2 (formerly codified at 30 CFR 221.66 (*see* note 2, *supra*)). In a different case involving this same appellant, this Board reversed a denial of a request for a stay of a payment order under 30 CFR 243.2 in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raised a bona fide legal issue, lessee was faced with the threat of irreparable injury if the stay was not granted, it appeared the threatened injury to the lessee outweighed any potential harm the stay might cause the lessor, and it did not appear from the record that a stay was contrary to the public interest. *Marathon Oil Co., supra.* The Board decision was predicated in significant part on a lack of any "reason apparent from the record in this case why an adequate indemnity bond will not suffice to protect the interest of the United States in guaranteeing payment." 90 IBLA at 247, 93 I.D. at 12 (footnote omitted). In support of its holding, the Board noted that under the Administrative Procedure Act, 5 U.S.C. § 704 (1982), and Departmental regulations, 43 CFR 4.21, the failure to stay the order requiring payment would make it a final Departmental decision subject to immediate judicial review and concluded that the public interest is not generally served by short-circuiting the administrative review process within the Department. 90 IBLA at 248, 93 I.D. at 13. [6]

Although issuance of the final Departmental decision by the Assistant Secretary on June 11, 1984, precluded further administrative review, this not only verified that the case was then ripe for judicial review, but also allowed appellant to avail itself of the remedy of a

[6] It appears from the record appellant sought an administrative stay subsequent to the October 1983 order, but not the July 1983 order. Apparently no decision was issued in response to the stay request. Since the civil penalty assessment did not commence until 30 days after the final Departmental decision of June 11, 1984, which was not subject to further administrative review, we need not consider the applicability of civil penalties during the pendency of an administrative stay request.

judicial stay pending review by the court pursuant to 5 U.S.C. § 705 (1982). [7] Pursuit of this remedy would have allowed the Department to argue before the court the need to enforce the decision pending appeal. Further, it would have placed the court in a position to evaluate the need for a stay pending judicial review in view of the appellant's likelihood of success on the merits, the threat of irreparable injury to appellant, the potential harm to the nonmoving parties, and the public interest. *See Placid Oil Co.* v. *United States Department of the Interior*, 491 F. Supp. at 905. In light of the availability of a stay pursuant to the provision of 5 U.S.C. § 705 (1982), pending judicial review, we are unable to afford relief from the assessment of civil penalties on the basis of appellant's due process objection where appellant has failed to avail itself of this remedy.

We recognize that a motion for preliminary injunction and for a judicial stay of administrative action was filed with the district court on November 5, 1984. Although appellant asserted therein it was "prepared to post a bond with this Court sufficient to secure the payment of the total amount of royalties being sought by the Federal Defendants in this action together with interest thereon," there is no indication in the record that an indemnity bond was ever filed to protect the royalty interest holders against loss of royalty and interest on late payments. This lack of a tender of payment, either in the form of a bond or an escrow deposit, is a critical element distinguishing this case from two of the three cases cited by appellant for the principle that payment of the amount assessed by MMS has not always been held to be indispensable by the Board or the courts. In *Marathon*, as noted above, the Board reversed a refusal to consider an acceptable bond in the absence of apparent risk of damage to the lessor's interest if an acceptable bond is provided. Similarly, the temporary restraining order issued by the court in *Conoco, Inc.* v. *Watt, supra*, was predicated in part on a finding that deposit of the funds into the court would adequately protect the Department's interest in collection of the amount of penalty due. 559 F. Supp. at 630.

In this case, the critical interest at risk and unprotected was that of the United States and the Native corporations in receipt of the royalties to which they were entitled on gas sold from the Kenai leases. This interest was unprotected from the time of appellant's rollback of the royalty payments in April 1983 to the late payment of the additional royalty owed on the day of the hearing in June 1985. Had appellant timely pursued a temporary restraining order before the district court, the court could have considered a stay of the royalty payment order to the extent deemed appropriate by the court conditioned upon protection of the royalty interest through provision of a bond or escrow deposit. *See* 5 U.S.C. § 705 (1982); Fed. Rules Civ.

[7] The remedy of a judicial stay was apparently available to appellant from Dec. 6, 1983, when Marathon and the Department stipulated in the district court suit that Marathon need not further exhaust any available administrative remedies regarding the royalty valuation orders.

Proc. Rule 65. In this regard, we note that Rule 65(c) provides in pertinent part that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In the absence of evidence of a tender by Marathon of some type of acceptable security for the payment of the royalty obligation in support of its motion for preliminary injunction, we are unable to conclude that application of the civil penalty provisions of FOGRMA offends due process limitations. This follows from the availability of a stay pending administrative review under 30 CFR 243.2 upon the posting of an acceptable bond and the further availability of a stay after a final administrative decision pending judicial review under statutory authority such as that provided by 5 U.S.C. § 705 (1982), conditioned upon providing such security as the court may deem adequate. The availability of this relief means that a party need not be intimidated from pursuing its right to judicial review by the threat of a burdensome cumulative penalty.

The implementing regulation provides scant guidance regarding the amount of any penalty to be assessed: "The penalty amount shall be determined by MMS taking into account the severity of the violation and the person's history of noncompliance." 30 CFR 241.51(c). There is no indication in the record that any discretion was exercised in setting the proposed penalty amount at the statutory maximum in the September 29, 1984, civil penalty notice (Exh. 12). Indeed, at this stage of the process prior to a hearing, it may be difficult for MMS to ascertain many of the facts relevant to the amount of any penalty to be imposed.

[4] Appellant asserts that the provisions of section 109(c) of FOGRMA require the Department to make a rational determination of the penalty amount apart from its finding that the violation was willful. We agree that this conclusion is supported by the requirement that the Secretary shall state on the record the reasons for his finding as to the amount of the penalty and as to whether and to what extent the penalty should be remitted or reduced. 30 U.S.C. § 1719(i) (1982).

As a threshold matter, we must reject appellant's contention that the determination of the amount of the civil penalty is controlled by the Department's enforcement policy on civil penalties under FOGRMA approved April 1, 1986. Review of the terms of the policy make it clear that it pertains to civil penalties levied under 30 CFR 241.51(a) rather than the separate provisions for civil penalties for intentional violations set forth at 30 CFR 241.51(b). It is the latter regulation involving knowing and willful violations under section 109(c)(1) of FOGRMA which is at issue in this case.

Judicial precedents under other statutes authorizing cumulative civil penalties for violation of administrative orders offer significant guidance in exercising the discretion required in determining the amount of the civil penalty. In *United States* v. *Louisiana-Pacific Corp.*, 554 F. Supp. 504 (D. Ore. 1982), [8] a civil penalty action brought by the United States for violation of a Federal Trade Commission (FTC) divestiture order involving a potential civil penalty of $10,000 per day, the court recognized five factors in setting the penalty amount: the good or bad faith of the appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter similar behavior and vindicate the FTC and the integrity of its orders. 554 F. Supp. at 507. [9] These same factors have been utilized by other courts as well in assessing civil penalties. *See United States* v. *Phelps Dodge Industries, Inc.*, 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984).

Applying these factors to the context of the present appeal, we first examine whether Marathon's response to the June 1984 royalty payment order manifested good faith. In April 1983 after receipt of the letters explaining the net-back method of valuation to be used for LNG feedstock gas, appellant simultaneously filed suit to obtain a court determination of the amount of its royalty obligation and unilaterally rolled back its royalty valuation to a level approximately one-third of the valuation under the Phillips formula previously used. This was done with the knowledge that the valuation under the newly ordered net-back formula would be something in excess of $3 per Mcf, a valuation approximately five times that used after the rollback. Subsequently, when the July 1983 MMS royalty order directing use of the net-back method of valuation effective August 1 was received, no effort was made to comply with the order and appellant adhered to the rolled back valuation. The testimony reveals this was a decision reached by high level corporate officials which was based in part on the belief the issue was now within the jurisdiction of the court and in part over concern for the ability to recoup any royalty overpayment from CIRI. Although a protective administrative appeal was filed noting the pending litigation (Exh. 190), it does not appear that a stay of the effect of the order was requested.

Thereafter, upon receipt of the Assistant Secretary's royalty order of June 11, 1984, Marathon again refused to comply notwithstanding the admonition therein that the obligation to pay royalties determined by MMS to be due and owing is not suspended by an administrative or judicial appeal of the order. Settlement negotiations with Departmental officials broke down due in large part to the attitude of Marathon officials that compliance with the royalty valuation orders was excused pending an ultimate decision from the court. However

[8] *Rev'd in part and vacated in part on other grounds*, 754 F.2d 1445 (9th Cir. 1986).

[9] On appeal, the civil penalty assessment was vacated on the ground the FTC had improperly rejected summarily appellant's petition for modification of the order. 754 F.2d at 1445.

comforting this erroneous perception was, it was not until after the Department issued the civil penalty notice on September 29, 1984, and filed its counterclaim in the district court for cancellation of the subject leases that Marathon filed a motion for preliminary injunction in the court requesting a stay of the royalty orders. Further, there is no evidence that any bond or other security to protect the royalty interest holders for the value of the LNG feedstock gas removed from the leases and sold was ever filed, and the royalty order was never stayed.

We wish to make it clear that the filing of suit for judicial review of a final Departmental decision regarding royalty valuation does not constitute bad faith. However, the failure to comply with a royalty payment order in the absence of a stay on administrative appeal pursuant to the regulations at 30 CFR 243.2 or, on appeal from a final Departmental decision to the courts, in the absence of a court-ordered stay of the effect of the administrative decision pending judicial review, pursuant to 5 U.S.C. § 705 (1982), or other authority, may properly be construed as an absence of good faith. This conduct may be construed as bad faith where, as occurred in this case, the failure to comply is coupled with both a failure to obtain a stay of the administrative decision and a unilateral rollback of the royalty valuation to a substantially reduced level.

With respect to the injury to the public resulting from the violation, we must conclude that evidence of actual injury was not established by the record at the hearing. [10] Under section 111(a) of FOGRMA the Secretary is required to charge interest on payments not received on the date due. 30 U.S.C. § 1721(a) (1982); *see* 30 CFR 218.102. Specifically, section 111(a) provides that interest shall be charged on such payments at the rate applicable under section 6621 of the Internal Revenue Code of 1954. An explanation of the basis for charging interest at this rate is offered in the legislative history:

> This section established interest penalties for late payments in the cases where royalty payments are not received by the Secretary on the date that such payments are due and when the Secretary fails to make payment to a State or Indian tribe on the date required. The interest penalty so charged is at the rate applicable under section 6621 of the Internal Revenue code of 1954, a rate based in part but higher than the prime interest rate. Such interest penalties are deemed part of royalty payments. Imposition of such high penalties against those owing money to the United States is to remove the incentives such persons may have to hold the money owned and invest it rather than pay it on time to the MMS. Also, the high penalty required of the United States should be a strong incentive to the MMS to disburse moneys under the mineral leasing laws of 1920 promptly.

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[10] We note, however, that CIRI has asserted in its amicus curiae brief that 70 percent of the royalties owed to CIRI were subject to sharing with the other Native regional corporations and, in turn, with Native village corporations within each region. CIRI contends in its brief that the royalty "revenue stream may be critical to the survival of many of the ANCSA Native Corporations, and, thus, to the ultimate success of ANCSA."

H.R. Rep. No. 859, 97th Cong., 2d Sess. 36, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4268, 4290. Thus, as a result of the delay in payment, the public has been compensated by the payment of interest on the unpaid funds at a substantial rate higher than the prime rate of interest on borrowed funds. Hence, we cannot conclude that injury to the public has been established on the record in this case. For the same reason, we are unable to find that Marathon benefitted significantly from its delay in payment of the royalty obligation.

With respect to the question of the ability of Marathon to pay a penalty, we find the record to be inconclusive except for the evidence recognized by the Administrative Law Judge that the LNG gas project was substantially profitable.

An additional factor we find appropriate in determining the amount of the civil penalty to be assessed is the need to deter similar behavior and to uphold the authority of MMS and the integrity of its royalty payment orders. This objective is consistent with the purposes of Congress in enacting FOGRMA. Thus, section 2(b) of FOGRMA provides, in pertinent part, that:

> (b) It is the purpose of this Act–
>
> * * * * * * *
>
> (2) to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases on Federal lands * * *;
>
> (3) to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States * * *

30 U.S.C. § 1701(b)(2) (1982). Although Marathon was seeking judicial review of the royalty valuation orders issued by the Department, it not only failed to comply with those orders, but flaunted them by rolling back the royalty valuation to a value approximately one-third of that used prior to the orders. The absence of discernible damage to the public interest on the record in this case in view of the subsequent payment with interest does not negate the substantial risk of loss attendant upon the failure to pay royalty timely on the full value of oil and gas removed from the ground. Unforeseen circumstances, *e.g.*, bankruptcy, a not unheard of event in the oil and gas industry in recent years, threaten the public interest in recovery of full royalty value. In the absence of the tender of an acceptable bond in support of an application for a stay, either before the Department or the courts, there is no opportunity for either the Department or the courts to ensure the public interest is protected pending completion of administrative and/or judicial review. Allowing a payor to unilaterally determine the level of royalty payment pending final resolution of a royalty dispute as happened here is clearly unacceptable. Consequently, we find a substantial need to uphold the authority of MMS and the integrity of its orders, as well as to deter conduct such as that engaged in by Marathon in the present case.

Accordingly, we hold that the absence of apparent injury to the public interest coupled with the lack of any apparent benefit to Marathon from the failure to timely comply with the royalty payment orders are mitigating factors which tend to support a reduction in the amount of the civil penalty. On the other hand, the lack of good faith manifested by appellant militates in favor of a substantial penalty. Further, the need to uphold the authority of MMS to require timely payment of royalty on oil and gas production in accordance with its value determination, in the absence of approval of a stay, and the corresponding need to deter noncompliance tend to support a substantial penalty.

Balancing these factors, we find that the amount of the civil penalty in this case is properly assessed at 50 percent of the proposed amount (the statutory maximum) or the sum of $10,220,000.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed as to the finding of a knowing and willful failure to comply with the order; affirmed as to the finding of the applicability of the provisions of FOGRMA; and, affirmed as modified as to the amount of the civil penalty assessed.

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

[95 I.D. 293]

FRESA CONSTRUCTION CO. *v.* OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

106 IBLA 179 Decided: *December 20, 1988*

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying appellant's application for review of and temporary relief from a cessation order. CO No. 87-11-018-01.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under the Surface Mining

Control and Reclamation Act of 1977, bears the burden of affirmatively demonstrating entitlement to the exemption.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Coal Exploration Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State

OSMRE has jurisdiction to issue a cessation order without giving the state regulatory authority 10 days notice when a person is conducting surface mining operations under a notice of intent to prospect.

3. Surface Mining Control and Reclamation Act of 1977: Coal Exploration Permits: Generally

Coal may not be extracted for commercial sale under a notice of intent to prospect, unless the sale is to test for coal properties necessary for development of a mine, for which a surface mining permit application will later be submitted.

4. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

Because conducting surface mining operations without a surface mining permit is specifically defined at 30 CFR 843.11(a)(2) to constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm, OSMRE may issue a cessation order solely on the grounds that surface mining operations are being conducted under a notice of intent to prospect.

APPEARANCES: James N. Riley, Esq., and David J. Romano, Esq., Clarksburg, West Virginia, for Fresa Construction Co., Inc.; Wayne A. Babcock, Esq., U.S. Department of the Interior, Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Steve Barcley, Assistant Attorney General, Environment and Energy Division, for the West Virginia Department of Energy, intervenor.

OPINION BY ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF LAND APPEALS

Fresa Construction Co., Inc. (appellant), appeals from a June 1, 1987, decision issued by Administrative Law Judge Joseph E. McGuire, rejecting its application for review of and temporary relief from Cessation Order (CO) No. 87-11-018-01. The CO was issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on April 17, 1987, pursuant to the provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). [1] The West Virginia Department of Energy (WVDOE) has intervened in the appeal, opposing the issuance of the CO.

The facts in this matter were developed during an administrative hearing held by Judge McGuire on May 28, 1987, in Morgantown, West Virginia. At the hearing, Michael R. Fresa (Fresa), president and owner of appellant, testified that WVDOE issued a prospecting permit

[1] All further citations to the *United States Code* are to the 1982 edition.

to appellant in 1983 and a surface mining permit in 1984 covering a 37-acre tract of land. The area encompassed by this tract had previously been deep mined by Consolidation Coal Co., from whom appellant acquired the mineral rights. Beginning in 1984 and continuing through the time of the hearing, appellant conducted a surface mining operation on the 37-acre tract. It holds the mineral rights, however, to a much more extensive area.

On December 30, 1986, a representative of Jno. McCall (McCall), a coal broker located in Baltimore, Maryland, sent a telex message to appellant stating: "Confirming near-term requirement for unit train of 10 A, 2.5 S, 3,000 BTU for export to consumers in Belgium and Portugal. Phil Lehr from Jno. McCall Coal Export Corp" (Exh. C). [2] According to testimony at the hearing, the telex set forth a request for shipment of a unit train of coal, *i.e.*, 7,000 tons of coal, with 10 percent or less ash, 2.5 percent or less sulphur, and, after correcting an obvious error, 13,000 Btu.

On January 2, 1987, appellant filed with WVDOE a Notice of Intent to Prospect covering 1.3 acres of land adjacent to its 37-acre permitted site (Exh. 6). The notice indicated that approximately 7,000 tons of coal would be removed from the site "for a coal test order." Operations were scheduled to begin on January 17, 1987, with the area regraded by April 17, 1987. Because of the amount of coal appellant proposed to remove, it was required to describe why an amount in excess of 250 tons was necessary to assess the coal resources or make feasibility studies, and to state how the coal would be used. Appellant stated: "As further detailed on the attached letter, a market for this coal might be established, if a shipment of 7,000 tons can be mined and delivered quickly. It is for this reason that we need to prospect and produce more than the normal 250 ton limit" (Exh. G at item 13). The attached letter was the telex described above.

WVDOE approved the Notice of Intent to Prospect on January 21, 1987 (Exh. 6). A copy of appellant's approved Notice of Intent to Prospect was sent to OSMRE in the regular course of business. Because of an OSMRE study which indicated abuse of prospecting approvals, OSMRE had begun to closely monitor all prospecting approvals. In particular, OSMRE was concerned that applicants were not being required to describe how they would control run-off and sedimentation or show why they needed amounts of coal in excess of 250 tons for test purposes, and that prospecting approvals were in fact being used to circumvent the requirements of SMCRA (Tr. 60).

OSMRE inspector C. Donald Summers testified that after receiving a copy of appellant's prospecting approval, he inspected the site on March 24, 1987. No operations had begun. On April 14, 1987, he returned to the site and observed that coal was being removed, the

[2] All exhibits referred to in this decision are exhibits admitted into evidence at the hearing before Judge McGuire.

operation had created a 50 to 60-foot highwall, operations were being conducted within 300 feet of an estimated 33 homes and four other buildings and within 100 feet of a public road, and the existence of boreholes indicated blasting had occurred (Tr. 84, 89-91). [3] He testified that there were no drainage controls and spoil was being stored on the adjacent 37-acre permitted site (Tr. 90).

Summers attempted to determine whether the coal was being removed for a test burn as stated in the prospecting approval. The site supervisor indicated the coal would be sold to the P.H. Gladfelter Paper Co. (Tr. 97). [4] Summers contacted McCall, who had sent appellant the telex, and spoke to an unidentified person who, according to Summers, did not give a "straight answer" with regard to the intended use of the coal, except to say that McCall purchased coal or made contracts to purchase coal for buyers (Tr. 118). Summers also contacted Gladfelter, and was informed that it purchased coal through McCall and did not purchase coal for test burns (Tr. 97).

OSMRE officials determined that appellant should be issued a CO for mining without a valid surface mining permit. OSMRE contacted WVDOE, informed officials there of its position, and asked them if they would issue a CO. WVDOE apparently declined to issue a CO. [5] OSMRE then determined to issue its own CO. Summers, accompanied by another OSMRE official, served the CO on April 17, 1987.

The CO, citing section 22A-3-8 of the West Virginia Surface Mining and Reclamation Act, section 521(a)(2) of SMCRA (30 U.S.C. § 1271(a)(2)), 30 CFR 773.11(a), and 30 CFR 843.11(a)(2), provided: "The operator is conducting surface coal mining operations on a Notice of Intent to Prospect approval, without first obtaining a valid surface coal mining permit from the state regulatory authority. The area is adjacent to surface mining permit S-2-84 in the same coal seam. Coal is being sold commercially" (Exh. G). The CO required the operator to "[i]mmediately cease all surface coal mining operations. Reclaim all disturbed area by 8:00 a.m. April 30, 1987; or obtain a valid surface coal mining permit from the State Regulatory Authority by 8:00 AM May 17, 1987" (*id.*).

Appellant requested and was granted an informal minesite hearing, which was held on April 24, 1987. Appellant informed OSMRE that McCall had refused to accept delivery of the coal, which it had instead stockpiled at its nearby tipple. OSMRE amended the CO to delete the statement that the coal was being sold commercially, and to give appellant an extension of time to reclaim the land. No other relief was granted.

On May 18, 1987, appellant filed with the Hearings Division, Office of Hearings and Appeals, a Motion to Dismiss, Application for Review,

[3] Summers further indicated that an individual present at the site stated he was there to monitor blasting activities (Tr. 91).

[4] Other testimony showed that coal from the 37-acre permitted site had been sold to Gladfelter.

[5] OSMRE did not call as a witness its official who contacted WVDOE. Instead, testimony concerning the telephone call to WVDOE was presented through other witnesses.

and Motion for Temporary Relief from enforcement provisions of the CO. The administrative hearing discussed above was scheduled and held by Judge McGuire. Prior to taking evidence on the Motion for Temporary Relief and Application for Review, Judge McGuire denied appellant's Motion to Dismiss. At the conclusion of the hearing, Judge McGuire denied appellant's Motion for Temporary Relief. Appellant immediately sought temporary relief through the United States District Court for the Northern District of West Virginia. On June 19, 1987, the district court approved a consent order which essentially granted appellant temporary relief and permitted it to remove a block of 250-400 tons of coal, which constituted the only coal remaining on the 1.3-acre site (Exh. I).

In his June 1, 1987, decision, Judge McGuire identified the issue in the case as whether OSMRE properly issued CO No. 87-11-018-01. He concluded that OSMRE established a prima facie case that appellant violated 30 U.S.C. § 1271(a)(2) by having conducted surface coal mining operations without first obtaining a surface coal mining permit from WVDOE, and that appellant failed to carry the ultimate burden of persuasion of showing that the order was not properly issued. Judge McGuire determined that appellant, in responding to an order for coal in which time was of the essence, made a business decision to obtain the coal under a Notice of Intent to Prospect rather than pursuant to a surface mining permit, the processing time and expense of which were considerably greater.

The respective burdens placed on the parties in proceedings reviewing the issuance of a notice of violation or CO under SMCRA were set forth in *Race Fork Coal Corp.* v. *OSMRE*, 84 IBLA 383, 388-89, 92 I.D. 68, 71 (1985):

> In administrative review proceedings under the Act, this Department has held consistently that one who contests OSM[RE] jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based. *Sam Blankenship*, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983); *Jewell Smokeless Coal Corp.*, 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982); *Daniel Brothers Coal Co.*, 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980). OSM[RE] carries the initial burden of establishing a prima facie case as to the validity of the notice or order. 43 CFR 4.1171(a). OSM[RE] has established a prima facie case where evidence sufficient to establish essential facts will remain sufficient if uncontradicted. Sufficient evidence justifies but does not compel a finding in favor of the one presenting it. *Belva Coal Co.*, 3 IBSMA 83, 88 I.D. 448 (1981); *James Moore*, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979). [6] OSM[RE]'s initial burden is limited to a prima facie showing that the one named in the [notice of violation] or cessation order was "engaged in a surface coal mining operation and failed to meet Federal performance standards." *Rhonda Coal Co.*, 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Such a showing would establish an activity that falls within the definition of surface coal mining operations in 30 U.S.C. § 1291(28) [1982], which caused a violation of one or more of the regulations governing surface coal mining. Such a showing by OSM[RE] as to the validity of the notice or order under 43 CFR 4.1171(a) shifts to the applicant for review, under 43 CFR

[6] OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. The violation will be sustained on appeal when OSMRE's evidence is not rebutted. *Turner Brothers Inc.* v. *OSMRE*, 103 IBLA 10 (1988); *Mullins Coal Co.* v. *OSMRE*, 96 IBLA 333, 335 (1987).

4.1171(b), the burden of going forward and the ultimate burden of persuasion as to (1) whether he was conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether this activity is excepted from the coverage of the Act or regulations and therefore not subject to OSM[RE] jurisdiction.

Thus, whether appellant challenges either OSMRE jurisdiction on the basis of a claimed exemption, or the merits of OSMRE's case against it, OSMRE bears the burden of establishing a prima facie case and appellant bears the ultimate burden of persuasion.

Appellant and WVDOE initially raise two arguments against OSMRE's jurisdiction over appellant's 1.3-acre site. First, they contend that because the tract subject to the prospecting approval was only 1.3 acres, OSMRE had no enforcement authority based on a statutory 2-acre jurisdictional limitation set forth in section 528(2) of SMCRA, 30 U.S.C. § 1278(2). [7]

[1] Contrary to appellant's arguments, the 2-acre exemption has consistently been held to constitute an affirmative defense. Consequently, the exemption must be pleaded and proved by the person claiming it. *Cumberland Reclamation Co.*, 102 IBLA 100 (1988); *OSMRE* v. *C-Ann Coal Co.*, 94 IBLA 14 (1986); *S & S Coal Co.* v. *OSMRE*, 87 IBLA 350 (1985). Accordingly, appellant bears the burden of proving entitlement to the 2-acre exemption.

Section 528(2) previously provided that SMCRA would not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." Departmental regulations at 30 CFR 700.11(b) implemented the statutory exemption and provided that SMCRA applied to all surface mining and reclamation activities except "the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." *S & S Coal Co., supra.* As a general rule, surface coal mining operations shall be deemed "related" if they occur within 12 months of each other, are physically related, and are under common ownership or control. 30 CFR 700.11(b)(2). "Affected area" is defined in 30 CFR 701.5 as:

[A]ny land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes * * * any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; * * * any area covered by surface excavations, workings, * * * refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, * * *.

There is no dispute that the 37-acre permitted tract and the 1.3-acre site at issue here are "related operations" within the meaning of 30 CFR 700.11(b). Evidence was presented that the tracts were contiguous, mining was still ongoing on the 37-acre permitted tract (Tr. 44), spoil from the 1.3-acre site was stored on the 37-acre tract (Tr. 90, 140), and the same coal seam was being mined on both tracts (Tr. 94). The evidence presented by OSMRE was sufficient to establish a prima

[7] This 2-acre exemption was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

facie showing that appellant's operations on the 1.3-acre site actually affected more area than just that tract and that appellant was not entitled to a 2-acre exemption. Accordingly, the burden shifted to appellant to show that its operations were limited to the 1.3-acre tract covered by the prospecting approval. Appellant failed to present any evidence showing that only the 1.3-acre tract was affected. Instead, it argued that there was no proof that any area beyond the 2 acres it had bonded had been affected. [8] Because it offered no evidence on this issue, appellant failed to carry its burden of proving that the total affected area was less than 2 acres, and failed to show its entitlement to the 2-acre exemption.

WVDOE contends that any activities related to the 1.3-acre site taking place on the 37-acre site may not be considered in calculating the affected acreage because the 37-acre site is covered by a surface mining permit. The definition of "affected area" includes *any* adjacent lands, the use of which is incidental to surface coal mining and reclamation operations. 30 CFR 701.5. No exception is made for adjacent *permitted lands*. Under the construction of the 2-acre exemption WVDOE advances, surface mining operators would be free to mine innumerable 1.99-acre tracts of land adjacent to a permitted area and use the permitted area for ancillary activities. There is no basis for such an interpretation of the 2-acre exemption, and we accordingly reject this argument.

[2] Appellant and WVDOE next contend OSMRE lacks jurisdiction because it failed to give the State the 10-day notice (TDN) they argue was required by SMCRA and applicable regulations. Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1), sets out the requirement for a TDN:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. *The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action.* [Italics added.]

Section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2), further provides:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this

[8] Testimony indicated that the bonding costs were the same for a fraction of an acre as for an entire acre, and that appellant had, therefore, bonded 2 full acres.

chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

Departmental regulations provide that, with certain exceptions not applicable in this case, "[s]urface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." 30 CFR 843.11(a)(2).

If appellant was conducting surface mining operations without a valid surface mining permit, that fact would, by definition, constitute a condition or practice causing or reasonably expected to cause significant, imminent environmental harm to land, air, and water resources. Because OSMRE is required by statute to issue a CO immediately upon determining that a person is engaging in surface coal mining operations causing or reasonably expected to cause significant, imminent environmental harm to land, air, and water resources, it would not be required to issue a TDN to the State. 30 U.S.C. § 1271(a)(2); 30 CFR 843.11(a)(1). *Firchau Mining, Inc.* v. *OSMRE*, 101 IBLA 144, 148 (1988); *Mid-Mountain Mining, Inc.* v. *OSMRE*, 92 IBLA 4, 6-7 (1986); *S & S Coal Co., supra* at 253; *Virginia Citizens for Better Reclamation*, 82 IBLA 37, 44-45; 91 I.D. 247, 251-252 (1984). Because of our holding, *infra*, that appellant has failed to show it was not conducting surface coal mining operations without a valid surface mining permit, we hold that OSMRE was not required to issue a TDN to the State.

Concerning the merits of this case, as previously discussed, OSMRE bears the burden of establishing a prima facie case. 43 CFR 4.1171(a). Appellant bears the ultimate burden of persuasion. 43 CFR 4.1171(b); *Miami Springs Properties*, 2 IBSMA 399, 404, 87 I.D. 645, 647 (1980); *Burgess Mining & Construction Corp.*, 1 IBSMA 293, 298, 86 I.D. 656, 658 (1979); *James Moore*, 1 IBSMA 216, 223-24, 86 I.D. 369, 373 (1979). The decision as to whether appellant's operations on the 1.3-acre site, conducted pursuant to a prospecting approval, were in fact surface mining operations, ultimately turns on the question of whether the coal was mined for testing purposes.

Surface coal mining operations are clearly distinguished from coal exploration operations under SMCRA. Under section 701(28)(A) of SMCRA, 30 U.S.C. § 1291(28)(A), coal exploration activities subject to section 512 of SMCRA, 30 U.S.C. § 1262, are excluded from the definition of surface coal mining operations. Coal exploration is defined at 30 CFR 701.5:

Coal exploration means the field gathering of: (a) surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or (b) the gathering of environmental data to establish the conditions of an area

before beginning surface coal mining and reclamation operations under the requirements of this chapter.

[3] Section 512 of SMCRA, 30 U.S.C. § 1262, requires any person undertaking coal exploration operations to file a notice of intent to explore. The rights acquired under an approved notice of intent to explore are restricted. Specifically, no more than 250 tons of coal may be removed during exploratory operations except with written approval of the regulatory authority, granted after the submission of a statement of why the extraction of more than 250 tons is necessary for exploration purposes. Section 512(d) of SMCRA, 30 U.S.C. § 1262(d); 30 CFR 772.12(a). Also, a person operating under an exploratory authorization may not extract coal for commercial purposes without first obtaining a surface mining permit, except when the regulatory authority "makes a prior determination that the sale is to test for coal properties necessary for the development of surface coal mining and reclamation operations for which a permit application is to be submitted at a later time." 30 CFR 772.14.

The potential for abuse of the exploration provisions to circumvent the more stringent provisions of SMCRA was apparent to both Congress in considering passage of SMCRA and to the Department when it promulgated the regulations implementing SMCRA. In analyzing section 512 of SMCRA, the Committee on Interior and Insular Affairs stated:

> This section prescribes the procedures and standards to apply to coal exploration. No permit is required, but exploration is to be performed subject to regulations designed to provide notice to the regulatory authority and compliance with environmental standards set out for surface mine operations. In order to limit the size of such operations, no more than 250 tons can be produced under such an operation.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 173, *reprinted in* 1977 U.S. Code Cong. & Admin. News 593, 704.

The preamble to the final Departmental regulations explained why written approval to mine more than 250 tons of coal was required:

> Section 512(d) of the Act requires specific written approval of the regulatory authority to remove more than 250 tons. It is important in the regulatory process to know exactly why it is necessary to remove more than 250 tons of coal, in order to prevent mining under the guise of exploration. This is particularly pertinent because of the abbreviated permit approval requirements and the lack of a requirement for a performance bond associated with exploration operations.

48 FR 40621, 40627 (Sept. 8, 1983). With regard to 30 CFR 772.14, the regulation governing the commercial sale of coal mined under an exploration permit, OSMRE stated:

> The substance of the previous section [815.17] was unchanged in the proposed rule except to clarify that a "surface coal mining and reclamation operations" permit will be needed for the commercial sale of coal extracted during exploration operations and that no such permit is needed if, prior to exploration, the regulatory authority determines the sale is to test coal properties for development of a mining operation for which a permit is to be submitted at a later time.

Id. at 40630. Finally, in responding to public concerns over possible abuse of the exploration permit, OSMRE stated:

> One commenter was confused as to why coal would be sold if it was to be used for testing purposes. Users, the commenter asserted, generally do not pay for "test burns." The commenter said if the sample load is so large it is paid for, then a permit should be required anyway. The commenter feared the provision would be abused by operators who negotiate purchase agreements with buyers of coal providing in those agreements for testing of the coal in order to fit within the exception.
>
> OSM[RE] agrees that it is common for larger operators to provide test loads to users rather than to charge for such tests. However, this is not necessarily always the case and thus the language of final § 772.14 allows a regulatory authority to distinguish between those situations where coal is sold in interstate commerce as part of a surface coal mining and reclamation operation, and those situations where, although the coal is sold, the objective is testing of the coal as part of coal exploration. *OSM[RE] agrees that care should be taken so that this provision is not abused.* [Italics added.]

Id.

The record in this case clearly establishes that appellant removed the coal on the 1.3-acre site in response to the telex from McCall. As OSMRE argues, no requirement for a test burn is apparent on the face of that telex. OSMRE presented further testimony that upon inquiry McCall did not confirm that a test burn was required. Appellant's only evidence on this issue was Fresa's testimony that a test burn was required, and its argument that Summers may have spoken with a McCall employee unfamiliar with the sale.

Although Fresa testified he was also exploring the feasibility of opening a deep mine adjacent to the 37-acre permitted site, this reason was not listed on the notice of intent to prospect (Exh. 6), and Fresa neither gave any information indicating that removal of all of the coal on the 1.3-acre site was necessary for this purpose nor explained how tests conducted at this site could assist in a determination of mining possibilities in an area quite far removed from it, as evidenced by his own testimony. Because this alleged exploratory purpose was not part of the original notice of intent to prospect, it will not be considered in determining whether that notice showed the coal from the site was being removed for exploratory and/or test purposes.

OSMRE's evidence was sufficient to establish a prima facie case. Standing alone, Fresa's statement concerning McCall's requirement for a test burn is insufficient to overcome OSMRE's prima facie case. Therefore, appellant has failed to carry its burden of proving that it was not conducting surface mining operations without a valid surface mining permit. [9]

[4] Appellant and WVDOE both argue that issuance of a CO was improper without a specific finding that significant, imminent environmental harm would result from the operation. In this regard, they note that OSMRE did not charge appellant with any of the

[9] Appellant argues that it had a valid permit in the form of its prospecting approval. As was noted in the text, *supra*, SMCRA clearly distinguishes between coal prospecting and coal mining. The fact that appellant had been given permission to explore an area for possible future mining does not insulate it from the requirement that it obtain a valid mining permit before it actually begins mining. We decline to equate a prospecting approval with a surface mining permit.

alleged problems discovered at the site, but merely raised the issue of mining without a permit. [10]

The CO was issued pursuant to section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2), quoted *supra*. This section requires OSMRE to issue a CO when it determines that a condition or practice exists that is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 843.11(a)(2), conducting surface mining operations without a surface mining permit is defined as constituting a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. Therefore, OSMRE properly issued a CO pursuant to section 521(a)(2) of SMCRA when it determined that appellant was conducting surface mining operations because it was extracting coal for a commercial purpose without a surface mining permit or a proper determination that the sale was to test coal properties necessary to the development of surface coal mining and reclamation operations. *Firchau Mining, Inc., supra.* [11]

Finally, appellant contends it was denied a fair hearing because Judge McGuire was biased against it. There is no indication from the transcript, nor does appellant assert, that Judge McGuire denied it the opportunity to submit any evidence into the record. Instead, appellant argues that Judge McGuire took an adversarial stance in questioning its witnesses. [12] In view of the facts that appellant was not precluded from building a complete record, and that the Board has reviewed this matter de novo, we find that appellant has been afforded a fair hearing. [13]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

KATHRYN A. LYNN
Administrative Judge
Alternate Member

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[10] Much time was spent at the hearing discussing the fact that, in a similar case involving alleged surface mining under a prospecting approval which occurred 2½ weeks before the present CO was issued to appellant, the other coal company was cited with numerous specific violations in addition to the allegation of mining without a valid permit.

[11] Appellant argues essentially that WVDOE's determination that the coal was being removed for a test burn cannot be challenged by OSMRE. The Federal oversight role under SMCRA allows and requires OSMRE to challenge any state enforcement decision it believes is erroneous.

[12] Appellant also contends that Judge McGuire's dismissal of its subsequently filed appeal of the civil penalty assessed in connection with this matter demonstrates his bias. The civil penalty issue was considered in *Fresa Construction Co.* v. *OSMRE*, 101 IBLA 229 (1988), and is not part of this appeal. We decline to address this issue further in the context of the present appeal.

[13] WVDOE argues that Judge McGuire erred in relying upon a consent order in *Humphreys* v. *Faerber*, Civ. No. 86-P-134 (Monongalia County Cir. Ct. Apr. 21, 1987). The consent order, which requires WVDOE to obtain detailed information from persons seeking to extract more than 250 tons of coal pursuant to a prospecting approval, took effect subsequent to the issuance of the CO at issue here. Because we have reached our decision without reliance upon the *Humphreys* consent order, we need not determine whether Judge McGuire erred in considering it.

I CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

STATE OF ALASKA

106 IBLA 160 Decided: *December 20, 1988*

Consolidated appeals from Instruction Memorandum AK 86-212 (Apr. 25, 1986), and from the decision of the Alaska State Office, Bureau of Land Management, placing certain land in a pool of properties available for selection by Cook Inlet Region, Inc. AA-58369, F-532.

Dismissed in part; affirmed in part; vacated in part and remanded.

1. Administrative Procedure: Adjudication--Rules of Practice: Appeals: Dismissal

An instruction memorandum is merely a document for internal use by BLM employees and has no legal force or effect. It is not directed to outside parties and neither initiates or disposes of an individual case, so it is not a "decision" subject to appeal under 43 CFR 4.410.

2. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally--Alaska Native Claims Settlement Act: Native Land Selections: State Selected Lands

Under sec. I.C.(2)(b) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet area, the Secretary is authorized to place lands into a pool for selection by Cook Inlet Region, Inc., if the State of Alaska concurs. In sec. 606(d)(5) of the Alaska Railroad Transportation Act of 1982, Congress provided that the concurrence required of the State as to the inclusion of any property in the pool shall be deemed obtained unless the State advises the Secretary in writing that it requires the property for a public purpose. By providing that transfer to the pool would occur unless notice were given that the State requires the property "for a public purpose," Congress opened to inquiry the State's basis for objecting to the transfer. As a result, BLM may properly require the State to demonstrate that it requires an out-of-region parcel for a public purpose in order for the State to block inclusion of the parcel in the CIRI selection pool.

APPEARANCES: Elizabeth J. Barry, Esq., Assistant Attorney General, for the State of Alaska; Mark Rindner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; Dennis Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; and Robert Perkins, Fairbanks, Alaska, for amicus curiae Skyline Ridge Park Committee.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

These are consolidated appeals by the State of Alaska (the State) from actions taken by the Alaska State Office, Bureau of Land

Management (BLM), involving the availability of land for selection by Cook Inlet Region, Inc. (CIRI). The central issue in this appeal involves statutory construction, so that it is necessary to set out the history of the provision to be construed.

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1638 (1982), with the goal of providing a fair and just settlement of aboriginal land claims by Natives in Alaska. 43 U.S.C. § 1601(a) (1982). ANCSA established 12 regional Native corporations, including CIRI, which were given the right to select land and to share in revenues derived from the sale of minerals. However, in the Cook Inlet Region (which includes the Anchorage metropolitan area and a large portion of the Kenai Peninsula), existing Federal withdrawals, State land selections, and other previous non-Native settlements greatly limited CIRI's selection options. CIRI, finding its selection rights unfulfilled, instituted litigation.

An effort to settle this litigation resulted in an agreement called "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" (Terms and Conditions). A version of the Terms and Conditions document was submitted to the House Committee on Interior and Insular Affairs in December 1975 and was expressly ratified as a matter of Federal law by Congress in section 12(b) of the Act of January 2, 1976, P.L. 94-204, 89 Stat. 1151 (1976). *See Cook Inlet Region, Inc.*, 90 IBLA 135, 140, 92 I.D. 620, 622-23 (1985). [1]

Under paragraph I.C.(2)(a) of the Terms and Conditions, the Department, in conjunction with the General Services Administration (GSA), was to attempt to place certain categories of surplus Federal land located inside the Cook Inlet Region into a pool to facilitate CIRI's selection. The selection pool was to be comprised of lands within the following categories: (1) abandoned or unperfected public land entries; (2) Federal surplus property; (3) revoked Federal reserves; (4) canceled or revoked power site reserves (5) public lands created by the reduction of certain Federal installations; and (6) other lands as agreed by the parties.

Additionally, under paragraph I.C.(2)(b) of the Terms and Conditions, in some circumstances, land in the same categories located *outside* the Cook Inlet Region could also be placed in the pool: "With the concurrence of CIRI [and] the State * * * the Secretary may, in his discretion, contribute to [the CIRI selection] pool properties * * * from without the boundaries of the Cook Inlet Region."

On January 14, 1983, Congress enacted the Alaska Railroad Transfer Act of 1982 (ARTA), P.L. 97-468, 96 Stat. 2556 (1983), the primary purpose of which was to transfer the Alaska Railroad from Federal to

[1] The version of the Terms and Conditions that was ratified by P.L. 94-204 may be found in 1975 *U.S. Code Cong. & Admin. News* 2402-19. It has subsequently been amended several times. *See, e.g.*, sec. 3, P.L. 94-456, 90 Stat. 1935 (1976). The case record sent to the Board by BLM following receipt of the notice of appeal did not contain a copy of the Terms and Conditions. However, in response to a request from the Board, BLM supplied the version that resulted from the negotiations in conjunction with the consideration of the Alaska Railroad Transfer Act that is quoted below.

State ownership. Before enactment, CIRI and its villages had asserted competing claims to certain railroad lands which conflicted with the proposed transfer. As discussed more fully below, CIRI and the State negotiated amendments to the Terms and Conditions which resulted in extinguishing most of these CIRI claims. Congress, in section 606(d)(5) of ARTA, enacted the following provision concerning the State's concurrence right for out-of-region selections under paragraph I.C.(2)(b) of the Terms and Conditions:

> Section 12(b)(8) * * * is amended to read as follows:
>
> * * * * * * *
>
> (iii) The concurrence required of the State as to the inclusion of any property in the pool under subparagraph I(C)(2)(b) [of the Terms and Conditions] shall be deemed obtained unless the State advises the Secretary in writing, within 90 days of receipt of a formal notice from the Secretary that the Secretary is considering placing property in the selection pool, that the State, or a municipality of the State which includes all or part of the property in question requires the property for a public purpose of the State or the municipality. [2]

These appeals concern the interpretation of this provision.

[1] The State has appealed from BLM's Instruction Memorandum (IM) No. AK 86-212 (Apr. 15, 1986), which established BLM's internal procedures for adjudication of the State's public purpose assertions under section 12(b)(8) of the Act of January 2, 1976, as amended. The IM provides that BLM will give notice to the State that property is being considered for the out-of-region pool. If the State timely responds to such notice and asserts that a parcel is required for a public purpose, and CIRI also desires the lands, this assertion would not be considered to be conclusive, but would be subject to a "limited review" by BLM to determine whether the asserted requirement was "actual" and the asserted public purpose "identified." Thus, under the IM, a "bare allegation [by the State] that the land is required for a public purpose will be insufficient to automatically foreclose consideration of" placement in the CIRI selection pool. The IM sets forth four bases for "limiting or rejecting a State public purpose assertion." The State's appeal from the IM was docketed as IBLA 86-1222.

This appeal is not justiciable. Under 43 CFR 4.410(a) and (b), one must be a party who is adversely affected by a BLM *decision* to have a right to appeal to this Board. A BLM instruction memorandum is merely a document for internal use by BLM employees and has no binding legal force or effect. *The Joyce Foundation*, 102 IBLA 342, 345 (1988); *United States* v. *Kaycee Bentonite Corp.*, 64 IBLA 183, 214, 89 I.D. 262, 279 (1982). It is not directed to outside parties, and it neither initiates or disposes of an individual case, so it is not a

[2] The ARTA amendment, *i.e.*, sec. 606(d)(5) of P.L. 97-468, 96 Stat. 2569 (1983), was not the first provision enacted by Congress that amended sec. 12(b) of the Act of Jan. 2, 1976, *supra*. Sec. 12(b)(8) was enacted by Congress in 1980 in sec. 1435 of P.L. 96-487, 94 Stat. 2545-46 (1980). However, it is the language of sec. 12(b)(8)(iii), as ARTA amended it, which is at issue here. Similar language concerning the State's right to advise the Department that it "requires the property for a public purpose" also appears in sec. 12(b)(8)(i)(C) and (D) of the Act of Jan. 2, 1976, as amended. The current text of sec. 12 of this Act, including the ARTA amendments, is set out as a note to 43 U.S.C. § 1611 (1982).

"decision" subject to appeal under 43 CFR 4.410. Thus, the State's appeal from the IM must be dismissed.

However, even before the State filed its appeal from the IM, it had already received an adverse decision applying the provisions of the memorandum. That decision is subject to appeal.

Specifically, on April 16, 1986, BLM issued a decision placing 600 acres on Bender Mountain near Fairbanks in the pool of properties available for selection by CIRI, overruling the State's objection to such action. The area of the Bender Mountain parcel originally in dispute consisted of 810 acres located approximately 4 miles northwest of downtown Fairbanks. On October 22, 1985, the State was formally notified that the Secretary was considering placing the Bender Mountain property in the pool of properties available for selection by CIRI under the Terms and Conditions. [3] On January 17, 1986, the State notified BLM of its objection to the placement of any of the 810 acres comprising the Bender Mountain property into the selection pool because the State required the land for a public park. The State specified that "the entire property is required for a public park proposed by the Fairbanks North Star Borough," adding that the proposed park enjoyed widespread public support in the Fairbanks area, as demonstrated by documents attached to the State's objection. BLM provided CIRI 90 days in which to respond to the State's objection and to provide additional information.

In its April 16, 1986, decision, BLM denied the State's objection as to 600 acres of the 810 acre parcel, finding that the State had not demonstrated that it required those 600 acres for a public purpose. BLM granted the State's objection against placing 200 acres of the Bender Mountain parcel in that pool. [4] BLM's decision concluded that a "passive park" was consistent with BLM's "public purpose standards", *i.e.*, "the purpose must serve a State or municipal objective related to the promotion of the health, safety, general welfare, security, contentment, recreation, or enjoyment of all or some portion

[3] BLM's letter of Oct. 22, 1985, to the State is missing from the case file forwarded to us by BLM. Of course, BLM was required to include this document, as it must file the complete case file surrounding any appeal made to the Board, including all official correspondence received or sent by BLM. *See Mobil Oil Exploration & Producing Southeast, Inc.*, 90 IBLA 173, 177 (1986). The Oct. 22, 1985, letter provided notice to the State of the proposed inclusion of this land in the CIRI selection pool and started the protest period. As such, it is a critical document and should not have been omitted from the case file.

We find this omission troubling, because it appears from other documentation in the record that BLM adopted in this letter a different (and evidently contrary) position regarding the effect of the State's protest than that later taken in BLM's Apr. 16, 1986, decision. CIRI's letter of Oct. 28, 1985, to BLM states: "I have reviewed [BLM's] letter to [the State], dated October 22, 1985, and am disturbed by the apparent characterization of the objection rights of [the State]. Specifically, it appears that [BLM] may be granting to the State conclusive objection rights rather than the 'public purpose requirement' objection rights defined by Congress by Section 606(d)(5)(ii) [*sic*] of [ARTA]." Further, on Nov. 5, 1985, BLM wrote a letter to the State "to clarify the objection rights allowed the State," in which it set forth a policy similar to that later followed in the decision on appeal.

Failure to include the Oct. 25, 1985, letter in the case file in these circumstances may have been inadvertent, but it creates the unfortunate impression that BLM may have been attempting to obscure the fact that it altered its position on the point at issue in this appeal.

[4] The remaining 10 acres out of the 810-acre Bender Mountain parcel contain physical improvements and were reported as excess to GSA on Mar. 20, 1986. BLM withheld action on these 10 acres because it had not received a letter of concurrence from GSA.

of the public within the affected political subdivision" (Decision at 5). The decision recited the information in the record, including that provided by the State and by CIRI, concerning the uses of the parcel, and concluded:

> While the documentation submitted by the State does not support a requirement of the entire 810 acres for a park, it does demonstrate a requirement for a portion of the parcel, including the ridgetop and the south slope above the access road, as excerpted above. In accordance with the supporting documentation in the case file and the public purpose standards, the State's objection will stand as to the following described lands, which will not be placed in the selection pool of properties for Cook Inlet Region, Inc. * * * There was insufficient documentation to support the State's assertion that the remaining land on Bender Mountain is required for a public purpose. Therefore, pursuant to Sec. 12(b)(6) of the Act of January 2, 1976, 43 U.S.C. 1611, and Par. I.C.(2) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, the following described lands are hereby placed in the pool of properties and are available for selection by Cook Inlet Region, Inc., subject to valid existing rights.

(Decision at 6).

The State and CIRI both filed notices of appeal from this decision which were docketed as IBLA 86-1229. By order dated September 16, 1986, pursuant to a stipulation filed by BLM, CIRI, and the State, the Board dismissed the appeal of the State except for 2.5 acres of the 600 acres that had been placed in the pool. In addition, we dismissed CIRI's appeal and granted the Skyline Ridge Park Committee status as *amicus curiae*. [5] Thus, only 2.5 acres remain in dispute.

[2] The issue in this appeal is whether BLM had authority to overrule the State's objection under the amended statutory provision quoted above. To assist our analysis of this provision, it is helpful to isolate its operative language: "The concurrence required of the State [under sec. I.C.(2)(b) of the Terms and Conditions] * * * shall be deemed obtained unless the State advises the Secretary * * * that the State * * * requires the property for a public purpose."

The parties concur that, prior to the ARTA amendments, the State held an "absolute" or "unqualified" veto over CIRI's ability to obtain out-of-region surplus properties under section I.C.(2)(b) of the Terms and Conditions (State's Reasons at 4; BLM Answer at 7; CIRI Answer at 6, 10). [6]

They also concur that, as a result of "lengthy negotiations" between CIRI, the State, and the Department prior to the ARTA amendments, the State agreed to refine the nature of its veto, in exchange for CIRI's giving up its claims to Alaska Railroad lands.

The State asserts that the effect of the ARTA amendments was limited to changing the meaning of silence by the State from a veto to concurrence. But, it maintains, the amendment "did not alter the fact

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[5] Perkins has filed information supporting his contention that the entire 810-acre Bender Mountain parcel was in fact "required for a public purpose." To the extent that the matter has been settled as to all but 2.5 acres of this parcel, Perkins' comments are no longer relevant. Insofar as Perkins' comments relate to the 2.5 acres that remain in dispute, BLM should address them on remand.

[6] This view is apparently based on the parties' reading of the pre-ARTA Terms and Conditions. The parties have stated that this absolute veto power under sec. 12(b)(8)(i)(C) would remain in effect until July 15, 1987, at the latest, after which time the State's objection must be based on a public purpose.

that the state has a veto" and "did not give CIRI or BLM any right to second-guess the wisdom of the state's decision that property is required for a state or municipal public purpose" (Statement of Reasons at 5). Thus, it maintains that the language at hand provides that, if the State submits a written objection within 90 days setting forth a public purpose, BLM has no authority to require the State to demonstrate its public purpose needs to BLM's satisfaction (Statement of Reasons at 13).

CIRI and BLM assert that the ARTA amendments changed the State's absolute veto to a conditional veto whereby the State could only block placement of properties in the surplus property pool if the State required the land for a *demonstrable* public purpose. BLM's position is fully set out in IM No. AK 86-212 (Apr. 15, 1986):

> If * * * the State responds that a parcel is required for a public purpose, and the lands are still desired by CIRI, BLM is obliged to subject the State's assertion to a limited review to satisfy the Secretary's statutory responsibility to both parties. The overall objective of the review will be to assess the sufficiency of the public purpose assertion in light of the information of record and any additional evidence provided by the State and CIRI.

On appeal, BLM notes that, "[u]nder the State's view, its filing [of an objection] could be completely whimsical and even false, but as long as it was filed within ninety days CIRI's interests would be conclusively terminated" (BLM Answer at 8). BLM argues that this interpretation fails to give meaning and effect to section 606(b)(5) of ARTA, which amendment (it asserts) redefined the terms of the State's objection right under section I.C.(2)(b) of the Terms and Conditions.

CIRI supports the policy adopted by BLM in this IM, arguing that it will assure that

> the dual legislative objectives of fulfilling CIRI's land entitlement and protecting the State's legitimate public needs will be accomplished. If, as objectively determined by BLM, the State actually requires the land for a public purpose, then the State can properly veto any selection by CIRI. If the State does not actually require the land for a legitimate public purpose or if, as happened in this case, the State objectively does not need all the land at issue for its asserted purpose, then CIRI's land entitlement will be fulfilled. The legitimate interests of both CIRI and the State are fully protected. Moreover, because the claims of both parties are subject to review by BLM, amicable settlement of conflicting claims is encouraged.

(CIRI Answer at 12). CIRI states that the "required for a public purpose" standard imposed by the ARTA amendments must have definite boundaries of substance and procedure which serve the underlying purpose of ARTA. *Id.* at 14.

Both sides to this dispute point to the legislative history in support of their differing interpretations. However, the legislative history refers to the State's protest right to object in many situations, of which only one is at issue in this case. Further, the history is subject to conflicting interpretation. For example, CIRI notes that Senate Report

97-478, June 22, 1982, [7] refers to the State being able to block placement of lands in the pool only where it needs the lands for a "demonstrable" public purpose. However, the word "demonstrable" does not appear in the language of the Act. Opposite conclusions may be drawn. On the one hand, the fact that the parties used the term during negotiations may reflect that they intended the State to have to demonstrate its public purpose need in order for its objection to be honored. On the other hand, as the State maintains, the fact that the word is not in the final amendment suggests that the parties and Congress intended that no obligation to demonstrate need be included.

By the same token, the State notes that the word "veto" was used by the parties to describe the State's objection rights throughout the negotiations leading up to the ARTA amendment, emphasizing that this word suggests that it enjoyed a right of "authoritative prohibition." Although the word "veto" does appear in the legislative history, it does not appear in the final amendment as passed in 1983. As above, this fact cuts both ways. It may show that the parties intended the State to retain an authoritative right to prohibit placement of lands in the selection pool, but the fact that the term is not in the final amendment suggests that the final agreement, as ratified by Congress, was not intended to include such prohibition. Further, as BLM points out, references to the State's "veto" right may be read as entailing nothing more than a recognition of the State's ability to keep land reasonably required for a public purpose out of the selection pool.

The only language directly explaining the effect of the ARTA amendments on section I.C.(2)(b) of the Terms and Conditions appears in a Senate Report set out at 128 Cong. Rec. 33586 (Dec. 23, 1982):

> Sec. 12(b)(8)(iii). Sec. I(C)(2)(b) of the "Terms and Conditions" authorizes the Secretary to place lands into the in-region pool from outside the region which are in the same categories as lands listed at I(C)(2)(a) (e.g. abandoned or unperfected public land entries, surplus property, revoked Federal reserves, cancelled or revoked power sites, ANCSA 3(e) lands) if the State concurs. Under this amendment *the State will not withhold its concurrence* unless the State or one of its municipalities needs the land for a public purpose. [Italics supplied.]

The State argues that the ARTA amendments, in effect, refer to its right of approval as a "required concurrence," and it also points to the preceding language from the legislative history as recognizing that the State may "withhold its concurrence." It concludes from this that the State's concurrence is a "necessary prerequisite," and argues that, since the State can still withhold such concurrence, the State retains "a conclusive right of objection to prevent property from being placed in the pool" (Statement of Reasons at 7-8).

There is no dispute that the State can withhold its concurrence. The issue is whether failure to grant concurrence may be disregarded where the State does not objectively need the land for a public purpose,

[7] Although the State, BLM, and CIRI refer to this report, they have neither cited us to a published version nor enclosed a copy of it.

or, in other words, whether the State may block land transfer to CIRI by arbitrarily withholding its concurrence. Use of the mandatory words "will not withhold" in the legislative history set out above suggests that the amendment was intended to provide that concurrence could *not* arbitrarily be withheld, but could be withheld only if it (or one of its municipalities) actually needs the land for a public purpose.

The State and BLM both point to the discussion of the amendment of section 12(b)(8)(i)(C) in the legislative history of ARTA. 128 Cong. Rec. 33585 (Dec. 23, 1982). The amendment of this section affects section I.C.(2)(a) and (c) of the Terms and Conditions; it is thus not directly involved in this dispute, which concerns only section I.C.(2)(b) thereof. However, amended section 12(b)(8)(i)(C) and 12(b)(8)(iii) contain identical language concerning the State's opportunity to advise the Department that the State or a municipality of the State "requires the property for a public purpose." Thus, study of the legislative history of the amendment of section 12(b)(8)(i)(C) is illuminating.

The discussion of the amendment of section 12(b)(8)(i)(C) in the legislative history suggests that the ARTA amendments were intended to change the State's right to object from an absolute veto to a nonabsolute "public purpose" veto. That discussion states:

> Section 12(b)(8)(i)(C). Under this provision the State of Alaska may prevent the Secretary from making land available to CIRI from the in-region pool if the State or a municipality requires the land for a public purpose. The State's "public purpose" veto takes [effect] on military land on January 1, 1985 and on all other land when the Secretary's obligation under I(C)(2)(a) of the "Terms and Conditions" is fulfilled or on July 16, 1987, whichever occurs first. *Until the State's public purpose veto takes effect, the State retains the authority it has under existing law to prevent the Secretary from making land available for selection by CIRI under I(C)(2)(a)(vi) and (c) of the Terms and Conditions.*
>
> Under IC(2)(a)(vi) of the "Terms and Conditions", the Secretary may identify "other Federal lands" for CIRI's in-region pool only with the State and CIRI's concurrence. *The State's concurrence will be required until the State's public purpose veto takes effect.*" [Italics added.]

I.C.(2)(a)(vi) of the Terms and Conditions, like I.C.(2)(b), speaks in terms of the State's agreement or concurrence with an action of the Secretary.

The parties concur that, before the ARTA amendments, the State enjoyed an absolute veto power over CIRI selections under the Terms and Conditions. The legislative history of this provision clearly distinguishes between this pre-ARTA absolute "authority * * * to prevent the Secretary from making land available for selection by CIRI" and the new, post-ARTA "public purpose" veto. If, as the State maintains, it was intended that the State's authority to object after ARTA would remain absolute and insulated from any independent inquiry by BLM, there would have been no distinction to draw between before and after the public purpose veto took effect, and there would

have been no need to take action to amend the veto power. We are unwilling to interpret action of Congress as a nullity: some purpose must be imputed to the decision to amend.

We deem that the implication of this distinction is that the ARTA amendments were intended to restrict the State's previously unrestrained veto power to circumstances where the State in fact required the land for a public purpose. Otherwise, there would have been no need to amend this authority.

Turning to the language of the controlling statute itself, under section 12(b)(8)(iii) of the Act of January 2, 1976, *as amended* by ARTA, property shall be placed in the CIRI pool as provided by section I.C.(2)(b) of the Terms and Conditions, unless a specific condition occurs, that is, unless notice is given that the "State requires the property for a public purpose." The State would have us interpret this provision as though the operative conditional language were merely that "the State requires the property." If Congress had intended the State to retain an absolute veto power without needing the land for a public purpose, it could easily have done so simply by providing "the State desires the property." It did not do so. Instead, it provided that the State give notice that it "requires the property *for a public purpose*" (italics supplied). We hold that, by so doing, Congress opened to inquiry the State's basis for objecting to the transfer. Accordingly, we affirm BLM's decision insofar as it holds that the ARTA amendments require the State to demonstrate to the Department that it requires an out-of-region parcel for a public purpose in order to block inclusion of the parcel in the CIRI selection pool.

Section 12(b) of the Act of January 2, 1976, as amended, expressly delegates to the Secretary of the Interior the duty to make conveyances to CIRI "in accordance with the specific terms, conditions, procedures, covenants, reservations, and other restrictions set forth in the * * * Terms and Conditions," as amended elsewhere by ARTA. 43 U.S.C. § 1611 (note) (1982). This authority has been redelegated to the Bureau of Land Management. Having determined that section I.C.(2)(b) of the Terms and Conditions provides that the State must demonstrate to the Department an actual public purpose need for an out-of-region parcel in order to block its inclusion in the CIRI selection pool, it follows that BLM must be able to review the assertion of public purpose need in order to ensure that the conveyances are being made in accordance with the terms set forth in the Terms and Conditions, as dictated by Congress. Accordingly, we also affirm BLM's decision insofar as it holds that the State's assertion of public purpose need is subject to review by BLM to assess the sufficiency of the public purpose assertion in light of the information of record and any additional evidence provided.

We disagree with the State's assertion that BLM is not competent to make this assessment. The Department has considered Recreation and Public Purpose Act applications under 43 U.S.C. § 869 (1982) since 1927. There will doubtless be areas of disagreement between the State

and CIRI on such questions as the limits of the area whose residents would actually be served by a public purpose. But we are confident that BLM is fully capable of resolving such land-use questions on behalf of the Department. If either the State or CIRI disagrees with a BLM decision, it may seek administrative review.

Although we affirm BLM's authority to review the State's assertions of public purpose, we cannot affirm its decision to place the 2.5 acres that remain in dispute into the pool. The decision simply concludes that the State did not submit sufficient documentation to support the assertion that it was needed for a public purpose. That conclusion indicates neither what further documentation might be adequate nor which, if any, of the four reasons offered in the decision and the IM as "sufficient cause for limiting or rejecting a State public purpose assertion" serves as the basis for the conclusion and why it does so. [8] Accordingly, it is necessary to vacate BLM's decision insofar as it places this parcel into the CIRI selection pool and remand the case to BLM for adjudication of the merits of the State's assertion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the State's appeal from IM No. AK 86-212 (Apr. 15, 1986) docketed as IBLA 86-1222 is dismissed; BLM's decision of April 16, 1986, is affirmed in part, vacated in part, and remanded for further consideration, as discussed above.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

WILL A. IRWIN
Administrative Judge

[8] BLM's IM No. AK 86-212 states as follows:

"Any of the following shall be a sufficient cause for limiting or rejecting a State public purpose assertion: 1. The lands that the State alleges are required for public purpose are unavailable for conveyance to the State or a municipality of the State under existing Federal or State authority. 2. The State fails to identify the required public purpose upon which the assertion is based. 3. Evaluation of the record, as supplemented by the State and CIRI, indicates that the public purpose can be reasonably accomplished through some other means, or through acquisition of less than the entire area. 4. The primary objective of the assertion is to benefit private and/or proprietary interests, either through promotion of material gain or extension of exclusive license or privilege (for example, avoidance of future taxes, or leasing land for commercial development)."

We note that, in view of the absence of an adequate factual basis in the record concerning the 2.5 acres still in dispute, we do not reach the question of whether these specific standards are proper.

UNITED STATES OF AMERICA *v.* VERNARD E. JONES; COOK INLET REGION, INC., NONDALTON NATIVE CORP., NONDALTON CITY COUNCIL, NONDALTON VILLAGE COUNCIL, (INTERVENORS)

106 IBLA 230 Decided: *December 29,1988*

Appeal from a decision of an Administrative Law Judge holding homesite claim AA-85 invalid.

Reversed and remanded.

1. Administrative Procedure: Generally--Appeals: Generally--Board of Land Appeals--Public Lands: Jurisdiction Over--Res Judicata--Rules of Practice: Generally--Secretary of the Interior--Stare Decisis

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of anagency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

2. Act of June 8, 1906

The Antiquities Act is not self-executing and does not withdraw land other than by a formal determination issued by Presidential proclamation affecting a specific parcel of land.

3. Act of June 8, 1906

A person who makes an "appropriation" of land by complying with the public land laws does not, by this action alone, "appropriate" under 16 U.S.C. § 433 (1982), objects of antiquity which may exist on that land.

4. National Historic Preservation Act: Generally

The NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to Federal undertakings which may adversely affect such resources. Whatever procedures the NHPA may require BLM to follow in reviewing a homesite application, the fact they must be undertaken neither invalidates the application nor necessitates its rejection.

5. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally--Conveyances: Generally--Patents to Public Lands: Generally

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

6. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Indians: Alaska Natives: Generally--Conveyances: Generally--Patents to Public Lands: Generally

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to

permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed, and gives the patentee the protection of a judicial forum.

7. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally

A protest of the acceptance of a notice of location of a homesite which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act, 43 U.S.C. § 1165 (1982), could apply and, correspondingly, the protest could not be a "protest against the validity of such entry" so as to preclude application of the Act.

8. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally

A field investigation report prepared by BLM is not a protest.

9. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally--Conveyances: Generally--Patents to Public Lands: Generally

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

10. Alaska: Alaska Native Claims Settlement Act--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims

With the exception of the rights specifically granted or retained by that Act, Sec. 4 of ANCSA, 43 U.S.C. § 1603 (1982), extinguished all forms of aboriginal title however characterized or described. Its three subsections apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

11. Alaska: Alaska Native Claims Settlement Act--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on aboriginal use and occupancy but property rights created by Congress.

12. Alaska: Alaska Native Claims Settlement Act--Alaska: Homesites--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

Subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that homesite location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homesite was located, and thus is barred.

13. Alaska: Land Grants and Selections--Alaska: Possessory Rights

Although the occupancy provisions of the Alaska Organic Acts (Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26 and Act of June 6, 1900, ch. 786, § 27, 31 Stat. 330) protected Native and missionary station occupation of lands as of the dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants.

14. Alaska: Possessory Rights

Cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy, or claim to the land terminates all possessory interests protected under the Alaska Organic Acts and restores the land to its original status as vacant and unappropriated land, regardless of subsequent allegations that the former occupants never intended to permanently abandon use and occupancy of the land. Unless evidence of continued use and occupancy can be shown, prior use and occupancy does not serve as a bar to the initiation of rights in the lands by others.

15. Alaska: Possessory Rights--Notice: Generally--Settlements On Public Lands

The presence of deteriorated partial remains of a church and unattended graves are not by themselves sufficient evidence to establish use and occupancy which is notorious, exclusive, and continuous, and of such nature as to put others on notice that another continues to use and occupy the land.

APPEARANCES: Thomas E. Meacham, Esq., Anchorage, Alaska, for appellant; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Russell L. Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; James Vollintine, Esq., Anchorage, Alaska, for Nondalton Native Corp., Nondalton City Council, and Nondalton Village Council.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Vernard Jones has appealed a September 3, 1986, decision by Administrative Law Judge Michael L. Morehouse which held appellant's homesite claim (AA-85) invalid because the land is occupied and claimed by Natives of Alaska. The decision was rendered after an evidentiary hearing held in Iliamna, Alaska, on August 22, 1976. A previous decision on other issues relating to the homesite claim was issued by the Assistant Solicitor on June 30, 1969. *Vernard E. Jones*, 76 I.D. 133 (1969) (hereinafter *Jones*).

This case and appellant's homesite claim have a long history. The numerous and sometimes complex legal issues were argued in a series of posthearing briefs filed by appellant, the Bureau of Land Management (BLM), and intervenor Cook Inlet Region, Inc. (CIRI). Additional issues were raised in joint briefs filed by intervenors, Nondalton Native Corp., Nondalton City Council, and Nondalton Village Council (Nondalton).

The facts necessary to understand the controversy are not complex but concern sensitive matters, and at times the briefs have reflected the emotions of the parties. Since the hearing in 1976, the parties have amplified the record with additional factual evidence in support of their legal arguments. The facts and issues are best understood in the context of the events leading to the present appeal.

I

On July 22, 1966, Vernard E. Jones filed a "Notice of Location of Settlement or Occupancy Claim" form with BLM's Anchorage District Office. The notice stated that on July 17, 1966, Jones had begun to settle or occupy a 5-acre parcel of land on the north shore of Lake Clark immediately to the east of the mouth of the Kijik River. The notice was filed pursuant to the Alaska Homesite Act, which provides:

> [A]ny citizen of the United States, after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form, without any showing as to his employment or business, upon payment of $2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior * * *.

Act of May 26, 1934, ch. 357, 48 Stat. 809-10, *repealed by* Federal Land Policy Management Act of 1976, P.L. 94-579, § 703(a), 90 Stat. 2743, 2789-90.

BLM sent Jones a form acknowledgement dated September 20, 1966, and assigned serial number AA-85 to the claim. One paragraph of the form stated: "Our records show that the lands are subject to settlement or occupancy. Your notice of location is therefore recognized as of the date filed." Shortly thereafter, Joseph McGill and Grant H. Pearson, members of the Alaska State Legislature, sent a letter concerning Jones' homesite to the Director of the Division of Lands, State of Alaska, stating, in part:

> The location where his homestead is staked in [sic] on the old Russian Church that was built in 1896. The old Indian graveyard is located near this church and is also on the area staked.
>
> It is very important that these Historical remains be protected and we highly recommend that this homestead be disallowed.

Jones, supra at 134; Exh. 42 at 45.

The letter was referred to BLM, and by notice dated February 6, 1968, BLM vacated its acknowledgement of Jones' homesite and declared his location notice unacceptable. BLM's notice stated that a protest against settlement of the land had been filed and a field investigation had found the homesite to be "within the old Kijik Native Village which contains the ruins of an old Russian Orthodox church, archaeological deposits, and between two and three hundred Native graves." BLM concluded that under the Antiquities Act of 1906 (ch. 3060, 34 Stat. 225, codified at 16 U.S.C. §§ 431-433 (1982)), "the antiquities located on the old Kijik Native Village at Lake Clark are the property of the United States" and could "only be removed or disposed of" in accordance with Departmental regulations promulgated under the Act. In addition, BLM noted that Public Land Order No. (PLO) 2171 (25 FR 7533 (Aug. 10, 1960)) had withdrawn and reserved "public lands customarily used by Indians, Eskimos, and Aleuts as burial grounds for their dead."

Jones appealed BLM's decision to BLM's Office of Appeals and Hearings. [1] By decision dated March 13, 1968, the Office of Appeals and Hearings found BLM's determination that "the homesites are incompatible with the 1906 law is correct." [2] Jones then appealed to the Assistant Solicitor-Public Lands. By decision dated June 30, 1969, Ernest F. Hom, Assistant Solicitor, Land Appeals, issued the *Jones* decision addressing four matters relevant to the present appeal.

First, the decision noted that the parties "appear to have viewed appellant's notice of location as the equivalent of an application for land" which BLM could reject upon determining that the land "should not be disposed of in the manner contemplated in the filing of the notice." *Jones, supra* at 136. The opinion pointed out that, in Alaska, a notice of location is not an application, and a determination of suitability is not a prerequisite to settlement.

> If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights in the land which will ultimately entitle him to receive patent to the land. * * *
>
> * * * The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title. [Citations omitted.]

Id. at 136-37. The Assistant Solicitor concluded that acceptance of appellant's notice of location "did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land." *Id.* at 137.

The *Jones* decision next addressed "the premises for the Bureau's determination that the land was closed to settlement." *Id.* BLM's reliance on PLO 2171 was rejected because "[t]he record clearly indicates that no plat of survey has been filed which delineates any native cemetery on the land in question." *Id.* at 138. By its terms, the PLO was effective immediately for Native cemeteries which had been surveyed and for others "upon the filing * * * of an accepted plat of survey designating an area as a cemetery, and the notation thereon of the character of such cemetery as a Native cemetery." 25 FR 7533 (Aug. 10, 1960).

The decision then addressed the Antiquities Act. It noted that section 2 (16 U.S.C. § 431 (1982)) "speaks of a reservation of lands but it provides for accomplishing this by a Presidential proclamation designating the reserved land as a national monument." *Jones, supra* at 139. Addressing the other sections of the Act (16 U.S.C. §§ 432-433 (1982)), the Assistant Solicitor found that "nothing in the express

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[1] At the time BLM maintained an Office of Appeals and Hearings. The Office of Hearings and Appeals, and its component, the Interior Board of Land Appeals, were created in 1970 by order of the Secretary of the Interior. See 35 FR 10012 (June 18, 1970), 35 FR 12081 (July 28, 1970).

[2] Jones was joined in the appeal by Hollis E. Justis who had filed a homesite selection next to Jones'. *See Hollis E. Justis*, 21 IBLA 63 (1975). A description of the Justis appeal is found in *Jones, supra*.

language of those sections has anything to do with the reservation of lands." *Id.* Consequently, it was determined that: "As the record does not show that the land in question has been withdrawn as an historic site or that it was withdrawn for any other purpose at the time of appellant's settlement, we cannot conclude that it was proper to refuse to accept appellant's notice of location." *Id.* at 140.

The *Jones* decision noted one additional matter which may have anticipated the current proceedings: "Inasmuch as the land embraced in appellant's homesite claim apparently was included in the site of Kijik Village, it may be that there are vested rights in the former villagers or their descendants which would preclude the obtaining of any rights through settlement on the land in 1966." *Id.* The opinion also noted that, with a limited exception, all public lands in Alaska had been withdrawn from all appropriation pending action by Congress to resolve the rights of Native Aleuts, Eskimos, and Indians. PLO 4582, 34 FR 1025 (Jan. 23, 1969). Pointing out that the withdrawal did not preclude recognizing Jones' homesite claim, the decision stated:

> [S]hould it be determined that appellant's settlement was preceded by the establishment of rights in others, appellant's homesite location would necessarily have to be declared null and void. If, on the other hand, the land is found to have been vacant, unappropriated and unreserved on July 17, 1966, appellant is entitled to credit for his acts of occupancy and use after that date.

Jones, supra at 140. The *Jones* decision reversed BLM and the case was remanded "for action consistent with this decision." *Id.*

The *Jones* decision was issued June 30, 1969. On July 17, 1969, Jones filed a request for reinstatement of his homesite selection. On October 31, 1969, he filed an application to purchase the land. There is no indication that BLM acted on his homesite application until February 3, 1976, when it filed a complaint initiating the contest proceeding which is the subject of this appeal.

The contest complaint listed three charges [3] based on the Homesite Act and 43 CFR 2563.2-1(e)(4), which requires a homesite applicant to show:

> That no portion of the tract applied for is occupied or reserved for any purpose by the United States, or occupied or claimed by any native of Alaska, or occupied as a townsite, or missionary station, or reserved from sale, and that the tract does not include

[3] The charges were:

"(a) Section 10 of the act of May 14, 1898 (30 Stat. 413) and the act of March 3, 1927 (44 Stat. 1364), as amended to date, (43 U.S.C. section 687(a)), and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that no portion of the land claimed may be occupied or reserved for any purpose by the United States or occupied or claimed by Natives of Alaska. Contestee has attempted to claim land claimed by Natives as burial grounds.

"(b) Section 10 of the act of May 14, 1898, as amended, *supra*, and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that the land must be unoccupied, unimproved, and unappropriated by any person claiming the same other than the applicant. Contestee has attempted to appropriate lands which are not unimproved and unappropriated by any other person.

"(c) Section 10 of the act of May 14, 1898, as amended, *supra*, and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that no portion of the land claimed may be occupied or reserved for a missionary station. The St. Nicholas Russian Orthodox Church of Nondalton claims the church building and the burial grounds on the claim."

improvements made by or in the possession of any other person, association, or corporation.

Neither the charges nor the case presented at the hearing were directed toward establishing that Alaska Natives or other persons were living on the land when Jones filed his notice. Rather, the evidence presented at the hearing and documents subsequently admitted into the record pertain to the nature and extent of the previously existing Kijik village, the remains of the Russian Orthodox Church and associated burial area, and the alleged continuity of Native claims to the land based upon these facts. The contest hearing was held before Administrative Law Judge Dean F. Ratzman on August 22, 1976. Completion of posthearing briefing was delayed by a number of extensions granted to facilitate negotiations among the parties.

Following passage of the Alaska Native Claims Settlement Act of 1971 (ANCSA), P.L. 92-203, 85 Stat. 688, codified at 43 U.S.C. §§ 1603-1627 (1982), *as amended*, CIRI filed a selection application pursuant to section 14(h)(1), 43 U.S.C. § 1613(h)(1) (1982). The lands described in the application included Jones' homesite. By decision dated October 22, 1981, BLM held that the land described in Jones' homesite application was not available for selection. By order dated December 28, 1981, the contest proceedings were suspended pending CIRI's appeal of BLM's October 22, 1981, decision to this Board. On appeal BLM conceded error and the Board set aside the BLM decision. *Cook Inlet Region, Inc.*, 77 IBLA 383, 384 n.1, 90 I.D. 543, 544 n.1 (1983).

Following issuance of the *Cook Inlet* decision, briefing resumed and, after further extensions and submittal of additional documents, the record was closed by order dated February 25, 1985. In the interim between the hearing and the completion of the record, Judge Ratzman retired and the case was assigned to Administrative Law Judge Morehouse. After reviewing the record, in a decision dated September 3, 1986, Judge Morehouse made findings of fact and concluded:

> [A]t the time Jones filed his notice of location in 1966, at the time he filed his application to purchase the land in 1969, and at the time of the hearing in 1976, the land covered by Jones' homesite claim was occupied and claimed by Natives of Alaska and the tract contained improvements made by and in the possession of others; that Jones was, or should have been, fully aware of the claims and interests of the Nondalton natives; and that by reason of the regulations * * * the land was not available for entry as a homesite claim.

(Decision at 5). On October 18, 1986, Jones filed a notice of appeal. The parties then filed a series of briefs addressing legal issues pertaining to a number of Federal statutes enacted between 1884 and 1971.

Unlike the issues of law, the facts concerning the occupation of Kijik village are not in dispute. The record includes anthropological and archeological studies which also review historical records pertaining to the area. Lynch, *Qizhjeh* (U. of Alaska, paper No. 32, 1982); [4]

[4] The copy of the study in the record is missing pages iv, viii, and 33.

Vanstone & Townsend, *Kijik: An Historic Tanaina Indian Settlement* (Fieldiana: Anthropology, vol. 59, 1970). These sources provide the following information.

Tanaina Indians migrated to the Cook Inlet area prior to European exploration and some may have moved inland to the Lake Clark area late in the 18th century to avoid Russian harassment (*Qizhjeh* at 6-7; *Kijik* at 21-22). At least two sites were occupied prior to the establishment of Kijik village near the shore of Lake Clark sometime before 1840, although some sites may have been occupied simultaneously (see *Qizhjeh* at 9, 12-16). The Kijik villagers lived in small houses built of hewn log walls with base logs laid a foot or so into the ground (see *Kijik* at 29-45). Population figures for the village are inconsistent but suggest that people may have been moving away during the late 1800's. [5]

Around the turn of the century a number of maladies struck the village, and by 1909 the village was abandoned (although at least one person may have remained in the area) (*Qizhjeh* at 10, 76; *Kijik* at 23, 25; see also Tr. 120-21). The survivors moved approximately 35 miles to the old village of Nondalton on Sixmile Lake, and moved again in 1940 to the present town of Nondalton (*Qizhjeh* at 10). Most or all of the houses at Kijik were dismantled and moved by the former villagers (*Kijik* at 23). [6]

Although no structures remain standing at the village site, to the south is the three-part, bay-window shaped wall of the altar end of a Russian Orthodox Church and the partial remains of the side walls (see *Qizhjeh* at 60-65; *Kijik* at 45-49). The date of church construction is not known, but 1877, 1881, and 1884 have been suggested (*Qizhjeh* at 60, *Kijik* at 21). Associated with the church is a cemetery area of scattered graves which extends a considerable distance east and southeast of the church along a ridge to a point on the shore of Lake Clark (see *Qizhjeh* 14, 18; *Kijik* at 48). Although at least some graves were originally marked with Russian Orthodox crosses, the gravesites were not maintained and the precise number of graves is not known. [7] Within the cemetery area there are also several house sites and a number of cache pits (*Qizhjeh* at 18, 26, 34, 65).

Although in issue at the hearing, there no longer appears to be any question that the remains of the church are within appellant's

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[5] See *Qizhjeh* at 9-10; *Kijik* at 22-23. The census reports for 1880 and 1890 list villages which may be Kijik. If so, the population was reported as 91 in 1880 and 42 in 1890. Other reports place the population at 106 in 1898 and 22 in 1902.

[6] *Kijik* at page 23 reports that two houses were left standing. If so, they no longer exist. See also Exh. 40 at 18. Additional details of the moving of the houses were provided at the hearing by Nicholia Kolyaha who was born in Kijik in 1892 (Tr. 61). He also testified that during the winter a priest had come and the church was dismantled and moved to Old Nondalton (Tr. 68-70). Because some walls of the church still exist, his testimony may describe the removal of the vestibule, which was constructed with milled wood (very valuable at the time), and the church roof, which may have been copper. See *Qizhjeh* at 63, but see Tr. 82-83. If so, a tree may have been planted at the site of the altar. See *id.* at 24; Olekasa Deposition at 16-17; Tr. 71, 73-74, 275.

[7] *Qizhjeh* at pages 63-64 cites no source for the statement that more than 100 crosses were standing in the 1930's. The number may originate with Tr. 96-97. But cf. Tr. 146-47, 150. *Kijik* at page 48 reports finding nine crosses during excavations of the village site in 1966. See also Exh. 40 at 41-43.

homesite (see Statement of Reasons at 3; Reply Brief at 4, 8-9). There is no evidence as to the total number of graves within the homesite, but, based on the location of the remains of the church and other evidence presented at the hearing, there is no question that some lie within the homesite (see Tr. 177, 197, 207, 230-32, 253).

The ultimate issue before us concerns conflicting claims of rights to the 5-acres within appellant's homesite. The factual issues concern the acts of use and occupancy on which the claims are based. Prior to considering Judge Morehouse's findings on these matters, we must address the legal arguments which would obviate our review of the factual issues.

II

We begin with the issues raised by Nondalton. If Nondalton is correct, the outcome of the contest is irrelevant, and there is no reason to review the proceedings.

Nondalton first argues that we should reconsider and overrule the ruling regarding the Antiquities Act made in the *Jones* decision (Nondalton Brief on Appeal at 8). Nondalton notes that the Board's authority to do so was recognized in *Ideal Basic Industries* v. *Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976):

> Recognition of the IBLA's power to reconsider under the circumstances of this case is consistent with the fact that it has long been recognized that the Secretary of [the] Interior has broad plenary powers over the disposition of public lands. He has a continuing jurisdiction with respect to these lands until a patent issues, and he is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest. So long as the legal title remains in the Government, the Secretary has the power and duty upon proper notice and hearing to determine whether the claim is valid. [Citations omitted.]

Appellant responds by arguing that the *Jones* decision was issued under delegated Secretarial authority and cannot be overturned because it reversed a decision made by the predecessor to this Board (Reply Brief at 13-14).

[1] The Board of Land Appeals is a part of the Office of Hearings and Appeals, a component of the Office of the Secretary of the Interior, and is authorized "for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 CFR 4.1. When considering appeals, the Board exercises the authority previously delegated to the Office of the Solicitor. 35 FR 12081 (July 28, 1970).

Under the principle of stare decisis, rules of law established by prior Departmental decisions are binding precedent. However, such decisions, including Secretarial decisions, may be overruled when found to be erroneous. *See United States* v. *Union Carbide Corp.*, 31 IBLA 72, 84 I.D. 309 (1977); *United States* v. *Winegar*, 16 IBLA 112,

166-80, 81 I.D. 370, 392-98 (1974). [8] Under the principle of administrative finality--the administrative counterpart of res judicata--an agency decision may not be reconsidered after a party has been given an opportunity for Departmental review and did not seek review, or appealed and the decision was affirmed. *See, e.g., Turner Brothers, Inc.* v. *OSMRE,* 102 IBLA 111, 121 (1988). However, as recognized in *Ideal Basic Industries,* as a matter of administrative authority, so long as title to the affected land remains in the Department, the Secretary, or those exercising his delegated authority, may correct or reverse an erroneous decision. [9]

Having authority to reconsider the *Jones* decision, we find no need to do so. Nondalton's Antiquities Act arguments are without merit.

[2] With respect to section 2 of the Act (16 U.S.C. § 431 (1982)), Nondalton argues that the Department erred in *Jones* when finding the land not to have been withdrawn, because, according to Nondalton, the Act grants the Secretary broad authority and, by virtue of the Department's trust responsibilities, lands containing Indian ruins must be regarded as reserved (Nondalton Posthearing Brief at 10-11, Brief on Appeal at 10). This argument has no statutory foundation. Nothing in the Antiquities Act suggests that it is self-executing or operates other than by a formal determination affecting a specific parcel of land. Section 2 of the Act does not directly grant Secretarial authority to withdraw land. Instead it authorizes the President of the United States "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * * to be national monuments, and may reserve as a part thereof parcels of land * * *." 16 U.S.C. § 431 (1982).

We know of no instance in which section 2 has been applied to reserve land without a proclamation. The Antiquities Act was passed in 1906. If it had reserved land by virtue of the presence of Indian ruins or artifacts, every pending or subsequent public land entry would have been placed in jeopardy by the discovery of a qualifying object. We know of no prior decision which has even considered the question. *Cf. United States* v. *Gunn,* 7 IBLA 237, 79 I.D. 588 (1972); *Grand Canyon Scenic Railway Co.,* 36 L.D. 394 (1908). To the contrary, the Act itself contains ample evidence that Congress anticipated that significant objects would be found on public lands to which private parties had acquired rights. In section 2 Congress also provided:

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[8] *Winegar* overruled *Freeman* v. *Summers (On Rehearing),* 52 L.D. 201 (1927). The result was reversed by the U.S. District Court for the District of Colorado based on its finding of congressional ratification of the rule of discovery set forth in *Freeman. Shell Oil Co.* v. *Kleppe,* 426 F. Supp. 894, 899-902, 908 (D. Colo. 1977), *aff'd, Shell Oil Co.* v. *Andrus,* 591 F.2d 597 (10th Cir. 1979), *aff'd,* 446 U.S. 657 (1980).

[9] *See also Gabbs Exploration Co.* v. *Udall,* 315 F.2d 37, 40 (D.C. Cir.) *cert. denied,* 375 U.S. 822 (1963); *cf. Northwest Alaskan Pipeline Co.,* 99 IBLA 201, 206-07 (1987); *A. W. Schunk,* 16 IBLA 191, 197 (1974) (A.J. Stuebing concurring and dissenting in part); *Harkrader* v. *Goldstein,* 31 L.D. 87, 91 (1901). Within its procedural rules the Board provides a limited exception, when allowing petitions for reconsideration to be filed within 60 days of the date a decision is issued; otherwise its decision is final for the Department. 43 CFR 4.403.

When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract * * * may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

16 U.S.C. § 431 (1982). By providing for relinquishment, Congress recognized the validity of rights to lands containing qualifying objects.

Nondalton also argues that *Archaeological Ruins*, 52 L.D. 269 (1928), cited and relied upon in *Jones*, can be distinguished (Nondalton Brief on Appeal at 9-10). Nondalton, however, does not point to any error in the discussion of the Antiquities Act presented in *Archaeological Ruins*. Although *Archaeological Ruins* clearly addressed a different question than did *Jones*, the difference does not render the earlier decision irrelevant. *Jones* did not simply apply the conclusion of *Archaeological Ruins*, but examined its reasoning regarding the question whether the Antiquities Act made an implied reservation of lands containing historic ruins or objects of antiquity. *Jones, supra* at 139. It found that implicit in the answer given to one question addressed in *Archaeological Ruins* "was the conclusion that land subject to the act is not thereby withdrawn or reserved from future entry under the homestead law." *Id.* Based on this, and other matters, *Jones* concluded that "the Antiquities Act itself has no segregative effect." *Id.* at 140. Both decisions rejected the position now advanced by Nondalton that lands containing Indian ruins are reserved by the Antiquities Act. Nondalton has not shown that either was in error. [10]

Finally, Nondalton argues that by making a homesite application Jones violated section 1 of the Antiquities Act, which provides a fine and imprisonment for "[a]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government" without having received prior permission from the department having jurisdiction over the lands. 16 U.S.C. § 433 (1982). Nondalton views appellant's homesite as an illegal attempt to "appropriate" the remains at the Kijik site, and thus maintains that the homesite is invalid (Nondalton Brief on Appeal at 9).

[3] Nondalton views the homesite as an "appropriation" under the Antiquities Act but offers no basis for this conclusion. Nondalton's reading of the statute shares the defects found in its position regarding section 2. Within the context of public land laws, an individual who claims a tract of land in compliance with such a statute is sometimes said to have "appropriated" the land. However, there is no legal history indicating that the verb "appropriate" carries this meaning in the Antiquities Act. As with section 2, every person acting pursuant to public land laws would have been in jeopardy of the cancellation of his

[10] One conclusion reached in *Archaeological Ruins* was that objects within the purview of the Antiquities Act "belong to the United States--the owner of the fee--at least until the entryman has earned the equitable title to the land, and are subject to the right of the Government to issue permits or licenses for the examination, excavation, and recovery thereof * * *." *Archaeological Ruins, supra* at 271. However, "an entryman of public lands embracing ruins and archaeological sites, upon showing compliance with statutory conditions, is entitled to an unrestricted patent." *Id.* at 272.

claim and prosecution in the courts upon the discovery of artifacts. As a matter of statutory interpretation, it would be incongruous to conclude that Congress recognized private parties might acquire rights to public lands containing antiquities, provided a mechanism for the relinquishment of such rights, and at the same time subjected the party to prosecution for having selected the land. More sensibly, Congress intended "appropriate" in section 1 to prohibit the removal of objects from Federal lands and understood the statute to operate within the context of the criminal laws.

[4] Nondalton also argues that transfer of title to appellant's homesite is precluded by the National Historic Preservation Act of 1966 (NHPA), P.L. 89-665, 80 Stat. 915, 16 U.S.C. §§ 470-470w-6, *as amended*, (see Nondalton Brief on Appeal at 13). Nondalton raises a valid point as to the NHPA, but its conclusion that the NHPA bars approval of appellant's application for patent does not follow. Appellant's homesite is within the Kijik Historic District, which is on the National Register of Historic Places. 45 FR 17446, 17447 (Mar. 18, 1980). As a result, the NHPA must be considered by BLM when reviewing appellant's homesite application. *See* 16 U.S.C. § 470f (1982); 36 CFR Part 800; *State of Alaska*, 85 IBLA 196, 204-05 (1985). In the present posture of this case, however, it would be premature to specify the review BLM must undertake. For the purposes of this appeal it is sufficient to note that "the NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources." *Solicitor's Opinion*, 87 I.D. 27, 29 (1979). The fact that NHPA procedures must be undertaken when reviewing appellant's homesite application neither invalidates the homesite location nor necessitates rejection of the application for patent.

III

We turn next to appellant's argument that, regardless of the findings now under appeal, he is entitled to receive a patent under the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act was enacted as part of the General Revision Act of 1891. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095. As originally enacted, the pertinent portion stated:

> *Provided*, 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; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Id. at 1099. As a result of changes in administrative organization, the reference to a "receiver's receipt" was changed to "receipt of such officer as the Secretary of the Interior may designate." 43 U.S.C. § 1165 (1982).

Appellant first alleged entitlement to patent under the Confirmation Act in his 1984 posthearing brief. In the period between the hearing and his brief, the U.S. Court of Appeals for the Ninth Circuit characterized the Alaska Homesite Act as a "homestead law" under the Confirmation Act and found the contest before the court to be barred by the latter statute. *Grewell* v. *Watt*, 664 F.2d 1380, 1384 (9th Cir. 1982). Appellant argues that, having been initiated more than 2 years after he filed his application for patent, the BLM contest was too late and he is entitled to a patent as a matter of law (Contestee's Posthearing Brief at 7-8).

Jones' opponents raise four arguments against his contention: (1) the statute does not preclude the United States from exercising its trust responsibility to protect the possessory rights of Natives (BLM Answer at 14-17; CIRI Response on Appeal at 13); (2) the statute does not bar a Government contest based on prior third-party rights (CIRI Posthearing Brief at 32-34; CIRI Response on Appeal at 13); (3) even if the statute applies, the 2-year period did not run because a protest was pending (CIRI Posthearing Brief at 30-32; BLM Posthearing Reply Brief at 2-3; CIRI Posthearing Reply Brief at 27-34; BLM Answer at 17-19; CIRI Reply Brief at 10-12); and (4) even if the statute applies, Jones does not qualify because he has never paid the purchase price and received a receipt (BLM Posthearing Reply Brief at 3-6; BLM Reply Brief at 8-14; CIRI Reply Brief at 7-10). The first two counter-arguments raise an issue whether the Confirmation Act may apply, and the second two whether it does apply.

The opponents' first two arguments assert that there are circumstances in which "the two year period of limitation in the Confirmation Act" does not apply (BLM Answer at 15; see CIRI Posthearing Reply Brief at 32). Characterizing the Confirmation Act as a statute of limitations misconstrues its nature and effect. The court in *Grewell* v. *Watt, supra* at 1382 n.1, rejected this characterization of the Act, noting that "it is not a statute of repose, protecting against dilatory action," but rather "permits an entryman to ground affirmative rights on its language." Similarly, in *Payne* v. *Newton*, 255 U.S. 438, 444 (1921), the Supreme Court stated that "the evident purpose of Congress" was

> to require that *the right to a patent* which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, *shall be recognized and given effect* by the issue of the patent without further waiting or delay,–and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute. [Italics supplied.]

See also Stockley v. *United States*, 260 U.S. 532, 540-44 (1923); *Lane* v. *Hoglund*, 244 U.S. 174 (1917).

[5] The statute grants a right to a patent 2 years after issuance of a "receipt upon the final entry" when there is "no pending contest or protest." No contest may be initiated because the entry has matured into a right and the facts on which the entry was based may no longer be questioned. Nothing in the wording of the Act provides for an exception to its application, and the language used by the courts precludes recognizing one. When Congress creates a right, neither the Department nor this Board has the power to remove it by creating an exception. *Cf. Schade* v. *Andrus*, 638 F.2d 122, 124 (9th Cir. 1981).

[6] The argument that the Confirmation Act does not bar a Government contest to protect Native possessory rights is also based on an analogy between the Confirmation Act and 43 U.S.C. § 1166 (1982), which provides: "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents" (BLM Answer on Appeal at 15-17). The Supreme Court has held that the latter statute does not preclude suits by third parties and, consequently, is "without application to suits by the United States to annul patents * * * because issued in alleged violation of rights of its Indian wards and of its obligations to them." *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926); *see Cramer* v. *United States*, 261 U.S. 219, 233-34 (1923). Because the Confirmation Act is not a statute of limitations, the analogy fails and the cited cases cannot be applied.

The Board is keenly aware of the importance of the Department's obligation to protect Native rights. However, this duty does not extend to actions which would repudiate rights Congress has granted by statute or negate the duties the Department owes to other citizens. *See Milton R. Pagano*, 41 IBLA 214, 218 (1979); *Lane* v. *Hoglund, supra* at 181. Nor does our rejection of this argument render the Department unable to pursue its obligations to Native Americans. An entryman's right to receive a patent under the Confirmation Act does not preclude a subsequent judicial challenge of its validity. As quoted above from *Payne* v. *Newton, supra*, the Confirmation Act transfers authority over controversies concerning the validity of an entry to the courts after the 2-year period has passed, giving an entryman the protection of a judicial forum. The Supreme Court's decisions regarding 43 U.S.C. § 1166 (1982), expand the time within which the Department may bring such a suit to protect Native rights. However, this does not prevent the Confirmation Act from applying.

CIRI argues that the Confirmation Act does not bar BLM's initiation of a contest to protect third-party rights, based on *Henry King Middleton, Jr.*, 73 I.D. 25 (1966) (CIRI Posthearing Brief at 32-34). However, the *Middleton* opinion does not support this conclusion.

In *Middleton*, the appellant's homestead entry had been canceled for failure to comply with the cultivation requirements of the homestead law. On appeal to the Secretary, the appellant claimed entitlement to a

patent under the Confirmation Act, raising a question whether the Act was in conflict with the homestead laws and thus inapplicable in Alaska. *Id.* at 27. [11] A possible conflict was posed because the patenting procedure followed in Alaska allowed payment of the purchase price and issuance of a receipt prior to publication of notice of the patent application, rather than after publication. *Id.* at 28-29.

The *Middleton* opinion first considered whether the Alaska procedure would cause the Confirmation Act's 2-year period to commence with the publication of notice, rather than with issuance of a receipt. This possibility was rejected because in *Stockley* v. *United States*, the Supreme Court rejected the argument that the period, which by statute commenced with the issuance of the "receiver's receipt upon the final entry," could be varied to take into account changes in the Department's administrative procedures. *Id.* at 29-30.

The *Middleton* opinion next considered whether a 2-year period, commencing with issuance of a receipt and leading to "a present right to receive a patent," was in conflict with 43 U.S.C § 270-4 (1982) [12] which "precludes the issuance of a patent until after publication of notice and expiration of the period for a third party to institute adverse proceedings in court." *Id.* at 30. The Department found no conflict because, even though the requirement to publish notice and allow third parties to raise adverse claims "might require more than two years after the filing of final proof to determine the rightful patentee," this procedure "need not affect the determination of the entryman's compliance or the rights and obligations existing between the United States and the entryman." *Id.* at 31. Thus, the Department concluded that the statutes were not in conflict, because the Government need not delay action on an applicant's final proof pending publication of notice. *Id.* at 32. Consequently, the Confirmation Act was held to apply in Alaska, and the Government is required to take action on Alaskan applications within 2 years. If it does not, "the Department is without authority to challenge it thereafter." *Id.* at 33.

The *Middleton* opinion went on to note that:

> A modification in the procedure followed in other States would be required, however, where, as here, more than 2 years elapsed after the issuance of the final receipt without the initiation of a contest or protest and where publication was not made. In this situation notice of the filing of final proof must still be published, and third parties claiming rights adverse to those of the entryman must be given an opportunity to assert their claims.

Id. at 32. CIRI quotes this portion of the *Middleton* decision and concludes that the Confirmation Act does not bar a Government contest "so long as the government contest raised issues of prior third-party rights to the subject land" (CIRI Posthearing Brief at 34). The

[11] The Act of May 14, 1898, ch. 299, § 1, 30 Stat. 409, *as amended* by the Act of Mar. 3, 1903, ch. 1002, 32 Stat. 1028, extended to Alaska the provisions of the homestead laws "not in conflict with this Act."

[12] The statute was enacted as part of sec. 10 of the Act of May 14, 1898, ch. 299, 30 Stat. 409, 413-14, *repealed by* Federal Land Policy and Management Act of 1976, P.L. 94-579, § 703(a), 90 Stat. 2743, 2789-90.

conclusion does not follow from the decision. The reference is to the procedure followed in "other States," and the "modification" is that a patent will not issue at the end of the 2-year period when notice has not been published and third parties have not been given an opportunity to assert their rights. The statement does not pertain to Government contests. Under the statute, third-party adverse claims are prosecuted in the courts. 43 U.S.C. § 270-4 (1982). Nothing in *Middleton* suggests that such claims may be pursued within the Department by either the Department or a private party. To the contrary:

> If no action is taken within that period to challenge the sufficiency of an entryman's proof, the Department is without authority to challenge it thereafter. [2]

[2] The statute similarly cuts off any private contest or protest in which the entryman's performance is challenged, for, when the Department can no longer challenge the entryman's compliance with the law it is also precluded from entertaining a similar contest or protest brought by a private individual. *See John N. Dickerson*, 35 L.D. 67 (1906); *Milroy* v. *Jones*, 36 L.D. 438 (1908).

Id. at 32-33. Any other conclusion would negate a right granted by Congress. Thus, *Middleton* does not preclude application of the Confirmation Act to the present case to bar a contest based on the rights of third parties.

Having determined that the Confirmation Act *may* apply in the present case, we turn to the question whether it does. Jones' opponents argue that the statute does not apply because a protest was pending and appellant has not received a receipt. Both matters are controlled by well-settled law.

In *Lane* v. *Hoglund, supra* at 178, the Supreme Court commented upon the use of "pending contest or protest" in the Confirmation Act:

> As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant conducted in his own interest against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry.

The Court's description was based partially on the original Departmental instructions issued under authority of the Act. *See Instructions*, 12 L.D. 450, 453 (1891); *Instructions*, 13 L.D. 1, 3 (1891). It remains accurate under the current regulations, except that the term "contest" is now also used to designate a formal hearing initiated by the Government for the purpose of invalidating an entry. *See* 43 CFR 4.450-1, 4.450-2, 4.451. In *Jacob A. Harris*, 42 L.D. 611, 614 (1913), it was said that, to preclude application of the Confirmation Act, a contest or protest

> must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well established practice of the Department, such a proceeding will

be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge.

Jones' opponents point to two documents as constituting protests--the 1966 McGill-Pearson letter which led to the decision in *Jones*, and a field report dated June 12, 1967 (CIRI Posthearing Brief at 30). [13] There is no need to consider whether the McGill-Pearson letter was a protest. In *Jones, supra* at 134, the Assistant Solicitor stated that the letter was "treated as a protest" by BLM. This comment was based on BLM's characterization of the letter in its notice vacating acknowledgement of appellant's notice of location. The question on appeal is whether *Jones* resolved the protest, or in some sense the protest continued after remand, precluding application of the Confirmation Act (See Contestee's Posthearing Reply Brief at 3; BLM Answer at 18).

[7] The argument that the letter continued as a protest overlooks the context in which it was sent. At that time the only document Jones had filed with BLM was his notice of location. Presumably the objectionable "action proposed to be taken" was BLM's acceptance of Jones' notice of location. *See* 43 CFR 4.450-2. Upon investigation, BLM vacated its acknowledgment of the notice, thus requiring Jones to take action to defend his homesite. Until the decision vacating acknowledgement of his notice was reversed, Jones could not make an application to purchase the land.

In 1969 Jones filed a formal request for reinstatement of his notice of location. He then filed an application to purchase. When Jones filed his application to purchase, a protest could have been lodged objecting to the possible approval of the application. However, the letter filed in 1966 could not constitute a protest of pending approval of an application which had not been filed and was not filed until 3 years later. Until the patent application was filed, there could not be a final entry triggering the Confirmation Act. Correspondingly, the letter could not be a "protest against the validity of such entry" precluding the Act's application. *See* 43 U.S.C. § 1165 (1982).

The argument that the letter continued as a protest is also based on an assertion that the letter raised issues not addressed in *Jones*. In support of this contention, the parties point to the facts stated in the letter and its request that BLM "do all you can to protect this site" (BLM Answer at 18). The comment in *Jones* regarding possible Native rights and the remand to BLM are construed as having been directed to the additional issues raised by the letter.

The protest letter referred to the "old Russian Church" and "old Indian graveyard" and their historic importance as the relevant concerns on which BLM should act. Although these were not allegations of "issuable facts which, if true, would defeat the entry and

[13] The opponents also point to several other letters as constituting protests. None is dated within 2 years of Oct. 31, 1969, the date of appellant's patent application.

warrant its cancellation" (*Gildner* v. *Hall*, 227 F. 704, 705 (D. Or. 1915)), [14] the letter clearly raised a proper concern, the authors intended BLM to take action, and, upon investigation, BLM did. BLM's decision rejecting the notice of location responded to the concerns stated in the letter and placed Jones "on his defense" by giving the facts legal grounds. *See Jacob A. Harris, supra.* When the issue reached the Secretary, the Department held that, because the land had not been withdrawn, BLM acted improperly when rejecting Jones' notice of location. *Jones, supra* at 140. That decision settled the legal claims made in BLM's notice of rejection.

Having resolved the issues, the *Jones* decision noted that there may be "vested rights in the former villagers or their descendants," that the issue of Native rights was unresolved, and that if it is determined that others had prior rights, "appellant's homesite location would necessarily have to be declared null and void." *Id.* at 140. These statements do not suggest that it was thought that any issue raised by the protest letter or BLM's notice of rejection remained to be acted upon. Rather, they refer to the opinion's prior discussion of procedures for selecting lands in Alaska. The issues reviewed by the Assistant Solicitor were whether the land was "withdrawn or otherwise closed to operation of the public land laws," and not whether the "land is vacant and unappropriated" because "no prior rights have been established." *Id.* at 136. The opinion acknowledged that the issue of Alaskan Native rights was under congressional scrutiny and that, because of the procedures in Alaska for selecting a homesite, the question of prior rights remained open. However, these questions cannot be attributed to anything stated in the McGill-Pearson letter. If any issue raised by the protest had remained, the case would have been remanded with instructions to BLM to investigate and, if appropriate, conduct a hearing. It would have then been incumbent on BLM to again take action. Instead, the decision rejected Jones' request for a hearing because "we find no issue presently ripe for determination." *Id.* at 140.

Jones' opponents attempt to tie the unaddressed issue of prior rights to statements in the protest letter. The letter, however, stated facts about the site and did not assert Native rights to the land. The matters raised were addressed by BLM and the subsequent appeals. The suggestion that the letter continued (and continues) as a protest because the facts remain unchanged is simply an assertion that, so long as appellant's homesite is present, BLM must continue to find grounds to reject it. *See Jerry H. Converse*, 52 L.D. 648 (1929). BLM was aware that Natives continued to object to the homesite after the

[14] This wording must be interpreted in the context of the homestead laws. In such cases "issuable facts" are allegations that the applicant has not completed the required acts. If true, such facts are sufficient to cancel the entry. In contrast, the facts stated in the letter concern the availability of the land for entry and settlement. If true, they would alert BLM to the possibility that the land might be held by another, but would not necessarily "defeat the entry and warrant its cancellation." Rather, this result would follow only if others had acquired rights to the land making it unavailable for location as a homesite.

remand in *Jones* and Jones was aware that a further challenge might be brought based upon a claim of Native rights, but this situation is not equivalent to a pending protest requiring action by BLM. [15]

[8] For similar reasons the field investigation report cannot constitute a protest. It is an internal report of a field investigation undertaken by BLM in response to the McGill-Pearson letter. The report was a record of the factual findings on which BLM relied when it issued its notice of rejection of Jones' location notice. The recommendation in the report was made part of BLM's notice and the matter was resolved by the *Jones* decision. CIRI argues that the portion of the report stating that villagers of Nondalton "strongly objected to the appropriation of the village site" conveyed the villagers' protest to BLM. As a matter of law, neither the statement nor the report constitutes a protest within the meaning of the regulation so as to preclude application of the Confirmation Act. [16] Nor could it be considered a protest of appellant's yet-to-be-filed patent application so as to preclude application of the Confirmation Act.

We next consider the issuance of a receipt. Appellant admits that he has not paid or tendered his purchase price (Reply Brief on Appeal at 15), but argues that Judge Morehouse erred in rejecting his Confirmation Act claim for this reason (Statement of Reasons at 6-25). The Judge based his decision on the Board's opinions in *United States* v. *Braniff (On Reconsideration)*, 65 IBLA 94 (1982), and *United States* v. *Bunch (On Judicial Remand)*, 64 IBLA 318 (1982), *aff'd sub nom. Bunch* v. *Kleppe*, Civ. No. A76-115 (D. Alaska Jan. 14, 1983) (Decision on Appeal at 6).

Appellant argues that the decisions relied upon are inconsistent with the purposes of the Confirmation Act and fail to take into account changes in administrative procedures. Appellant argues that, under current procedures for patenting unsurveyed land in Alaska, payment is not required or possible until the land has been surveyed and the acreage determined, and that a survey is not ordered until after the application has been approved. Appellant points out that BLM's delay in reviewing an application also precludes application of the Confirmation Act. This, according to appellant, is contrary to the purpose of the Act identified by the Supreme Court in *Stockley* v.

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[15] CIRI also argues there has been a continuing protest because various documents in BLM files show BLM to have understood the homesite to be under Native protest (CIRI Posthearing Brief at 14-15). Although the documents show that BLM was aware that Natives objected to appellant's homesite, as discussed above, a protest is a document filed with BLM by a party raising objections to a pending BLM action. Internal BLM documents do not constitute a protest requiring a decision on the merits.

[16] "[T]he reference is to a proceeding against the entry and not some communication which at most is only suggestive of the propriety of such a proceeding and may never become the basis of one." *Lane v. Hoglund, supra* at 178 (report recommending cancellation made within 2-year period, but proceeding not ordered until after its expiration). *Accord United States* v. *Bothwell*, 7 F.2d 624, 626 (D. Wyo. 1925) ("a mere adverse report does not justify withholding a patent"); *Gildner* v. *Hall, supra* at 705 (report "not brought to knowledge or attention of the entryman" for at least 6 years "cannot be regarded or deemed a protest"). *See Alfred M. Stump*, 42 L.D. 566 (1913), *vacating* 39 L.D. 437 (1911); *George Judicak*, 43 L.D. 246 (1914), *overruling Herman* v. *Chase*, 37 L.D. 590 (1909).

Some cases appear to find that a report was sufficient, but a reading of the facts reveals that the Department had acted on the report prior to the expiration of the 2-year period by suspending the application or otherwise taking official action which gave notice of the matters pending. *See, e.g., United States* v. *Fisher*, 227 U.S. 445, 448 (1913), *Zwang* v. *Udall*, 371 F.2d 634 (9th Cir. 1967) (decision ordering cancellation of entries), *Neis* v. *Ebbe*, 189 P. 417, 419 (1920); *see generally United States* v. *Bryant*, 25 IBLA 247 (1976), *aff'd*, Civ. No. A76-84 (D. Alaska Jan. 5, 1978).

United States, supra at 540, of avoiding "delays for an unreasonable length of time–that is, for more than two years." Appellant argues that the Confirmation Act should apply beginning with the date of the application to purchase, so that, consistent with the Act's purpose, BLM is required to conduct timely review. The parties also argue about whether appellant could have or should have paid the purchase price for his land at the time he applied for patent.

Although appellant's argument has some merit, [17] we decline to overrule our prior decisions. Our decision in *Bunch* quoted extensively from *Stockley*. The district and circuit courts had found (and the Government argued on appeal to the Supreme Court) that at the time the Confirmation Act was enacted the "receiver's receipt upon the final entry" was issued following adjudication of final proof of compliance and, for this reason, the Act should not apply until after submission and approval of an applicant's final proof. *Id.* at 533, 538; *see Stockley* v. *United States*, 271 F. 632, 636 (5th Cir. 1921). The Supreme Court noted that:

> The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued upon the submission of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently, the former alone being authorized to issue the receipt and the latter to sign the certificate.

Stockley v. *United States, supra* at 538-39. Nevertheless, as noted in *Henry King Middleton, Jr., supra* at 29-30, the Court found that the Act applied upon issuance of a receipt for payment of the purchase price.

[9] Because a receipt is required, in *Bunch* the Board rejected the appellant's argument that the 2-year period began when she filed her application to purchase. *United States* v. *Bunch (On Judicial Remand), supra* at 324; *see also United States* v. *Braniff (On Reconsideration), supra*; *United States* v. *Boyd*, 39 IBLA 321, 328-29 (1979); *United States*

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[17] Appellant has also provided a copy of the decision in *United States* v. *Guild*, AA-8433 (July 19, 1985). Based on an extended review of judicial and Departmental decisions addressing the Confirmation Act, the Administrative Law Judge held that Guild did not qualify because a receipt had not been issued, but suggested that it would be within the Act's purpose and prior decisions to allow the statute to apply 2 years from the date of a tender of payment of the purchase price. *Id.* at 10-11. If, as appellant claims, under current administrative practice the purchase price for unsurveyed lands may not be paid until after proofs have been approved and the lands surveyed, it is possible that the Department could delay acting on an application. Such delay would be contrary to the purpose the Supreme Court assigned to the statute. *See Stockley* v. *United States, supra* at 540. Paradoxically, however, it would also create a situation akin to that existing prior to 1908 which the Court refused to restore in *Stockley*. We need not resolve this paradox. Appellant does not claim that he tendered payment of his purchase price and, therefore, we need not address the merits of the issue.

Appellant does argue, based on *Matthiessen & Ward*, 6 L.D. 713 (1888), that he would have tendered payment at his peril. However, that case concerns the Government's liability for a receipt issued by a receiver who later died. The decision found that, because the payment was not required when made, it was not received pursuant to the receiver's duties so that the receiver, not the Government or the receiver's surety bond, was liable for repayment. The case has no application to receipts issued by BLM. See Public Land Administration Act, P.L. 86-649, § 204(a), 74 Stat. 506, 507 (1960); 43 U.S.C. § 1734(c) (1982).

v. *Bryant*, 25 IBLA 247 (1976), *aff'd*, Civ. No. A76-84 (D. Alaska Jan. 5, 1978). The requirement was not created by a Board or court decision but by an act of Congress. Just as we cannot create an exception to the Confirmation Act to preclude recognition of a right established by Congress, we cannot eliminate a congressionally imposed condition for acquiring the right. Accordingly, we reaffirm our prior decisions and affirm Judge Morehouse's conclusion that the Confirmation Act does not apply in this case.

IV

We turn next to appellant's arguments regarding the effect of ANCSA on the contest. In his posthearing brief, appellant contended that "[s]ections 4 and 22 of ANCSA, 43 U.S.C. § 1603, 1621, control the resolution of any pre-1971 aboriginal claims or claims of use and occupancy, and has in effect extinguished those claims, *nunc pro tunc*, as to the contestee's homesite" (Contestee's Posthearing Brief at 11). In particular, Jones argued that each of the three provisions of section 4 had extinguished the use and occupancy rights which were the basis of the contest charges, and title should be transferred to him pursuant to section 22(b) of ANCSA. The issues were addressed in Judge Morehouse's decision and were again raised on appeal (see Reply Brief at 12-14, CIRI Response on Appeal at 7-8; Appellant's Rebuttal Brief at 4-7).

Section 4 of ANCSA, 43 U.S.C. § 1603 (1982), provides:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Jones' statutory arguments are: (1) compliance with the Homesite Act gave him equitable title which, as a conveyance of an interest in public land, extinguished aboriginal title under subsection 4(a); (2) the claims asserted in paragraphs 5(a) and 5(b) of the contest complaint are communal claims based on aboriginal use and occupancy and were extinguished by subsection 4(b); and (3) the contest charges are precluded by subsection 4(c) because they are either based on assertions of aboriginal use and occupancy or are based on a statute relating to Native use and occupancy (Contestee's Posthearing Brief at 12-15).

His opponents respond: (1) section 4 does not apply because the contest concerns actual use and occupancy rather than aboriginal title (BLM Posthearing Reply Brief at 7-9); (2) section 4 does not apply to *in praesenti* rights granted under 25 U.S.C. § 280a (1982) (CIRI Posthearing Brief at 24-26; BLM Posthearing Reply Brief at 8; CIRI Posthearing Reply Brief at 19-21); (3) appellant does not hold equitable title and, if he does, equitable title is not a "conveyance" under subsection 4(a) (CIRI Posthearing Brief at 22; BLM Posthearing Reply Brief at 7; CIRI Posthearing Reply Brief at 17-18); and (4) "statute or treaty" in subsection 4(c) refers to prior congressional acts which explicitly recognized aboriginal title but deferred decisions concerning Native claims (CIRI Posthearing Brief at 24-26; CIRI Posthearing Reply Brief at 22). Additionally, the parties argue about the prospective and retrospective application of subsection 4(b) and 4(c) and the effect of ANCSA's cemetery site provision, 14(h)(1) (43 U.S.C. § 1613 (1982)). [18]

As indicated by the court in *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980), the provisions of section 4 must be interpreted in the context of the history of prior legislation, judicial decisions, and legislative documents which constitute its background. *See id.* at 1014-19. For the present case, however, the details of those events are of less concern than the district court's and circuit court's conclusions regarding the scope of the statute.

The opinions of both courts quoted two passages from the legislative history:

> 1. The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title. The land and money grants contained in the bill are intended to be the total compensation for such extinguishment. [H.R. No. 92-523, reprinted in 1971 U.S. Code Cong. & Admin. News at 2198.]
>
> 2. It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska. [Conf. Rep. No. 92-746, reprinted in 1971 U.S. Code Cong. & Admin. News. at 2253 (italics in original).]

435 F. Supp. at 1029, 612 F.2d at 1136. Based on these passages and its review of the statutory provisions, the district court concluded that "Congress has expressly directed that the language of the Settlement Act be broadly construed to effectuate a comprehensive settlement of all Native claims based on aboriginal use and occupancy of land in Alaska and to bar any litigation based on such claims." 435 F. Supp. at 1029. The same intent that the statute be broadly applied was also noted by the circuit court. 612 F.2d at 1137.

[18] Sec. 14(h)(1) of ANCSA authorized the Secretary to "withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places." 43 U.S.C. § 1613(h)(1) (1982).

Within the broad scope attributed to section 4, we find that the claims of Native use and occupancy raised in the present case fall within the statute and are barred. Accordingly, we reject the argument that the statute does not apply because the case concerns issues of actual Native use and occupancy. As stated by the district court, section 4 is directed to "all Native claims based on aboriginal use and occupancy."

Some confusion over the question of whether there is a difference between aboriginal title and rights based on use and occupancy arose with the decision in *Miller* v. *United States*, 159 F.2d 997 (9th Cir. 1947). That case concerned the compensability of Tlingit Indian possessory rights to tidal lands which were to be condemned for the construction of wharves. *Id.* at 998-99. In examining the basis for the rights claimed, the court stated that "whatever 'original Indian title' the Tlingit Indians may have had under Russian rule was extinguished" by the Treaty of Cession of 1867 (15 Stat. 539) by which the United States purchased Alaska from Russia. *Id.* at 1001. Nevertheless, the court went on to find that the Indians held possessory rights under statutes enacted by Congress pertaining to the occupancy and use of lands, including section 8 of the Alaska Organic Act of 1884 (ch. 53, 23 Stat. 24, 26) and section 27 of the Second Organic Act of 1900 (ch. 786, 31 Stat. 321, 330) (which are of concern in the present proceeding) and also found that such possessory rights are compensable.

Miller was rejected by the Supreme Court in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, *reh'g denied*, 348 U.S. 965 (1955). In reference to the Alaska Organic Acts, *Miller*, and claims to proprietary rights to lands, the Court stated:

> We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. [Footnote omitted.]

Id. at 278-79. Having determined that the statutes did not grant legal rights to the land, which would be compensable if the land was later taken, the Court turned to the question of aboriginal title.

> That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

Thus, unless recognized by Congress, "aboriginal title" is not legal title to land but merely the fact of possession. Because aboriginal title

does not entail property rights, the Treaty of Cession is of no consequence. Congress is the only forum for obtaining recognition of Native claims of aboriginal title as property rights. It alone may grant legal rights to lands held by the United States. In the Alaska Organic Acts, Congress did not recognize or grant property rights. Rather, it authorized Native possession to continue and provided protection against intrusion of Native use and occupancy by third parties. *See Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1373 (D.D.C. 1973), *dismissed as moot*, No. 2014-71 (Feb. 16, 1977) ("rights based on aboriginal title are rights to undisturbed use and occupancy").

[10] Congress did not act to resolve Native claims of entitlement to lands until it enacted ANCSA in 1971. As can be seen from the legislative history quoted by the courts in *Atlantic Richfield*, Congress intended to end all litigation on the issue of Native rights to lands based on aboriginal use and occupancy. Section 4 was intended to extinguish all forms of aboriginal title however characterized or described. In this regard there is no difference in the nature of the aboriginal title addressed by the three subsections of section 4 of ANCSA. Subsection 4(a) refers to "aboriginal title," subsection 4(b) to "aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy," and subsection 4(c) to claims "based on claims of aboriginal right, title, use, or occupancy * * * or * * * based on any statute or treaty of the United States relating to Native use and occupancy." Consistent with *Tee-Hit-Ton Indians* and *Atlantic Richfield*, the provisions of section 4 apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

The subsections of section 4 do not differ as to the type of aboriginal title addressed, but do differ as to the time affected by the extinguishment. Subsection 4(a) extinguished aboriginal title as of the date of *past* conveyances so that, after enactment, a claim as to prior rights cannot be asserted to invalidate any conveyance. *United States* v. *Atlantic Richfield, supra*, 435 F. Supp. at 1022, 612 F.2d at 1135. Subsection 4(b) extinguished any aboriginal title *existing* on the date of enactment so that a claim as to such title could not be asserted in the *future*. Subsection 4(c) extinguished all legal claims based on claims of aboriginal title which could have been asserted *at the time of enactment* or were *pending* in any forum. Subsection (c) precludes all claims based on an assertion of aboriginal title. Aboriginal title includes claims based on use and occupancy of land. Accordingly, we reject the argument that section 4 cannot apply because the contest now before us concerns actual use and occupancy, rather than aboriginal title.

[11] Just as section 4 of ANCSA must be broadly construed to find that a claim based on aboriginal title does not survive its enactment, so also must "statute or treaty" in subsection 4(c) be construed to apply to

all statutes "relating to Native use and occupancy," rather than the restricted list of the Alaska Organic Acts and similar statutes offered by CIRI. To now construe the reference to statutes and treaties in subsection 4(c) in a manner which would allow a claim based on aboriginal use and occupancy to survive would be contrary to the broad scope of the section and the Congressional intent to resolve such claims by enacting ANCSA. [19]

We agree with CIRI, however, that section 4 does not extend to vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are neither claims of aboriginal title nor claims based on use and occupancy, but property rights created by Congress. *See Tee-Hit-Ton Indians* v. *United States, supra* at 278-79. Thus, the question remains whether, in the case now before us, vested rights were acquired under the missionary station provision of the second Alaska Organic Act, 43 U.S.C. § 280a (1982), or other provisions relied upon when bringing the contest charges. In other words, there remains the question of whether "there are vested rights in the former villagers or their descendants." *Jones, supra* at 140. [20]

It also follows that subsection 4(c) bars any assertion of a claim based on prior Native use and occupancy. In *United States* v. *Atlantic Richfield, supra*, 435 F. Supp. at 1025-26, the court stated:

> The language of subsection 4(c) is clear and unequivocal. It explicitly extinguishes *all* claims that are based on claims of aboriginal occupancy. Claims of past trespass to lands claimed by reason of aboriginal title require as an essential element of proof a showing of aboriginal use and occupancy at some time in the past. Such trespass claims are claims "based on claims of aboriginal occupancy" and fall within the scope of the plain language of subsection 4(c). [Footnote omitted.]

This conclusion was affirmed by the Ninth Circuit, 612 F.2d at 1135-36, which held that "the Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." *Id.* at 1134. Presumably, both courts were relying on the previously quoted statement of congressional purpose that the Act was to be "broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska."

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[19] Native allotments based on individual use and occupancy of land were specifically addressed in ANCSA, and to the extent such rights have been preserved by ANCSA, they do not fall within the broad scope of sec. 4. See 43 U.S.C. § 1617 (1982); *Aguilar* v. *United States*, 474 F. Supp. 840, 845-46 (D. Alaska 1979).

[20] Our agreement with CIRI does not extend to the manner in which CIRI characterizes its claims. At various times it characterizes the rights derived from the Alaska Organic Acts as "vested property rights" (CIRI Posthearing Brief at 26), an "*in praesenti* grant" (CIRI Posthearing Reply Brief at 2, 12, 19-20), and "Native occupancy and use" which gives "a stronger claim than one based merely upon aboriginal land claims" (CIRI Response on Appeal at 8). Only two kinds of rights to land can be asserted–a property right deriving from an act of Congress (or prior sovereign authority), or a possessory right. Mere possessory control of Federal lands is trespass against the Federal title. Native occupancy (whether characterized as a possessory right granted by Congress or a continuation of occupation under claim of aboriginal title) can no longer be asserted as the basis of any legal claim. The question of whether the Alaska Organic Acts granted property rights is not different from the question whether the Acts made an "*in presenti grant*" of property rights. The term "*in praesenti*, which means 'in the present' is a Latinism wholly without merit." Garner, *A Dictionary of Modern Legal Usage* 300 (Oxford U. Press 1987). In this regard both sides err when arguing whether ANCSA extinguished and barred claims based on vested rights (see Reply Brief at 14, 20).

The holding in *Atlantic Richfield* resolved the ongoing issue of Native rights in areas selected by the State of Alaska for which the State had issued oil and gas leases. In *Edwardsen* v. *Morton, supra*, Native villages challenged the State's title to the selected lands and claimed compensation for trespass by the oil and gas lessees. The court concluded that the Natives' aboriginal title to the land gave them a right of undisturbed use and occupancy (*id.* at 1373) and that, for this reason, the land was not "vacant, unappropriated, and unreserved" under the Alaska Statehood Act so that tentative approvals of the selections by the Department were void when given (*id.* at 1375). The court further found that by extinguishing aboriginal rights with the enactment of ANCSA, Congress had retroactively validated the state selections and their tentative approval, defeating the plaintiff's claims to ownership. *Id.* at 1377-78. Nevertheless, the court held that claims of trespass and breach of fiduciary duty survived as accrued causes of action. *Id.* at 1379. *Atlantic Richfield* addressed the claims asserted in *Edwardsen*, with the Government prosecuting the trespass claims on behalf of the Natives. Finding ANCSA to have extinguished claims based on claims of aboriginal occupancy, the *Atlantic Richfield* courts rejected the trespass claims and, accordingly, dismissed them.

Native actions against the United States for the taking of legal claims by section 4 of ANCSA were addressed by the Court of Claims in *Inupiat Community of the Arctic Slope* v. *United States*, 680 F.2d 122 (Ct. Cl.), *cert. denied*, 459 U.S. 969 (1982). The court recognized that the logic of *Atlantic Richfield* was simply that "since the Settlement Act extinguished the aboriginal title * * * retroactively to the date of the patents and leases, the subsequent entries thereunder necessarily were not trespasses upon any protectible interest the Eskimos had." *Id.* at 127. The court also rejected the claim that lands not covered by Federal patents and state leases had been taken, stating that when Congress extinguished aboriginal title "it terminated not only the Inupiats' title but any claims based upon that title." *Id.* at 129.

[12] Just as the claims of past trespass and taking discussed above were claims based upon a claim of aboriginal title, in the present case the assertion that appellant's homesite is invalid because of prior Native use and occupancy of the land is a claim based on a claim of aboriginal title. As the testimony at the hearing makes clear, such a claim requires a showing of use and occupancy at some time in the past, in particular between the time Kijik village was abandoned and the date appellant located his homesite. Accordingly, this assertion is barred by subsection 4(c).

Nor does it matter that the assertion may be that the use and occupancy was protected by the Alaska Organic Acts. While Native occupancy was indeed protected by the Acts, that protection was extended by statutes "relating to Native use and occupancy," and, in accord with *Atlantic Richfield*, a claim that the occupancy of the land

was protected cannot serve as the basis for another claim. Thus, an assertion that Natives had occupied the land included in appellant's homesite under protection of the Alaska Organic Acts cannot serve as the basis for a further assertion that the land was unavailable and appellant's homesite was therefore invalid. Such claims are trespass claims. When Congress extinguished aboriginal title, it terminated all claims based upon such title. *Inupiat Community of the Arctic Slope* v. *United States, supra.* Accordingly, we find that subsection 4(c) precluded bringing those contest charges which asserted that appellant's notice of location and application are invalid because the land was used or occupied by Natives at the time of location. [21]

Accordingly, we hold that, to the extent the contest charges challenge appellant's homesite location and application because the land was used and occupied by Natives and therefore unavailable, the charges were precluded by subsection 4(c) of ANCSA. To the extent the charges concern vested rights acquired under statute prior to appellant's homesite location, they may represent proper allegations. Determining whether the charges raised a proper issue requires consideration of the specific statutes relied on at the hearing and evidence of record which would show that rights had been acquired under them. We consider this matter in the next section.

Having resolved the central issues concerning section 4 of ANCSA, the two remaining issues can be readily addressed. As pointed out by BLM and CIRI, appellant's arguments that he held a "conveyance" under subsection 4(a), had made a "lawful entry" under subsection 22(b), and is entitled to a patent presume that his homesite location was valid because there were no prior rights making the land unavailable. As explained below, neither subsection 22(b) nor 4(a) grants a separate right to obtain a patent.

Subsection 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws * * * and who have fulfilled all requirements of the law prerequisite to obtaining a patent." 43 U.S.C. § 1621(b) (1982). From the wording of the statute it is clear that any right appellant may have to obtain a patent depends upon his compliance with the requirements of other laws. The statute simply instructs the Secretary to resolve entries made under the public land laws prior to conveying lands to Native village and regional corporations. *See Lee* v. *United States*, 629 F. Supp. 721, 729-32 (D. Alaska 1985), *aff'd*, 809 F.2d 1406, 1411 (9th Cir. 1987).

Nor does subsection 4(a) grant a right to a patent. Rather, it provides that prior conveyances of land and interests in land "shall be regarded as an extinguishment of the aboriginal title thereto, if any." 43 U.S.C. § 1603(a) (1982). We need not resolve the issue of whether, prior to

[21] Although not explicitly analyzed, the conclusion that sec. 4 of ANCSA bars raising an issue based on Native occupancy which may have existed at the time an action was taken has been relied on by the Board in a number of prior decisions. *See Bristol Bay Native Corp.*, 71 IBLA 318 (1983); *State of Alaska*, 41 IBLA 315, 323, 86 I.D. 361, 365 (1979); *Louis P. Simpson*, 20 IBLA 387, 393 (1975).

ANCSA's enactment, appellant received a "conveyance" or "interest" in land within the meaning of subsection 4(a) which would extinguish aboriginal rights. All Native title and rights which may have existed were extinguished by subsection 4(b), and, under subsection 4(c), appellant's homesite cannot now be challenged on the basis of any right to occupy the land held by Natives prior to ANCSA's enactment. Accordingly, we need not decide whether such rights as may have existed were also retroactively abolished by subsection 4(a).

V

Thus, we arrive at the question whether other parties held vested rights to the Kijik site on the date appellant located his homesite (see Tr. 21-23). As further detailed at the outset of the hearing (Tr. 13-16, 26-27) and in BLM's posthearing briefs, the charges in the contest complaint were supported by claims that rights were held by the Russian Orthodox Diocese of Alaska, members of the St. Nicholas Church of Nondalton, and the Nondalton descendants of the villagers of Kijik which originated with section 8 of the Act of May 17, 1884, *supra*, and section 27 of the Act of June 6, 1900, (ch. 786, § 27, 31 Stat. 321, 330, codified at 25 U.S.C. § 280a (1982)) (BLM Posthearing Brief at 3-9).

These Acts are commonly referred to as the Alaska Organic Acts. The first statute was enacted as part of the legislation providing a civil government for the District of Alaska. It stated:

> [T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. * * * [T]he land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress.

Act of May 17, 1884, *supra*. The second statute made more detailed provisions for the civil government, both continuing and superseding the prior legislation. The relevant provision stated:

> The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong * * *

Act of June 6, 1900, *supra*.

Early Departmental decisions concluded that the 1884 Act required recognition of rights based on actual use and occupancy, although a

few decisions differed as to the effect those rights might have when the United States acted to withdraw or reserve the land. [22] Apparently because the statute referred to future Congressional legislation "under which such persons may acquire title to such lands," several courts also suggested that the statute granted a right to acquire title to the land. In *Russian-American Packing Co.* v. *United States*, 199 U.S. 570, 576 (1905), the Supreme Court commented:

> It is quite clear that this section simply recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress.

See also Bennett v. *Harkrader*, 158 U.S. 441, 445 (1895); *Young* v. *Goldsteen*, 97 F. 303, 308 (D. Alaska 1899).

The statute was equally understood to protect use and occupancy of land by missionary stations. See *Opinion*, 25 L.D. 480, 483 (1897); *Instructions*, 22 L.D. 330 (1896). The words "now occupied" in the 1884 statute were understood to refer to the date of the statute's enactment and "hence only reserve and protect such land as was then used as missionary stations." 25 L.D. at 484. The interpretation of the provision to apply only to land actually occupied or used as of its date of enactment was consistent with other Departmental decisions, including decisions regarding Native occupancy. *See, e.g., Wrangell Townsite*, 37 L.D. 334, 337 (1908); *Naval Reservation*, 25 L.D. 212, 214-15 (1897); *A. S. Wadleigh*, 13 L.D. 120 (1891). Following enactment of the missionary station provision in the Second Alaska Organic Act, the Department issued regulations allowing "any organized religious society that was maintaining a missionary station in the district of Alaska on June 6, 1900," to apply for patent to land actually used and occupied as of that date. *Regulations*, 32 L.D. 424, 446 (1904).

These early Departmental and judicial decisions are consistent with the later judicial decisions discussed in the preceding section which reviewed the Alaska Organic Acts in relation to the issue of aboriginal rights. However, the statements in the early decisions regarding a right or power to acquire title are in clear conflict with both the courts' analysis of ANCSA in *Atlantic Richfield* and the Supreme Court's decision in *Tee-Hit-Ton Indians*. As previously quoted, in response to arguments that the Alaska Organic Acts represented congressional recognition of Native possessory rights sufficient to be compensable as a taking, the Court stated that it found "nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress." *Id.* at 278. Rather, the Court stated, the provisions were intended "merely to retain the *status quo* until further

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[22] *Compare Baranof Island*, 36 L.D. 261, 263 (1908) ("protected as against any attempted subsequent disposition or reservation of the land"), *with Alaska Commercial Co.*, 39 L.D. 597, 598 ("acquired by such occupancy no vested right against the United States" "inoperative to prevent the United States from reserving the land for its own uses"), *vacated on other grounds*, 41 L.D. 75 (1912). The difference was resolved by decisions holding that possessory rights did not preclude Government reservation or withdrawal of land, though a reservation could except prior possessory rights. *See Pan Alaska Fisheries, Inc.*, 74 IBLA 295, 300-302 (1983).

congressional or judicial action was taken." *Id.* As a result of this analysis of the Alaska Organic Acts, the earlier statements indicating that those Acts granted a right to obtain title must be regarded as dicta.

Legislation was enacted to permit the conveyance of title to Alaskan land in a variety of circumstances, including missionary stations and the Native Allotment Act of 1906. However, Congress was not *required* to provide for the transfer of title. Nor can the provisions of the Alaska Organic Acts be regarded as a commitment by Congress to do so. Consistent with the Supreme Court's ruling in *Tee-Hit-Ton Indians*, by enacting ANCSA Congress did not resolve the issue of Native claims by providing for the transfer of lands actually occupied, but opted to authorize the conveyance of large parcels selected by village and regional corporations. *See Wisenack Inc.* v. *Andrus*, 471 F. Supp. 1004, 1009 (D. Alaska 1979). At the same time Congress extinguished all Native claims based on use and occupancy.

[13] Consistent with ANCSA, *Tee-Hit-Ton Indians*, and *Atlantic Richfield*, we conclude that, while the Alaska Organic Acts protected Native and missionary station use and occupancy of land as of their dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants. Neither statute granted vested property rights to the Natives living at Kijik on May 17, 1884, and June 6, 1900, or to the Russian Orthodox Diocese of Alaska, or St. Nicholas Church of Nondalton.

The only basis for a contrary conclusion offered by the parties is found in *Bolshanin* v. *Zlobin*, 76 F. Supp. 281 (D. Alaska 1948) (Tr. 16; BLM Posthearing Brief at 4; CIRI Posthearing Reply Brief at 11, 19). That suit was brought by church members against their priest to recover possession of the church building and land patented to the archbishop in 1914. The plaintiffs claimed title based on the Treaty of Cession. The court rejected this claim, finding, on the basis of early Departmental decisions, that the Treaty of Cession had "merely recognized a possessory right in the land" occupied by the church to which "the title was imperfect and incomplete * * * until the political department took further action." *Id.* at 287. "This," the court said, "was done with the passage of the act of June 6, 1900" and "[i]t was not until then that the title could be perfected." *Id.*

Jones' opponents claim that the court found the 1900 Act to have granted a vested or "*in praesenti*" right to lands. We do not think so. The court did not say that the "imperfect and incomplete" title became perfected upon enactment of the 1900 provision but that with the enactment "the title could be perfected." Consistent with this difference, the *Bolshanin* court found that the patent issued to the archbishop was not "merely confirmatory of a previously existing complete title, but was the grant of a fee simple title of the land described therein." *Id.* at 288.

Because the Second Alaska Organic Act did not grant the Kijik Natives, the Russian Orthodox Diocese of Alaska, or the local church at Kijik vested property rights, it follows that neither the Nondalton descendants of the Kijik villagers nor the Russian Orthodox Church (either in its own right or as successor to the rights of the church at Kijik) held vested rights to the land at the time Jones made his homesite location. As the cases previously discussed make clear, the Second Organic Act granted only a right of continued undisturbed occupancy. As analyzed in the preceding section, any claim to a right of occupancy held by Alaskan Natives was extinguished by section 4 of ANCSA, and a claim based on prior occupancy cannot be asserted under subsection 4(c).

Section 4, however, does not apply to extinguish any occupancy right which may have been held by the Russian Orthodox Church at the time Jones located his homesite or bar claims based on such occupancy. As established in early Departmental cases, such right would apply only to lands actually used and occupied by the church on June 6, 1900.

Although raised by the complaint, the decision on appeal did not reach the issue of rights held by the Russian Orthodox Church. The parties have argued the question of continued use and occupancy by the church on two grounds. First, BLM argues that under the theological principles of the Russian Orthodox Church there could be no intent to abandon the church's right to the property (BLM Posthearing Brief at 16-17; BLM Answer at 2-3). Second, BLM argues that the church has continued actual occupancy of the land by virtue of the presence of the remains of the church and cemetery area. CIRI raises a similar argument of Native occupancy of the site as a missionary station (see CIRI Posthearing Brief at 18-19; BLM Posthearing Reply Brief at 10-11; BLM Answer at 4-6; CIRI Response Brief at 3-5).

[14] The first argument errs by assuming actual intent to abandon is required. The case before us does not concern fee title to property or a vested property right acquired by the church pursuant to congressional legislation. Rather, it concerns a protected right of occupancy, and the question is whether the church continued to exercise its right or had ceased to use and occupy the land. This difference is the same as that previously analyzed and applied to Native occupancy rights arising under the Alaska Organic Acts for claims made under the Native Allotment Act of 1906. In *United States* v. *Flynn & Orock*, 53 IBLA 208, 238, 88 I.D. 373, 389-90 (1981), the Board held:

> [A]bsent the filing of an application for allotment, *cessation of use or occupancy* for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, *terminated all protected rights* under both the allotment and permissive occupancy statutes *and restored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy.* Such prior use or occupancy does not serve as a bar for the initiation of rights in the lands by other individuals. [Italics supplied, footnote omitted.]

Accordingly, we reject the parties' first argument because it has no application to the issue now before us. [23] For similar reasons we will not discuss the related argument concerning the legal standards applicable to the abandonment of cemeteries. The case before us concerns public, not private land. There is no question of dedication of land to a public purpose, and the issue of use and occupancy does turn upon the intent but upon the actions of the Russian Orthodox Church.

The question whether the Russian Orthodox Church continued to exercise its right of occupancy is controlled by the rulings of the Alaska courts. Those courts have commonly followed the common law rule, that in order to assert a possessory right:

> the use or occupancy which gives rise to such a right must be notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent.

United States v. *10.95 Acres of Land in Juneau*, 75 F. Supp. 841, 844 (D. Alaska 1948); *see United States* v. *Alaska*, 201 F. Supp. 796 (D. Alaska 1962); *United States* v. *Alaska*, 197 F. Supp. 834 (D. Alaska 1961); *United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska 1952). The Department has frequently relied upon the standard provided by these decisions. *See, e.g., United States* v. *Flynn & Orock, supra* at 227; *Herbert H. Hilscher*, 67 L.D 410, 416 (1960).

The most relevant evidence in the record regarding the church's claim to the land is found in the deposition of Reverend Michael Oleksa, the local priest for the area including Kijik (Dep. at 3). He visits Nondalton several times a year, staying 3 or 4 days each time (Dep. at 6, 47). He was, however, unable to testify that he or other representatives of the church had actually used the church at Kijik since 1909, when the village was abandoned (see also Tr. 87, 91, 114). His inability to do so was due, in part, to the lack of locally available church records for the period prior to the late 1930's (Dep. at 42, 47-48; but cf. Tr. 81, 84, 93, 192-93). He had "visited" the site only by way of a low-altitude fly over (Dep. at 11-12, 35). Oleksa also testified that the bishop's permission (or at least notification that the church and items used in worship were being moved) would have been required to move the place of worship from Kijik to Nondalton (Dep. at 14-15).

Oleksa did maintain that the church remained interested in the site and that he had written BLM to present the church's objections to having the land used for any purpose other than a graveyard (Dep. at 28-29). A copy of this letter, dated October 16, 1975, appears as an exhibit to the deposition. It states that, on behalf of the members of

[23] As argued in the briefs, to address the intent of the Russian Orthodox Church, or use and occupancy based upon Native religious beliefs, would raise threshold questions regarding the First Amendment. Under *United States* v. *Flynn & Orock, supra*, there is no need to consider these matters. We believe our approach to be consistent with the recent decision of the Supreme Court in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 56 L.W. 4292 (Apr. 19, 1988).

the church at Nondalton "as well as the Russian Orthodox Diocese of Alaska," the author wished to assert the claim of the Orthodox Church of St. Nicholas "to the church building and Orthodox burial ground at Kijik" (Dep. Exh. at 3).

The purpose of the missionary station provision of the Second Alaska Organic Act was to allow those using land for missionary stations to continue their occupancy protected from encroachment by others. The Act further directed the Secretary to survey and transfer title to such lands. Upon its enactment, the Department established procedures by which religious organizations could apply for and receive title. Nothing in the record suggests that any official of the Russian Orthodox Church visited the Kijik site, expressed any interest in obtaining title to it, or did anything to maintain its right of occupancy until Reverend Oleksa directed his letter to BLM in 1975. The only evidence is to the contrary (see Tr. 248-49).

Early decisions addressing the occupancy provision of the Alaska Organic Acts indicate that the Russian Orthodox Church actively pursued its interest in lands on which it maintained churches. *See Opinion*, 25 L.D. 480 (1897); *Instructions*, 22 L.D. 330 (1896). The patent in dispute in *Bolshanin* v. *Zlobin, supra*, was issued in 1914. Following abandonment of the village of Kijik, the church was still entitled to file an application for patent based on its use and occupancy as of June 6, 1900. Later, it could also have requested that the area be surveyed and withdrawn under PLO 2171. However, we find no evidence that the church took action to preserve its occupancy right so as to make the land unavailable for appellant's homesite location.

[15] Nor do we believe the remains of the church and the presence of graves to be sufficient to establish "notorious, exclusive, and continuous" use under the concepts of public land law so as to give notice that the land is used and occupied. Over the years, numerous sites in Alaska, as in the West, were occupied by groups of Natives or settlers as homesites or townsites. When deaths occurred, land was designated as a cemetery. As the population increased and visits by the clergy became more frequent, churches were constructed. Many settlements grew and title to the land was obtained under the public land laws. Others were abandoned and title remained in the United States. When subsequent settlers came upon the land and saw the remains of buildings or other evidence left by the former occupants, they knew that the land had once been occupied, but the remains they observed were evidence of prior rather than present use and occupancy. If they recognized gravesites, they would likely understand that they should be left undisturbed. Nothing in the public land laws, however, suggests that the graves would affect the rights of subsequent settlers or give the descendants of those buried a right to the land. Similarly, in the present case the remains of the church and the graves, as they existed when Jones filed his location notice, were not sufficient to show continued use and occupancy by the Russian Orthodox Church or to put appellant on notice of occupancy by the

Church. *Cf. Pedro Bay Corp.*, 78 IBLA 196 (1984); *United States* v. *Flynn & Orock, supra; Herbert H. Hilscher, supra.*

Having ruled upon the issues presented, we turn to the conclusions of Administrative Law Judge Morehouse in the decision on appeal. We believe the factual conclusions of the Judge appearing on pages 4-5 of the decision are generally supported by the record. [24] However, three of the findings clearly led to the legal conclusions quoted earlier in this opinion which, based on our analysis of the law, must be reversed. The fourth, fifth, and sixth findings listed in the decision concern Native use of the land and their attitudes toward it; the Russian Orthodox Church's attitude toward the site and its lack of intent to abandon it, and Jones' knowledge of Native concerns about the site (Decision at 4-5). These findings led to the conclusion that the land within the homesite was occupied and claimed by Natives, that Jones knew of their claims, and that the land was not available for entry (Decision at 6).

After enactment of section 4 of ANCSA, the conclusion that the land was "occupied and claimed by Natives of Alaska"in 1966, 1969, and 1976 cannot serve as the basis for a conclusion that "the land was unavailable for entry as a homesite claim." Contrary to assertions made by CIRI, the Alaska Organic Acts provided Alaskan Natives only a right to occupy lands under claim of aboriginal title pending congressional resolution of the question of Native rights. After enactment of section 4 of ANCSA, such prior Native use and occupancy cannot serve as a basis for a conclusion that the land in appellant's homesite was unavailable in 1966 or in 1969. Similarly, a conclusion that the land was unavailable in 1976 requires a determination that the land was occupied and claimed under aboriginal title as of that date. Such title to the land could not exist after ANCSA.

Judge Morehouse conceded that appellant was "probably" correct that section 4 extinguished the Native claims of the Nondalton Natives to the land within the homesite, but concluded that "this would not have any bearing on the validity of Jones' homesite claim" because "ANCSA did not reach back and automatically turn previously unavailable land into available land and retroactively validate what was otherwise an invalid homesite claim" (Decision at 7). As we have analyzed the statute, the Judge correctly concluded that section 4 would not retroactively validate appellant's homesite location if it was previously invalid because the land was unavailable. If the homesite had been challenged on this basis prior to ANCSA's enactment, it

[24] The dates concerning the history of Kijik village set forth by the Judge differ from those stated earlier in this opinion. The Board's recitation relies on the written authorities cited. Other portions of the record provide different dates. Nothing of consequence to this opinion turns on those dates. Outside the context of this case, such dates are, of course, subject to change as archaeologists and historians further research the history of Alaska.

would not have been revived by the statute. However, no such determination was made prior to ANCSA's enactment.

ANCSA precluded a subsequent determination of whether the land was previously unavailable due to Native use and occupancy. The Act did not retroactively validate appellant's homesite, but prevented a determination that it was invalid as a result of prior Native use and occupancy. After ANCSA, decisions concerning prior use and occupancy were neither necessary nor possible. There was no need to protect such occupancy in order to make the required conveyances to Native regional and village corporations. All lands in Alaska were withdrawn in 1969 and the withdrawals were continued under ANCSA. *See* 43 U.S.C. §§ 1610, 1616(d) (1982). As a consequence, in the 1970's most Alaska lands were unavailable for entry under the public land laws. No new rights could be acquired until the process of transferring title to individuals, the State of Alaska, and village and regional corporations was completed, or sufficient land was designated for that purpose. The withdrawn status of the land, not continued use and occupancy or the Departmental regulation, prevented the acquisition of additional rights.

VI

Appellant asserts he has a claim of right by virtue of his compliance with the Alaska Homesite Act. BLM and CIRI have opposed his claim based on Native use and occupancy at the time he located his homesite. We have determined that the latter claims are barred by ANCSA. Congress intended to end future litigation regarding the extent and nature of aboriginal title and all litigation involving issues of Native use and occupancy of lands prior to ANCSA. Accordingly, we find Judge Morehouse erred in ruling on the question of Native use and occupancy of the Kijik site and reverse his decision. We additionally hold that the record does not show that the Russian Orthodox Church preserved its right to occupy the land it used and occupied as of June 6, 1900.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to permit final adjudication of Jones' application to purchase.

R. W. MULLEN
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

December 20, 1988

APPLICATION OF INTERSEA RESEARCH CORP.FOR FEES AND EXPENSES UNDER EAJA *

IBCA-2084 F Decided: *December 20, 1988*

Contract No. 14-08-0001-18984, U.S. Geological Survey.

Sustained.

Equal Access to Justice Act: Awards—Equal Access to Justice Act: Contract Disputes Act of 1978: Prevailing Party

Where the Board found that a contractor was not entitled to an EAJA award for an unsuccessful claim because it was not the prevailing party on that claim, but found that the contractor's attorneys spent a negligible amount of time on preparation and presentation of such claim in comparison to the time spent on the other three claims involved in the principal litigation, the Board determined by a jury verdict approach that appellant's attorneys and their paralegals spent no more than 6 and 10 hours respectively on the unsuccessful claim and held that therefore, only $800 should be deducted from the EAJA application request of $74,460.

APPEARANCES: Richard D. Gluck, Attorney at Law, Lane & Mittendorf, Washington, D.C., for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an application, pursuant to The Equal Access to Justice Act (EAJA), for attorney fees and costs incurred by Intersea Research Corp. (IRC) in connection with its appeal before this Board, in *Intersea Research Corp.*, IBCA-1675 (April 25, 1985), 85-2 BCA par. 18,058. Under a constructive acceleration theory, appellant was awarded $304,729.71 plus interest as allowed by the Contract Disputes Act of 1978.

The claims of IRC in the initial proceeding were: (1) $402,759 for 47.62 days of delay for bad weather at the contract standby rate per day of $8,456, plus 10 percent profit; (2) $2,275 for 0.269 days of delay caused by fishing boats at the same rate, plus 10 percent profit; (3) $97,392 for mobilization and demobilization costs of a second research ship, plus 10 percent profit; and (4) statutory interest on the claim total. The purpose of the contract involved was to obtain information regarding potential hazards to oil and gas exploration on and beneath the ocean floor in designated areas of the Georges Bank on the Continental Shelf. To do this, IRC was required to sail a research ship fitted with technical and intricate electronic surveying

* Not in chronological order.

equipment to the area to gather precise graphical and navigational data.

By this application, appellant seeks $67,615.76 for professional services rendered and expenses incurred with respect to the underlying appeal, together with $6,845 for attorney fees and costs in attempting to collect the Board's award and pursuing this EAJA application. Thus, the total amount claimed in this proceeding is $74,460.76. The fees claimed are based on the maximum rate allowed by the Act and the Department's regulations. In support, appellant has attached considerable detailed documentation in the form of exhibits to its application and to its initial and reply briefs.

It is undisputed, and by this documentation we find that appellant established eligibility for an award under the EAJA, since it had fewer than 500 employees and its net worth did not exceed $7,000,000 when the adversary proceeding was initiated. The Government does argue, however, that the Government's position was substantially justified and that appellant was not the prevailing party with respect to one of the four items claimed in the underlying appeal. That item was for $97,392 for mobilizing and demobilizing the second research vessel, with respect to which cost the Board held IRC to have assumed the risk at the time of entering into the contract.

The Substantial Justification Issue

As was pointed out in *Margaret Howard d/b/a River City Van & Storage*, ASBCA Nos. 28648, 29097 (March 21, 1988), 88-2 BCA par. 20,655, and the cases cited, the Government bears the burden of showing that its position both leading to and during litigation was substantially justified. In a recent decision of the U.S. Supreme Court, *Pierce* v. *Underwood*, No. 86-1512 (decided June 27, 1988), 56 Law Week 4806, the term, "substantially justified," as used under the EAJA, was interpreted to mean, "not justified to a high degree, but rather, justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." The Court went on to say: "That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of the other Courts of Appeals that have addressed this issue." Thus, we appear to be back to the "reasonableness" test to determine whether the Government position was substantially justified. Therefore, the obvious question we need to ask in determining each EAJA case is: Did the Government have a reasonable basis for its action or inaction? If we find that it did not, then it follows that the position of the Government must be held not to have been substantially justified.

In its brief in opposition to appellant's EAJA application, the Government does not attempt to explain the inflexibility of its lease sale schedule, despite the liklihood of extreme adverse weather at the time of year involved, and despite its awareness of appellant's stoic performance at great expense under conditions warranting extensions of time, but which were not granted. The primary thrust of this brief

seems to be that because there were different views of the factual scenario by the parties, and the Board happened to agree with appellant's version, on a different day, another finder of fact may well have upheld the Government's version and the result would have been different. This implies that where there are close factual issues, the Government's position must have been reasonable. But, we do not accept this implication where, as here, the Board found in several specific respects the Government position to be unreasonable. The Government's brief closes with the following conclusion: "As the Government's position was not shown to be substantially unjustified, no fees and expenses can be awarded." This conclusion, of course, demonstrates a misconception of the burden of proof. As pointed out above, the *Government* has the burden of showing its position to have been substantially justified. We hold that it has failed to meet that burden.

The Prevailing Party Issue and Amount of Award

We agree with that portion of the Government's opposition brief which argued that appellant was not the prevailing party with respect to one of the four items claimed in the underlying appeal. That item was the claim of $97,392 for mobilizing and demobilizing the second research vessel. The Board held, with respect to such claim, that IRC assumed the risk at the time of entering into the contract. Accordingly, appellant is not entitled to an award for attorney fees and costs incurred in connection therewith.

More difficult, is the problem of how to determine the appropriate amount, if any, which should be deducted from this EAJA application for the claim on which the appellant did not prevail. Appellant contends that the full amount of fees and expenses requested in its application should be granted on the basis of *Hensley* v. *Eckerhart*, 461 U.S. 424,435 (1983), which held "that where claims for relief 'involve a common core of facts' or are 'based on related legal theories,' a fee award should not be reduced simply because a prevailing plaintiff did not receive every single aspect or dollar of the relief requested." However, that case also stands for the propositions: (1) that where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee; and (2) in determining what fee would be reasonable in a given case, the adjudicator should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. The court also said: "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has the discretion in making this equitable judgment."

As we perceive the record of the primary litigation as a whole, it suggests that an infinitesimal amount of time was spent by appellant's attorneys to prepare and present the unsuccessful claim, compared to the other claims. The Government has not contended that appellant's counsel spent any appreciable amount of time in preparing and presenting that claim in the course of the main litigation, even though the dollar amount was some $97,000. Neither has the Government contended that the amount to be deducted from the EAJA request should be in the same proportion that the unsuccessful claim bears to the total claim figure of $443,034 contained in the main litigation. Rather, it simply implied that its position was substantially justified with respect to the denied claim because the appellant did not prevail.

In the supporting documentation attached to appellant's application, the hours and portions of hours spent by both attorneys and legal clerks have been meticulously itemized, dated, and correlated with the tasks performed for appellant in the principal litigation. The Government does not contest the accuracy of the figures for the hours or the rates charged. We find them to be reasonable and within the statutory limitations. Nevertheless, this supporting documentation is not organized in such a manner so as to seggregate or identify the time spent separately on any of the four claims involved in the primary litigation.

Under these circumstances, we believe that a jury verdict approach is in order, and by such approach, we find that appellant's counsel and their paralegals spent a negligible amount of time on the preparation and presentation of the unsuccessful claim, not exceeding 6 hours for the attorneys and 10 hours for the paralegals. Therefore, applying the respective rates of $75 and $35 per hour, we allot only $450 attorneys fees and $350 for paralegal costs, or a total of $800, to be deducted from the request of appellant in the EAJA application.

The Government has neither challenged appellant's application for attorney fees and costs in any other respect, nor has it contended that the attorneys for appellant did not achieve excellent results on the whole from the principal litigation. Therefore, we further find that the consequence of the allotted deduction is an award for attorney fees and costs which is in reasonable relation to the results obtained.

Decision

Accordingly, we sustain appellant's application for attorney fees and costs in the amount of $73,660.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

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