UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - - Manual Lujan, Jr.

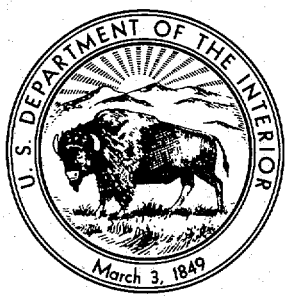
Office of Hearings and Appeals - - - - - Roger E. Middleton

Office of the Solicitar - - - - 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, 1991. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

The Honorable Manuel Lujan, Jr., served as Secretary of the Interior; Mr. Frank A. Bracken served as Under Secretary; Ms. Stella A. Guerra, Messrs. Eddie F. Brown, John M. Hayden, David C. O'Neal, John M. Sayre, and John E. Shrote as Assistant Secretaries of the Interior; Mr. Thomas L. Sansonetti served as Solicitor; and Mr. Roger E. Middleton served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "98 I.D."

Secretary of the Interior

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Henderson, John W., 40 L.D. 518; vacated, 43 L.D. 106 (See 44 L.D. 112; 49 L.D. 484).

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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.

Holland, G.W., 6 L.D. 20; overruled, 6 L.D. 639; 12 L.D. 433.

Holland, William C., M-27696 (Apr. 26, 1934); overruled in part, 55 I.D. 215.

Hollensteiner, Walter, 38 L.D. 319; overruled, 47 L.D. 260.

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Howell, John H., 24 L.D. 35; overruled, 28 L.D. 204.

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Hoy, Assignee of Hess, 46 L.D. 421; overruled, 51 L.D. 287.

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Hurley, Bertha C., TA-66 (Ir.) (Mar. 21, 1952); overruled, 62 I.D. 12.
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Peters, Curtis, 13 IBLA 4, 80 I.D. 595; overruled, 85 IBLA 343, 92 I.D. 140.

Phebus, Clayton, 48 L.D. 128; overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159.

Phelphs, W.L., 8 C.L.O. 139; overruled, 2 L.D. 854.

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

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

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

Phillips, Vance W., 14 IBLA 70; modified, 19 IBLA 211.

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.

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

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

Prange, Christ C., 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.
Southern Utah Wilderness Alliance, 100 IBLA 63; overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267.
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.

Utah Wilderness Assn, 91 IBLA 124; overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267.

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.

Welch *v.* Minneapolis Area Director, 16 IBLA 180; *rev'd*, 17 IBIA 56.

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

APPEALS OF MARTY INDIAN SCHOOL

IBCA-2563 - 2567, & 2783 - 2785 Decided: *January 17, 1991*

Contract Nos. AOOC 1420-2341 & -2233; AOOC 1420-2457, -2342, & -2341, Bureau of Indian Affairs.

Appeals Dismissed for Failure to Prosecute.

Contract Disputes Act of 1978: Generally

The Board is entitled to dismiss an appeal if the appellant fails to prosecute it and/or fails to respond to orders in a timely manner.

APPEARANCES: John M. Peebles, Esq., Domina, Gerrard, Copple & Stratton, Omaha, Nebraska, for Appellant; Jean W. Sutton, Esq., Department Counsel, Twin Cities, Minnesota, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Background of IBCA-2563 - 2567

These appeals were filed with the Board by counsel for Marty Indian School, Marty, South Dakota (Marty/appellant), on October 3, 1988, in response to a July 12, 1988, contracting officer's (CO's) decision, that disallowed Marty's program costs in the amount of $439,412 for fiscal year 1986, pursuant to a Departmental Inspector General audit (No. C-AP-AB-BIA-044-86-IA) made in accordance with OMB Circular A-128 and sections 271.46 (elsewhere in the decision referred to as 276.46) and 276.7 of Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1975.

On October 13, 1988, the Board dismissed the appeals without prejudice for 90 days in order to permit the parties to study the effect, if any, of H.R. 1223, the Indian Self-Determination and Education Assistance Act Amendments of 1988, which were signed into law on October 5. On December 7, appellant's counsel requested reinstatement of the appeals on the ground that the amendments strengthened its right of appeal to the Board but did not resolve the issues involved. On December 13, the Board reinstated the appeals by order and directed appellant to file its complaint within 30 days from

its receipt of the order. The complaint was received by the Board on January 17, 1989.

No answer was received from the Government, so on March 24, 1989, the Board issued an order entering a general denial on behalf of the Government, requesting briefs, and proposing to settle the record on April 17 in accordance with its rule at 43 CFR 4.114.

On April 17, 1989, the Board received a letter from Government counsel responding to Marty's April 6 motions to vacate the Board's order and to seek an oral hearing, motions that appellant's counsel's secretary had mistakenly directed to the Bureau of Indian Affairs (BIA) in Albuquerque, New Mexico. Government counsel opposed both of appellant's motions, and moved to dismiss the appeals, but also requested in the alternative, on behalf of both parties, that the appeals be dismissed without prejudice in order to permit the parties an opportunity to engage in settlement negotiations. A copy of appellant's motion to vacate the Board's order was received from appellant later the same day.

On April 20, 1989, the Board received a second letter from Government counsel enclosing a corrected copy of its response, as well as a copy of appellant's motion. In the event its motion to dismiss were not granted, the Government specifically suggested a "limited partial vacation" of the order for the purpose of allowing the parties time for informal exchange of information in aid of settlement negotiations, with submission of briefs at a later date if settlement could not be reached within a reasonable time. The Board held a conference call with counsel on April 21, during which the parties requested a six months' delay to conduct negotiations, and then, by order dated April 24, dismissed the appeals without prejudice until October 24, 1989. The order requested that the parties keep the Board informed of the outcome of their discussions.

On October 30, 1989, the Board received a request from appellant to extend the negotiation period through December 31, 1989. It granted the request by order dated the same day.

Nothing further was heard from the parties until after the Board on March 19, 1990, issued an order for appellant to show cause by April 14 why the appeals should not be dismissed for failure to prosecute them. Appellant responded on April 3 with a request to extend the negotiation period through May 14, which the Board agreed to do by order dated April 9. The order stipulated that the appeal would be dismissed unless the Board heard further from the parties on or before May 14, informing it of the status of the case.

Having heard nothing further from the parties, the Board on May 24, 1990, issued a second order to show cause why the appeals should not be dismissed. The order directed that the appellant provide the Board by June 30 with a status report on its negotiations, (1) including its response to the Government's earlier allegation that inadequate evidence had been submitted to the CO to enable him to determine the merits of Marty's contentions, (2) providing the Board

with three alternative hearing dates acceptable to both parties if a hearing were still desired, and (3) certifying that it was ready either to schedule such a hearing or to submit the matter to the Board for decision on the record.

No response was received from appellant, and on July 10 the Board issued a third order to show cause, giving Marty 10 days to comply with its May 24 order in order to avoid a dismissal of the appeals with prejudice. Counsel responded on July 23, (1) asking for further time until September 15 to prepare a report to the CO setting forth findings as to the disposition of all of the disallowed funds, (2) promising to submit to the Board by October 15 a report on the status of settlement negotiations, and (3) stating that if a hearing was still desired, it would be ready for the hearing.

By order dated August 17, 1990, the Board accepted appellant's representations but extended the compliance dates to September 30 for the report on use of funds and to October 30 for the report to the Board. The order also required joint progress reports to the Board every 30 days after October 30 if further extensions were to be granted, but cautioned the parties that no further extensions would be granted beyond December 31, 1990, in the absence of good cause, and that the appeals would be subject to dismissal *with prejudice* after that date.

As of this date, nothing further has been heard from either party concerning these appeals since July 23.

Background of IBCA-2783 - 2785

These later appeals were similarly filed with the Board by counsel for Marty by a notice of appeal dated June 5, 1990, in response to a March 30 determination by the CO upholding an auditor's disallowance of BIA funds in the amount of $37,946.67 in Departmental audit C-AP-AB-BIA-039-87-IA, made pursuant to the same authorities as in the earlier appeals.

The docketing notice for the appeals is dated June 8, 1990, and the return receipt from its mailing indicates that the notice was received by Marty on June 13. According to the docketing notice and the Board's rules, appellant was required to file its complaint on or before July 13. It did not do so.

The Department field solicitor filed its notice of appearance on June 28, 1990. Nothing further has since been received from either party.

Discussion

It is well known that Boards of Contract Appeals are considerably more lenient with respect to pleadings and other interlocutory matters than the courts, particularly the Claims Court. *Compare*, for example, *Claude E. Atkins Enterprises* v. *United States*, 899 F.2d 1180 (Fed. Cir. 1990), with *Willie Wood Mechanical Systems*, 89-3 BCA par. 22,039. In

the latter case, the Veterans Administration Board of Contract Appeals took pity on a *pro se* appellant that had failed to respond to two show cause orders, and ultimately reinstated its dismissed appeal. However, even Boards of Contract Appeals have their limits; and we believe that Marty Indian School, which by contrast *is* represented by counsel, has now exceeded those limits. It clearly has not taken the Board's rules and procedures seriously.

There is no doubt that Boards of Contract Appeals possess, and occasionally exercise, authority similar to that of the Claims Court in the management of their dockets. If they did not do so, their work could not be efficiently accomplished--a result that would benefit no one. *See, e.g., The Enton Corp.*, DOT BCA No. 2018, 89-2 BCA par. 21,658; *Scorpio Piping Co.*, ASBCA No. 34073, 89-2 BCA par. 21,813; and *Mac-In-Erny, Inc.*, ASBCA No. 28689, 88-1 BCA par. 20,359. Under the circumstances set forth, we must exercise that authority here.

DECISION

Accordingly, IBCA-2563 - 2567 are hereby dismissed *with prejudice* for failure of the appellant to prosecute them and for failure to respond to orders of the Board in a timely manner.

IBCA-2783 - 2785 are hereby dismissed *without prejudice* to reinstatement by letter request at any time on or before June 30, 1991, *provided* that at the time of requesting the reinstatement, appellant certifies that it is ready to proceed to a decision on the merits of the appeal *and* either (1) provides the Board with a date not more than 60 days thereafter when it will be ready to submit the case for decision on the record, or else (2) requests an oral hearing and provides the Board with three alternate dates, acceptable to both parties, on which the requested hearing can be held. All voluntary discovery should be accomplished by the parties during the next 4 months without resort to the Board. However, if any interim difficulties are encountered by either party, they should be promptly resolved by conference call to the Board.

Failure of the parties to comply with the Board's directions concerning IBCA-2783 - 2785 may result in dismissal of these appeals *with prejudice.*

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

January 25, 1991

JACK & SHIRLEY BAKER v. MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

19 IBIA 164 Decided: *January 25, 1991*

Appeal from a decision declining to take land in trust.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Blood Quantum--Indians: Lands: Trust Acquisitions

Land may be acquired in trust status under the Indian Reorganization Act, 25 U.S.C. § 465 (1988), or the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1988), for members of the Five Civilized Tribes who possess less than 1/2 Indian blood.

APPEARANCES: Jack and Shirley Baker, *pro sese.*

OPINION BY ADMINISTRATIVE JUDGE VOGT

INTERIOR BOARD OF INDIAN APPEALS

Appellants Jack and Shirley Baker seek review of a June 4, 1990, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take land in trust for appellants' benefit. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Background

Appellants, who are husband and wife, are both registered members of the Cherokee Nation of Oklahoma. Jack Baker possesses 1/64 degree Cherokee blood; Shirley Baker possesses 5/16 degree Cherokee blood. On December 20, 1989, they submitted an application for the trust acquisition of two parcels of land, one containing 0.785 acre and the other 2.39 acres, both located in the S½ SE¼, sec. 15, T. 20 N., R. 13 E., Indian Meridian, Tulsa County, Oklahoma. Appellants stated in their application that they intended to use the property for a smoke shop. They apparently submitted the application to an employee of the Cherokee Nation, who appears to have conducted a preliminary review under 25 CFR Part 151.[1]

[1] The Board assumes that the Cherokee Nation performs BIA realty functions under a P.L. 93-638 contract.

By letter of March 6, 1990, the Principal Chief of the Cherokee Nation recommended that the application be denied because neither appellant possessed 1/2 or more Indian blood and because the property was to be used for a smoke shop.

By letter of March 26, 1990, the Superintendent, Tahlequah Agency, BIA, denied appellants' request, giving as reasons:

- There is no statutory authority or policy which would justify your Land Acquisition.
- The purposes for establishing a smoke shop operation are neither unique nor will they contribute significantly to any particular economic or social program of the Tribe.
- You do not own any trust or restricted property currently and therefore it is not known to what degree you would need assistance in handling your affairs.

Appellants appealed to the Area Director, who affirmed the denial on June 4, 1990, stating:

[25 CFR] 151.10 sets out several factors to be considered when the Secretary evaluates a trust acquisition application, the first of which requires statutory authority for the acquisition. Your appeal document cites the Act of June 18, 1934 (48 Stat. 984), as authority for acquiring land in trust. It is the opinion of this office, however, that there is no authority through which members of the Five Civilized Tribes of Oklahoma [2] of less than 1/2 degree blood can acquire land in trust. This is based on a review of previous acts relating to the Five Civilized Tribes of Oklahoma, specifically the Acts of May 27, 1908 (35 Stat. 312); January 27, 1933 (47 Stat. 777); February 11, 1936 (49 Stat. 1135); and August 4, 1947 (61 Stat. 732); and the general scheme followed by Congress in dealing with the Five Civilized Tribes of Oklahoma.

In addition to this, our evaluation of your application in accordance with 25 CFR 151.10 supports the findings of the Superintendent that neither the purpose of nor your need for the land in trust justifies the transfer. You have also not demonstrated a need for federal protection and services, other than to operate a business free from state and local jurisdiction.

(June 4, 1990, Decision at 2).

Appellants' notice of appeal from this decision was received by the Board on July 2, 1990. Only appellants filed a statement with the Board.

Discussion and Conclusions

Appellants contend that the statutes relevant to their acquisition request are the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479 (1988),[3] and the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. §§ 501-509, neither of which restricts eligibility for trust land acquisitions to Indians of 1/2 or more Indian blood.

Appellants also argue that they need to have the property taken in trust in order to support themselves with a smoke shop business. They evidently believe that, if their land were in trust status, cigarette sales would not be subject to either state or tribal taxes.[4] They contend that

[2] These are the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Tribes.

[3] All further references to the *United States Code* are to the 1988 edition.

[4] Appellants premise this belief upon the decision of the United States Court of Appeals for the Tenth Circuit in *Citizen Band Potawatomi Indian Tribe* v. *Oklahoma Tax Commission*, 888 F.2d 1303 (10th Cir. 1989), *cert. granted*, 59 U.S.L.W. 3243 (U.S. Oct. 1, 1990) (No. 89-1322).

the trust acquisition will promote economic development because it will provide opportunities for employment.

Appellants further contend they have been discriminated against because trust acquisitions have been made for others. Finally, appellants state that, if the trust acquisition cannot be made for them, they are willing to convey the property either to the United Keetoowah Band of Cherokee Indians or to Shirley Baker's mother, Violet Sanders Hull, who is 5/8 Cherokee. They therefore ask the Board to rule that the trust acquisition can be made for the Band or Ms. Hull.

[1] In several recent decisions, the Board has discussed its role in reviewing BIA decisions concerning the acquisition of land in trust status. *See, e.g., Ross* v. *Acting Muskogee Area Director*, 18 IBIA 31 (1989); *Eades* v. *Muskogee Area Director*, 17 IBIA 198 (1989); *City of Eagle Butte, South Dakota* v. *Aberdeen Area Director*, 17 IBIA 192, 96 I.D. 328 (1989). In *City of Eagle Butte*, the Board observed that such decisions are committed to BIA's discretion and that the Board does not have jurisdiction to substitute its judgment for BIA's. *Cf. State of Florida* v. *United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). The Board concluded, however, that it does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority. 17 IBIA at 195-96, 96 I.D. at 330, and cases cited therein. The Board has also held that it has jurisdiction to review a discretionary BIA decision to the extent it reaches a legal conclusion. *See, e.g., Honaghaahnii Marketing & Public Relations* v. *Navajo Area Director*, 18 IBIA 144, 148 (1990); *Simmons* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 14 IBIA 243, 247 (1986).

25 CFR 151.10 requires BIA to consider a number of factors in evaluating trust acquisition requests:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

[2] In this case, the Area Director denied appellants' request on the ground, *inter alia*, that there was no statutory authority for the acquisition. This is a legal conclusion subject to Board review.

The Area Director based his conclusion in this regard upon a series of statutes concerning property of members of the Five Civilized Tribes, enacted subsequent to allotment of tribal lands under various statutes and agreements.

Section 1 of the Act of May 27, 1908, 35 Stat. 312, provided:

> That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions.

Succeeding enactments, specifically relating to the restricted lands of members of the Five Civilized Tribes with 1/2 or more Indian blood, continued to recognize lands owned by members with less than 1/2 Indian blood as free of restrictions. *E.g.*, Act of May 10, 1928, 45 Stat. 495; Act of January 27, 1933, 47 Stat. 777; Act of February 11, 1936, 49 Stat. 1135; Act of August 4, 1947, 61 Stat 731.

The Area Director concluded that to acquire land in trust status for members of the Five Civilized Tribes with less than 1/2 Indian blood would be contrary to the intent expressed in this series of statutes. His conclusion is supported by two Field Solicitor's memoranda included in the record for this appeal, both of which held that trust acquisitions for such individuals are precluded by these statutes. An August 10, 1976, memorandum from the Muskogee Field Solicitor concluded that, in enacting the OIWA, Congress did not intend to change existing law concerning the Five Civilized Tribes and that, therefore, trust acquisitions for members of less than 1/2 Indian blood could not be made under section 1 of the OIWA, 25 U.S.C. § 501.[5] A May 19, 1988, memorandum from the Pawhuska Field Solicitor concluded that, because of the provisions of the 1908 and 1947 Acts, section 210 of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2209,[6] was not applicable to members with less than 1/2 Indian blood.

Neither memorandum addresses what is perhaps the broadest trust acquisition authority of all, section 5 of the IRA, 25 U.S.C. § 465. That section provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust

[5] 25 U.S.C. § 501 provides:

"The Secretary of the Interior is hereby authorized is his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided*, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax * * *."

[6] 25 U.S.C. § 2209 provides:

"Title to any land acquired under [the ILCA] by any Indian or Indian tribe shall be taken in trust by the United States for that Indian or Indian tribe."

or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * * * * * *

Title to any land or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

This provision is applicable to the Five Civilized Tribes. Although some sections of the IRA were made inapplicable to Oklahoma tribes, section 465 was not one of those sections.[7] 25 CFR 151.5 recognizes the applicability of section 465 to Oklahoma tribes and their members:

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under Section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

Even though section 465 is applicable to the Five Civilized Tribes, however, the question remains whether it, or any other trust acquisition authority, is applicable to members of those tribes with less than 1/2 Indian blood.

The Board first considers whether the IRA or the OIWA may have repealed the provisions of the statutes concerning the Five Civilized Tribes which removed restrictions from members with less than 1/2 Indian blood. Under normal rules of statutory interpretation, there is a strong presumption against the repeal by implication of a specific statute by a general one. *E.g., Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974). In this case, a further impediment to a finding of repeal is the 1947 Act, enacted several years after the IRA and the OIWA, which clearly appears to be a reaffirmation of Congress' original intent concerning property of members of the Five Civilized Tribes.

However, as was stated by the Supreme Court in *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985):

[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. * * * "[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." * * * [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. [Citations omitted.]

Relying in part on *Blackfeet Tribe*, a Federal court of appeals has recently held that the OIWA repealed the Curtis Act of June 28, 1898,

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[7] 25 U.S.C. § 473, section 13 of the IRA, provides:

"[S]ections 2, 4, 7, 16, 17, and 18 of this Act [25 U.S.C. §§ 462, 464, 467, 476, 477, 478] shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole."

25 U.S.C. § 478, one of the sections made inapplicable to Oklahoma tribes, authorized tribal elections for the purpose of accepting or rejecting the IRA. The section provided that the Act would not apply to tribes which voted to reject it. The Oklahoma tribes had no opportunity to reject the Act.

30 Stat. 495, which had, among other things, abolished the tribal courts of the Creek Tribe. *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). Thus, the court held that a statute of more general application repealed a statute applicable only to the Five Civilized Tribes.

In light of the 1947 statute, the Board is unable to conclude that a similar repeal occurred in this case. The 1947 Act removed any ambiguity that might have existed concerning whether either the IRA or the OIWA was intended to repeal the earlier statutes relating to the property of members of the Five Civilized Tribes. The legislative history of the 1947 Act makes it apparent, however, that the Act was not intended to apply to lands acquired in trust under the OIWA. The House report on the bill which became the 1947 Act explained:

> The main purpose of the bill is to clarify the laws relating to the approval of conveyances of restricted Indian lands [of the Five Civilized Tribes], definitely defining the jurisdiction of the Oklahoma State courts over certain classes of Indian litigation, the procedure governing the removal of cases to the Federal courts, and the limitation of the tax- exempt acreage of restricted Indian lands.
>
> * * * * * * *
>
> * * * The tax-exempt status of lands now held or hereafter acquired in the name of the United States in trust for Indians and Indian tribes under the provision[s] of the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967) would not be affected by the provisions of this bill.

H.R. Rep. No. 740, 80th Cong., 1st Sess. 4 (1947). *See also id.* at 5 (comments of the Under Secretary of the Interior); S. Rep. No. 543, 80th Cong., 1st Sess. 4, 5 (1947). From this report language, it is apparent that Congress both recognized the OIWA as applicable to the Five Civilized Tribes and intended the OIWA land acquisition provision to remain separate from the provisions of the statutes concerning the Five Civilized Tribes.

Accordingly, the Supreme Court's analysis in *Blackfeet Tribe, supra*, is particularly relevant to this matter. That case involved the relation between certain statutes governing mineral leasing of tribal lands. The Act of February 28, 1891, 25 U.S.C. § 397, authorized leasing. The Act of May 29, 1924, 25 U.S.C. § 398, authorized state taxation of mineral production from leases under the 1891 Act. In 1938, Congress enacted the comprehensive Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396f. In *Blackfeet Tribe*, the Court held that the taxing authorization in the 1924 Act was not incorporated into the 1938 Act and so was inapplicable to mineral production from leases entered into under the later Act. The Court did not hold specifically that the taxing authorization had been repealed by the 1938 Act but stated that, if it survived at all, it was applicable only to leases entered into under the 1891 and 1924 Acts. 471 U.S. at 768. In reaching its conclusion, the Court relied in part upon the canon of construction noted above, *i.e.*,

that ambiguous statutory provisions are to be interpreted to the Indians' benefit.[8]

This case concerns the relation between the statutes concerning the Five Civilized Tribes on the one hand and the IRA and the OIWA on the other hand. It presents the specific question whether the land ownership limitations placed upon tribal members of less than 1/2 Indian blood by the first-named group of statutes are incorporated into the land acquisition provisions of the IRA and the OIWA. The answer to this question depends, at least in part, on the meaning of the term "restricted" as used in reference to land in the statutes concerning the Five Civilized Tribes.

Unlike Indians allotted under the General Allotment Act of 1887, 24 Stat. 388, who received their allotments in trust status, members of the Five Civilized Tribes were allotted under special statutes and agreements and received their allotments in "restricted fee" status.[9] In many Federal statutes, the term "restricted," when applied to individually owned Indian land, refers only to lands held in restricted fee status. In these statutes, the terms "trust" and "restricted" (or "subject to restrictions against alienation") are both used, and it is apparent that the term "restricted" is not intended to encompass land held in trust status. Examples include: 25 U.S.C. §§ 323 (rights-of-way); 416, 416c (leases on San Xavier and Salt River Reservations); 483a (mortgages); 2201(4) and other provisions throughout the ILCA.[10] Other statutes, however, use the term "restricted" to mean any land with restraints on alienation, including land held in trust status. Examples include: 25 U.S.C. §§ 380 (lease of allotments of deceased Indians); 393 (farming and grazing leases); 415 (general leasing). Some statutes, *e.g.*, 25 U.S.C. § 406 (timber sales), appear to use the term in both senses (compare 406(a), (b), and (e) with 406(c) and (f)). It is apparent that Congress has used the term "restricted" in two different senses, and thus an ambiguity may be said to exist with respect to its intended meaning in the statutes concerning the Five Civilized Tribes.

The Area Director, and the Field Solicitors' memoranda on which he relied, employ the broader meaning of the term "restricted" in construing those statutes. Thus they conclude that the acquisition of land in trust status is impermissible for tribal members who cannot

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[8] The Court also invoked another principle of statutory construction in Indian law: "[T]he States may tax Indians only when Congress has manifested clearly its consent to such taxation." 471 U.S. at 766.

[9] The difference between these two types of allotments is explained in *Cohen's Handbook of Federal Indian Law* (1982 edition) at 615-16:

"[A]llotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ('trust' allotment), or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment). * * * Historical differences in terminology and statutory origin cause occasional disputes over these definitions." (Footnotes omitted).

For many purposes, trust and restricted allotments have been treated alike. *See, e.g., United States* v. *Ramsey*, 271 U.S. 467 (1926) (criminal jurisdiction); *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717, 723-27 (1948) (state taxes); 43 CFR 4.201(m) (probate). *See, generally, Cohen* at 615-18.

[10] 25 U.S.C. § 2201(4) defines the term "trust or restricted lands" for purposes of the ILCA as "lands, title to which is held by the United States in trust for an Indian or an Indian tribe or lands title to which is held by Indians or an Indian tribe subject to a restriction by the United States against alienation."

hold restricted lands under those statutes. This is a reasonable construction of the statutes.

It would also be reasonable, however, to construe the term "restricted" in the statutes concerning the Five Civilized Tribes in the narrower sense of "restricted fee," because that was the status in which allotments had been made to the members of the Five Civilized Tribes and thus was presumably the status Congress had in mind when enacting further statutes concerning those allotments. This conclusion is supported by the House and Senate reports on the 1947 Act, which appear to recognize a distinction between restricted and trust lands; they use the term "restricted" throughout, in reference to lands held under the statutes concerning the Five Civilized Tribes, but change terminology when they refer to lands held under the OIWA, speaking there of lands held or acquired in "trust."

Under the narrower construction of the term "restricted," members of the Five Civilized Tribes with less than 1/2 Indian blood, although ineligible to hold or inherit land in restricted fee status, would be eligible to have land acquired in trust for them, assuming they meet other eligibility requirements. Under the canon of construction discussed above, the second construction, which is to the Indians' benefit, is to be preferred. *Cf. Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 728 F.2d 1555, 1569 (10th Cir. 1984), *dissenting opinion adopted as majority opinion by the court en banc*, 782 F.2d 855 (10th Cir. 1986), *cert. denied*, 479 U.S. 970 (1986) ("Given two reasonable interpretations [of a regulation concerning oil and gas royalties], Interior's trust responsibilities require it to apply whichever accounting method * * * yields the Tribe the greatest royalties").

This construction is also more consistent with the view of the court of appeals in *Muscogee (Creek) Nation* concerning the intent of Congress in the OIWA that "all of the Oklahoma tribes were to have the same legal status." 851 F.2d at 1445.[11] The court noted that "[a]n interpretation of the OIWA that permitted some Oklahoma tribes to have courts but not others would not comport with that intent." *Id.* Likewise, an interpretation that imposed upon some tribes but not others a two-class system of membership would not comport with such an intent. In this regard, the Board notes that the legislative history of the OIWA, as discussed in the Muskogee Field Solicitor's 1976 memorandum, indicates that the original bill did in fact divide Oklahoma Indians into two classes, based on blood quantum. That provision was deleted, as was another provision which would have defined "tribe" as an entity consisting only of persons with 1/2 or more Indian blood.[12] As enacted, the OIWA contains no references to blood quantum.

[11] In other respects as well, the courts have shown a recent tendency to apply to the Five Civilized Tribes general principles of Indian law previously considered inapplicable to them. *See, e.g., Housing Authority of the Seminole Tribe* v. *Harjo*, 790 P.2d 1098 (Okla. 1990), in which the Oklahoma Supreme Court held that certain formerly restricted land was Indian country for purposes of criminal and civil jurisdiction.

[12] The Field Solicitor stated that S. 2047, 74th Cong., 1st Sess., as introduced on Feb. 26, 1935, included the following provision:

Continued

As discussed above, 25 U.S.C. § 465, derived from the IRA, is applicable to the Five Civilized Tribes. The definition of "Indian" for purposes of the IRA appears at 25 U.S.C. § 479, is applicable to the Five Civilized Tribes, and provides that "[t]he term 'Indian' * * * shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." The OIWA does not define "Indian" but incorporates, for some purposes at least, the definition at 25 U.S.C. § 479. *See* 25 U.S.C. § 504.

Appellants come within the IRA definition because they are members of a recognized Indian tribe under Federal jurisdiction. The Board concludes that land may be taken in trust for them under either the IRA or the OIWA.

Even though legal authority for this trust acquisition exists, however, appellants are not *entitled* to have the property taken in trust for them. As discussed above, the decision whether to acquire land in trust status under the IRA or the OIWA is committed to the discretion of BIA. The Board will not disturb a BIA decision which is properly based on BIA's consideration of the criteria in 25 CFR 151.10.

In this case, the Area Director's decision, based in part on a legal conclusion, also gave other reasons for denying appellants' request. It is possible, however, that the Area Director's view of the law may have colored his further consideration of the request. The Board finds therefore that this matter should be remanded to enable the Area Director to consider appellants' request in light of the legal conclusion reached in this decision.

The Board touches briefly on the legal issues raised in some of appellants' other arguments.

Appellants contend that they have been discriminated against because other Indians have had land taken in trust for them. The Board addressed a similar argument in *Eades*, 17 IBIA at 202:

> Appellant also argues that she has been discriminated against because other Creeks have had land taken into trust for their benefit. Because no applicant has a right to have lands taken into trust for his or her benefit, and because BIA must consider each trust acquisition application on its own merits, an allegation that other Indians have had land taken into trust is insufficient to show that discrimination has occurred.

"[5](a) The term 'Indian of the first degree' shall mean any person whose name appears on the membership rolls of such tribe heretofore or hereafter approved by the Secretary of the Interior, and who is classified by the Secretary of the Interior as a person having one-half or more of Indian blood;

"(b) The term 'Indian of the second degree' shall mean any person whose name is now on or may hereafter be placed on the official rolls of the Indian office in Oklahoma and who is classified by the Secretary of the Interior as a person having less than one-half of Indian blood."

The Field Solicitor also indicated that the original bill provided for the taking into trust of the restricted fee lands of Five Civilized Tribes members of the "first degree" and for removal of restrictions from all Oklahoma Indians of the "second degree."

Like the appellant in *Eades*, appellants here do no more than allege that others have had land taken into trust. Such an allegation is insufficient to show discrimination.

Appellants also request the Board to issue an advisory opinion concerning whether a trust acquisition could be made for either the United Keetoowah Band of Cherokee Indians or Violet Sanders Hull, if appellants were to convey their property to the Band or Ms. Hull. The Board has no authority to issue an opinion on either question, absent an Area Director's decision concerning the matter. 43 CFR 4.1(2); 4.330(a); 4.331; *Florida Tribe of Eastern Creek Indians* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 13 IBIA 269 (1985).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's June 4, 1990, decision is vacated and this matter is remanded to him for further consideration in accordance with this opinion.

ANITA VOGT
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Chief Administrative Judge

ESTATE OF PETER ALVIN WARD

19 IBIA 196 Decided *February 5, 1991*

Appeal from an order denying petition for rehearing issued by Administrative Law Judge William E. Hammett in Indian Probate IP PO 46L 87-56.

Reversed.

1. Indian Probate: Indian Land Consolidation Act: Escheat--Statutory Construction: Indians--Statutory Construction: Legislative History

Where Congress, in amending an existing statutory provision, indicates an intent to clarify that provision, the amendment and its legislative history may be used in construing the original enactment.

2. Indian Probate: Indian Land Consolidation Act: Escheat

Interests subject to the escheat provision in 25 U.S.C. § 2206(a) (1988), escheat only to the tribe with governmental jurisdiction over the reservation or off-reservation area in which the interests are located.

APPEARANCES: Richard Reich, Esq., and Amy L. Crewdson, Esq., Taholah, Washington, for the Quinault Indian Nation; Kerry E. Radcliffe, Esq., and William C. Lewis, Esq., Seattle, Washington, for the Quileute Indian Tribe; Vernon Peterson, Esq., Office of the

February 5, 1991

Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE VOGT

INTERIOR BOARD OF INDIAN APPEALS

Appellant Quinault Indian Nation seeks review of a January 26, 1990, order denying rehearing issued by Administrative Law Judge William E. Hammett in the estate of Peter Alvin Ward (decedent). For the reasons discussed below, the Board reverses that order.

Procedural Background

Decedent, unallotted Makah 130-7498, died intestate on August 20, 1986, owning interests in trust allotments on the Quinault, Quileute, and Makah Reservations. On September 15, 1988, Judge Hammett issued an order in the estate, in which he determined that decedent's heirs were his widow and his daughter.[1] Noting that certain of decedent's interests were subject to escheat under section 207 of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2206 (1988),[2] the Judge retained jurisdiction "to issue a supplemental order to determine the tribal entity in which escheat shall be affirmed."

On February 7, 1989, Judge Hammett issued a "Supplemental Order Affirming Escheat," in which he determined, *inter alia*, that certain of decedent's interests in land within the Quinault Reservation escheated to the Quileute Tribe. Appellant attempted to appeal this order to the Board, but the Board dismissed the appeal as premature, holding that appellant was required to first seek rehearing from Judge Hammett. *Estate of Peter Alvin Ward*, 17 IBIA 95 (1989). Appellant filed a petition for rehearing, which was denied on January 26, 1990. This appeal followed.

Briefs were filed by the Quinault Indian Nation, the Quileute Indian Tribe, and the Bureau of Indian Affairs (BIA).

Historical Background

By Articles 1 and 2 of the Treaty of Olympia, July 1, 1855, and January 25, 1856, 12 Stat. 971, the Quinault and Quileute Tribes relinquished their claims to almost all of their territory, reserving for their use and occupation "a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States." Article 6 of the treaty authorized the President to remove the tribes from "said reservation or reservations to such other suitable place or places within said Territory as he may deem fit," to "consolidate them with other friendly tribes or bands,"

[1] This determination is now final for the Department of the Interior.
[2] All further references to the *United States Code* are to the 1988 edition.

and to assign reservation lands to individuals and families willing to locate on the lands as a permanent home. By Executive order of November 4, 1873, 1 C. Kappler, *Indian Affairs: Laws and Treaties* (Kappler) 923 (1904), a 200,000 acre reservation was established "[i]n accordance with the [Treaty of Olympia] and to provide for other Indians in that locality, * * * for the use of the Quinaielt, Quillehute, Hoh, Quit and other tribes of fish-eating Indians on the Pacific coast." The Quileutes refused to accept this as a reservation, stating that "their interpretation of the treaty was that they were to be given a reservation where they had always lived at the mouth of the Quillehute River." *United States* v. *Moore*, 62 F.Supp. 660, 668 (W.D. Wash. 1945), *aff'd*, 157 F.2d 760, *cert. denied*, 330 U.S. 827 (1946). By Executive order of February 19, 1889, 1 Kappler 923, the Quileute Tribe was granted a reservation of its own near La Push, Washington.

Around the turn of the century, allotment of the Quinault Reservation was initiated under the provisions of the General Allotment Act of 1887, 24 Stat. 388. By the Act of March 4, 1911, 36 Stat. 1345, Congress authorized and directed the Secretary of the Interior

> to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette, or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the [Treaty of Olympia], and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

Issues concerning allotment of the Quinault Reservation reached the Supreme Court. In *United States* v. *Payne*, 264 U.S. 446 (1924), the Court held that forested land capable of being cleared for agricultural use was subject to allotment. In *Halbert* v. *United States*, 283 U.S. 753 (1931), it held that individuals of Chehalis, Chinook, and Cowlitz ancestry were entitled to allotments on the reservation and that reservation residence was not a prerequisite to allotment.

Allotment of the reservation continued through the early 1930's. In 1935, the Indians of the Quinault Reservation voted to accept the provisions of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479, under which further allotment of Indian reservations was prohibited.

Although the Quinault Reservation Indians voted to accept the IRA, they did not adopt a constitution under that Act but, instead, continued to operate under bylaws they had adopted in 1922. In 1965, they adopted revised bylaws; in 1975, they adopted a constitution.[3] The 1965 bylaws and the 1975 constitution were formally recognized by the Associate Commissioner and the Commissioner of Indian Affairs,

[3] Art. II, sec. 1, of the 1975 constitution defines "member" as "(a) Any person of ¼ Quinault, Queets, Quileute, Hoh, Chinook, Chehalis, or Cowlitz blood of one of the named tribes or combined, not a member of any other federally recognized Indian tribe, (b) any person adopted into the Nation by a majority vote of the General Council."

respectively, as the governing documents of the Quinault Indian Nation.

The Indians of the Quileute Reservation also voted to accept the IRA. The Quileute Tribe adopted a constitution under the Act; that constitution was approved by the Secretary of the Interior on November 11, 1936, under authority of 25 U.S.C. § 476.

Discussion and Conclusions

At all times relevant to this appeal, section 207(a) of ILCA, 25 U.S.C. § 2206(a), provided:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death.

The issue in this appeal is whether land originally allotted to Quileute Indians within the Quinault Reservation is "within the [Quileute Tribe's] reservation or otherwise subject to [its] jurisdiction" for purposes of this provision.[4] The Board is aware that related issues concerning the rights of other tribes and/or individuals in the Quinault Reservation have been, and continue to be, litigated. *See, e.g., Confederated Tribes of the Chehalis Reservation* v. *Lujan*, 129 F.R.D. 171, 17 Indian L. Rep. 3025 (W.D. Wash. 1990), *appeal pending*, No. 90-35192 (9th Cir.), in which four tribes and nine individuals challenge the Secretary of the Interior's recognition of the Quinault Indian Nation as the sole governing authority for the reservation.[5] It is apparent that there are unresolved issues concerning rights in this reservation; most of these issues must be decided in other forums. In this appeal, it is the Board's narrow task to determine whether Congress intended in 25 U.S.C. § 2206(a) to permit the escheat of interests in land on the Quinault Reservation to a tribe other than the Quinault Indian Nation.

Judge Hammett did not explain his rationale for holding that the interests at issue here escheat to the Quileute Tribe. For purposes of this decision, the Board assumes that his reasons were the same or similar to the arguments put forth by the Quileute Tribe in this appeal.

The Quileute Tribe contends that it has rights in the Quinault Reservation under the Treaty of Olympia, the 1873 Executive order, and the 1911 statute, and that these rights were not affected by the creation of the Quileute Reservation at La Push or the fact that the

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[4] For purposes of this appeal, the Board assumes that the allotments at issue were in fact made o Quileute Indians. The record in this case is sketchy at best with respect to the tribal affiliations of the original allottees. Were the Board to conclude that interests on the Quinault Reservation could escheat to the Quileute Tribe, this case would have to be remanded to the Administrative Law Judge for further documentation concerning the allottees.

[5] Plaintiffs are the Federally recognized Chehalis and Shoalwater Bay tribes; the non-Federally recognized Chinook and Cowlitz tribes; and nine individuals, who are members of the Quileute, Makah, Hoh and Quinault tribes. The district court dismissed the case for failure to name an indispensable party, the Quinault Indian Nation.

Quinault Indian Nation is a "consolidated" tribe consisting of members of various tribal ancestry. The Tribe further contends that its rights in the Quinault Reservation were judicially confirmed in *Williams* v. *Clark*, 742 F.2d 549 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985).[6] With respect to section 2206(a), the Tribe argues that Congress intended small fractional interests to escheat to the tribe of the original allottee. Finally, the Tribe argues that an escheat of interests in Quileute allotments to the Quinault Nation would abrogate the Quileute Tribe's treaty and Fifth Amendment rights.

The Quinault Indian Nation and BIA argue that Judge Hammett's decision should be reversed. They contend, *inter alia*, that the United States has long recognized the Quinault Indian Nation as the tribe with exclusive authority to govern the Quinault Reservation and that Congress intended in section 2206(a) that small fractional interests would escheat to the governing tribe of a reservation regardless of the tribal affiliation of the original owners of the interests.

The decision of the United States Court of Appeals for the Ninth Circuit in *Williams* v. *Clark* appears, at first glance, to be strongly supportive of the Quileute Tribe's position here. That decision concerned the right of an individual Quileute Indian to devise an allotment on the Quinault Reservation to another Quileute Indian who was not his heir. Under 25 U.S.C. § 464, as originally enacted and as applicable to the case, such devises could be made only to "the Indian tribe in which the lands * * * are located [or] to any member of such tribe * * * or any heirs of such member." The court of appeals held that a member of the Quileute Tribe was a permissible devisee under former section 464, stating that the Quileute Tribe had unextinguished property rights in the Quinault Reservation and exercised jurisdiction over the reservation.

The Quileute Tribe argues that the Board is bound by the decision in *Williams* and must follow the precedent set therein. The Board agrees that it is bound by the holding in *Williams*. However, that holding pertained to former 25 U.S.C. § 464, not 25 U.S.C. § 2206(a). The court's language concerning jurisdiction was clearly dicta, and the court specifically declined to expand its statement concerning jurisdiction beyond the specific facts of the case before it.[7] It is clear that the court

[6] This decision reversed a decision of the U.S. District Court for the Western District of Washington, *Williams* v. *Watt*, No. C81-700R (Oct. 17, 1983), which had affirmed the Board's decision in *Estate of Joseph Willessi*, 8 IBIA 295, 88 I.D. 561 (1981).

[7] With respect to jurisdiction, the court stated: "We therefore hold that both the Quileute Tribe and the Quinault Tribe exercise jurisdiction over the Quinault Reservation and either may be considered the tribe in which the lands are located for purposes of IRA § 4 [25 U.S.C. § 464]," 742 F.2d at 555, and "[w]e do not consider here whether tribes other than the Quinault and Quileute also have jurisdiction over the Quinault Reservation for IRA § 4 purposes under the Executive Order of November 4, 1873. Further, we do not consider the extent of the Quileute Tribe's jurisdiction over the Quinault Reservation." *Id.* at note 8.

The Solicitor General of the United States, on behalf of the Secretary of the Interior, opposed the petition for certiorari filed in *Williams*, because of the narrow reach of the decision. In his brief before the Supreme Court, the Solicitor General stated:

"While the judgment of the court of appeals is inconsistent with the result we urged below, we see no warrant for further review in this Court. The court of appeals' decision is exceedingly narrow; it merely holds that, for the purposes of a superseded version of Section 4 of the IRA, the Quileute Tribe has a sufficient property interest in the Quinault Reservation to allow its members to devise their trust allotments to one another. Although the panel's

Continued

of appeals did not rule explicitly in *Williams* that the Quileute Tribe has jurisdiction over the Quinault Reservation for purposes of 25 U.S.C. § 2206(a).

Further, the two sections are not so analogous that the court's holding concerning former section 464 is necessarily applicable as well to section 2206(a). Rather, the implications of the court's analysis for the two sections are quite different. The aspect of section 464 at issue in *Williams* was the right of individual Indians to devise property to other individual Indians; despite the court's broad language concerning tribal treaty rights and jurisdiction, the result of its holding was simply to expand the rights of individual Indians over their own property.[8] By contrast, a conclusion that a tribe has jurisdiction for purposes of section 2206(a) would unequivocally recognize that tribe as possessing governmental authority over the land in question. This is so because of Congress' clear intent that the term "jurisdiction" as relevant to ILCA was to mean "governmental authority." *See* H.R. Rep. No. 908, 97th Cong., 2nd Sess. 8 (1982): "For the purposes of this Act, tribal jurisdiction means that the tribe exercises civil governmental powers over the lands involved or that the Secretary of the Interior recognizes that the tribe has the authority to exercise civil governmental powers over such lands."

Because application of the court's analysis in *Williams* would produce a significantly different result in this case than it did in *Williams*, and because the court specifically disclaimed an intent to expand its ruling beyond the case before it, the Board concludes that *Williams* is not controlling here and, therefore, does not compel a conclusion that the Quileute Tribe has jurisdiction over the Quinault Reservation for purposes of 25 U.S.C. § 2206(a).

The Department of the Interior has long recognized the Quinault Indian Nation as the governmental authority for the Quinault Reservation. Although the 1975 constitution has not been approved by the Secretary, it has been formally recognized by the Commissioner of Indian Affairs as the Nation's governing document. In that document, the Quinault Nation asserts "jurisdiction and governmental power" over the Quinault Reservation. *See also, e.g.*, with respect to the history of the Department's recognition of the Quinault Indian Nation, Memorandum of the Acting Associate Solicitor, Division of Indian Affairs, to Commissioner of Indian Affairs, March 18, 1980, *reprinted*

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opinion does contain unnecessary and ambiguous dicta concerning shared Quileute *jurisdiction* over the Quinault Reservation, the panel was generally careful to limit its holding to the question of devisability of Quileute *property* interests under the former language of Section 4 of the IRA * * * The court of appeals' decision does not disturb the federal government's longstanding recognition of the Quinault Nation's exclusive political jurisdiction over the Quinault Reservation." (Italics in original). Brief for the Secretary of the Interior in Opposition to Petition for Certiorari, *Elvrum* v. *Williams*, U.S. Supreme Court, No. 84-943, at 5-6.

[8] Under the present version of sec. 464, these rights are expanded further. In 1980, the section was amended to permit devises to heirs, lineal descendants, and "any other Indian person for whom the Secretary of the Interior determines that the United States may hold in trust [sic]." Act of Sept. 26, 1980, P.L. 96-363, § 1, 94 Stat. 1207.

in Return Land to the Quinault Indian Nation: Hearings before the Senate Select Comm. on Indian Affairs, 100th Cong., 2d Sess. 94 (1988).

By the same token, the Department has long recognized the governmental authority of the Quileute Tribe as limited to the Quileute Reservation. The Quileute constitution, as approved by the Secretary in 1936, provides at Article I: "The jurisdiction of the Quileute Tribe shall include all the territory within the original confines of the Quileute Reservation as set forth by Executive Order of February 19, 1889, and shall extend to such other lands as have been or may hereafter be added thereto under any law of the United States, except as otherwise provided by law." Article VIII, section 1, concerning allotted lands and the Tribe's power over them, is also limited to lands within the Quileute Reservation.

In *Edwards, McCoy & Kennedy* v. *Acting Phoenix Area Director*, 18 IBIA 454 (1990), the Board held that all Department of the Interior officials, including the Board, are bound by the Secretary's approval of a tribal constitution. In this case, no reason appears why the Secretary's and Commissioner's approval and recognition, respectively, of the two tribes' governing documents should not also be considered binding.[9]

It is not necessary to rely solely on these documents, however, or on the precedent of the Department's historical dealings with these two tribes. Congress has also clearly indicated that it recognizes the Quinault Indian Nation as the sole tribal governmental authority for the Quinault Reservation. Recently, the Senate report accompanying the National Indian Forest Resources Management Act, Title III of the Act of November 28, 1990, P.L. 101-630, 104 Stat. 4531, expressed this recognition:

> The phrase "reservation's recognized tribal government" is deliberately utilized throughout S. 1289 and this report. The phrase is necessary to avoid confusion since several distinct tribes or descendants of tribes may reside on a single reservation. For example, the Congress has consistently recognized the Quinault Indian Nation as the governing body of the Quinault Indian Reservation which includes residents of the Chinook, Cowlitz, Chehalis, Quileute, Hoh, Queets and Quinault tribal groups. [10]

S. Rep. No. 402, 101st Cong., 2nd Sess. 9 (1990). Congress' recognition of the Quinault Indian Nation as the governing body of the reservation is also evidenced by, *e.g.*, statutes transferring lands to the Quinault

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[9] While the court of appeals stated in *Williams* that the jurisdictional language in the Quileute constitution did not extinguish the tribe's *property* rights in the Quinault Reservation, 742 F.2d at 554, its statement did not address the *governmental* power of the tribe.

[10] Sec. 304(11) of the National Indian Forest Resources Management Act defines "Indian tribe" or "tribe" as "any Indian tribe, band, nation, Pueblo or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and shall mean, where appropriate, the recognized tribal government of such tribe's reservation."

Concerning this definition, H.R. Rep. No. 835, 101st Cong., 2nd Sess., (1990), states at page 17:

"The definition of 'Indian tribe' and 'tribe' is amended in the substitute to make clear that, where the terms are used in the legislation, in contextual circumstances indicating that some decisional action or authority is implied, the terms mean the recognized tribal government of such tribe's reservation. The amendment is to avoid confusion and litigation where two or more historical tribes or descendants of such tribes are located or reside upon the same reservation. Under those circumstances, it is intended that the governing body recognized by the Secretary shall be included in the definition. Because of the amendment of this definition, the phrase 'reservation's recognized tribal government' was deleted throughout the bill. However, no substantive change is intended."

Tribe or Quinault Indian Nation. Act of August 26, 1959, 73 Stat. 427; Act of October 15, 1962, 76 Stat. 913; Act of November 8, 1988, 102 Stat. 3327.

The Federal courts have also recognized the governmental authority of the Quinault Indian Nation over the Quinault Reservation. *E.g., United States* v. *Washington*, 384 F.Supp. 312, 374 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Cardin* v. *DeLaCruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982); *Snow* v. *Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984).

In view of this consistent history, the Board concludes that, for the purposes of 25 U.S.C. § 2206(a), the Quinault Indian Nation is the only tribe with governmental authority over the Quinault Reservation.

The Quileute Tribe's arguments, however, appear to be premised, not upon a claim of governmental authority over the Quinault Reservation, but upon a claim of property rights in the reservation.[11] Therefore, the Board must consider whether Congress intended in 25 U.S.C. § 2206(a) to permit escheats to tribes which lack governmental authority over the land in question but which may have property rights in the land.

The Quileute Tribe argues that Congress intended for small interests to escheat to the tribe of the original allottee, quoting in support a statement on page 11 of H.R. Rep. No. 908, *supra*, which indicates that the escheat provision of ILCA was intended to consolidate small fractional "interests in the tribes once [sic] owned these lands before they were allotted."[12]

The Quinault Nation and BIA argue that Congress intended in ILCA that small fractional interests would escheat to the governing tribe of the reservation on which the land was located. The order on appeal here, they argue, is contrary to the intent of ILCA because it does not serve the purpose of consolidation and because it weakens, rather than strengthens, the authority of a governing tribe over its reservation.

While the statute and its legislative history are not absolutely clear on the precise point at issue here, both the statutory language and the report language concerning tribal exercise of "civil governmental powers," quoted above, tend to indicate an intent to restrict escheats to the tribe with governmental authority over the land concerned. The report language relied upon by the Quileute Tribe to oppose this interpretation is ambiguous at best.

When viewed in the context of the general purpose of ILCA, the intended meaning of section 2206(a) appears more certain. The goal of

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[11] It is not clear from the Quileute Tribe's brief whether or not it is claiming to possess governmental authority over the Quinault Reservation. It speaks only of "property rights" and "treaty rights," with little indication of what it considers to be encompassed in the term "treaty rights." The Board notes that the Quileute Tribe is not among the plaintiffs in *Confederated Tribes of the Chehalis Reservation, supra.*

[12] A necessary assumption of this argument is, of course, that the land in question was owned by the Quileute Tribe prior to allotment. Because of its disposition in this matter, the Board is not required to reach any conclusion concerning property rights of the Quileute Tribe in the Quinault Reservation. *See also* note 4, *supra.*

ILCA was to "allow Indian tribes: (1) to consolidate their tribal landholdings; (2) to eliminate certain undivided fractionated interests in Indian trust or restricted lands; and (3) to keep trust or restricted lands in Indian ownership by allowing tribes to adopt certain laws restricting inheritance of Indian lands to Indians." H.R. Rep. No. 908, *supra* at 9. It is also apparent that Congress intended to vest tribes with additional authority over lands within their reservations. *See, e.g.*, 25 U.S.C. § 2205; H.R. Rep. No. 908; S. Rep. No. 632, 98th Cong., 2nd Sess. (1984). Neither this purpose nor the land consolidation purpose of ILCA would be served by escheating small fractional interests to tribes other than the governing tribe of the reservation on which the interests are located.

[1] In a recent amendment to 25 U.S.C. § 2206(a), Congress has clarified its intent in the original version of that section. Section 301 of the Act of November 29, 1990, P.L. 101-644, 104 Stat. 4662, amends the first sentence of section 2206(a) to read:

> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land.

Senate Report No. 483, 101st Cong., 2nd Sess. 6 (1990), explains that this provision

> amends the Indian Land Consolidation Act to make clear that lands within a reservation or other trust lands outside of reservations subject to the escheat provision, escheat to the recognized tribal government of the particular reservation, or to the tribal government that has jurisdiction over the off-reservation lands, and not to a different tribal government. For example, if a member of the Quinault Indian Nation who owns land within the Lummi Indian Reservation that is subject to the escheat provision of the Indian Land Consolidation Act, dies intestate, his land would escheat to the Lummi Indian Tribe, and not the Quinault Indian Nation.

The same report states at page 3 that two committee amendments to the amendment as originally drafted "provide further clarification that lands which escheat to a tribe should only include those lands that are within the jurisdiction of such tribe, whether on or off the reservation." It is apparent from the report language that Congress was aware of the problem that had arisen concerning the proper interpretation of section 2206(a) and that it intended the new language to clarify rather than alter the substance of the original version of this section. Accordingly, it is appropriate to consider the amendment and its legislative history in construing Congressional intent in the original version. *See, e.g., Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541-543 (1962); *May Department Stores* v. *Smith*, 572 F.2d 1275, 1277-78 (8th Cir.), *cert. denied*, 439 U.S. 837 (1978); *Johnson* v. *Heckler*, 607 F.Supp. 875, 881 (N.D. Ill. 1984); *aff'd*, 769 F.2d 1202 (7th Cir. 1985); 1A Sands, *Sutherland on Statutory Construction* §§ 22.30-22.31 (4th ed. 1985).

[2] For the reasons discussed, the Board concludes that Congress intended in the original version of 25 U.S.C. § 2206(a) to restrict

escheats of interests in trust or restricted land within an Indian reservation to the governing tribe of that reservation.

The Quileute Tribe's final arguments are that to escheat interests in Quileute allotments to the Quinault Nation would abrogate its treaty rights and constitute an unconstitutional taking of its property. The Board lacks authority to declare an act of Congress unconstitutional or violative of treaty rights. *See, e.g., Redleaf* v. *Muskogee Area Director*, 18 IBIA 268 (1990), and cases cited therein. Accordingly, the Board does not consider these arguments.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's January 26, 1990, order denying rehearing is reversed, and the land interests at issue in this appeal are held to escheat to the Quinault Indian Nation.

ANITA VOGT
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Chief Administrative Judge

APPEALS OF HARDRIVES, INC.

IBCA-2319 *et al.* Decided: *February 6, 1991*

Contract No. 6-CC-30-04090, Bureau of Reclamation.

Motion For Stay Granted.

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

The Board is not deprived of jurisdiction over a contractor's appeals when the United States brings a civil action against appellant pursuant to the fraudulent claims provision of the Contract Disputes Act of 1978, 41 U.S.C. § 604, and the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988).

2. Contracts: Contracts Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Appeals: Motions

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

APPEARANCES: Calvin H. Udall,Graeme Hancock, Attorneys At Law, Fennemore Craig, Phoenix, Arizona, for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

I. Background

These appeals, filed with the Board in 1987-88, involve Hardrives, Inc.'s claims and alleged subcontractors' claims in connection with the above contract for the construction of the Hohokam Canal. Numerous procedural matters, discovery, disputes, and Board orders have ensued. On October 14, 1988, the Board denied appellant's motion for discovery related sanctions, stating that the hearing date depended upon the completion of discovery and the Government's audit of the claims. *Hardrives, Inc.*, IBCA-2375, 89-2 BCA ¶ 21,738. Subsequently, there was no request for Board action, or to schedule a hearing. By order dated December 20, 1989, the Board dismissed all pending appeals without prejudice. Coincidentally, the parties filed a stipulation dated December 27, 1989, to dismiss appeals 2319 and 2514 without prejudice.

By request dated June 14, 1990, Hardrives sought reinstatement of all appeals pending as of the December 20, 1989, dismissal order, except 2319, 2514, and another appeal. Appellant stated that the appeals had been inactive pending completion of the Government's audit. The contractor added that, within 45 days, it anticipated making minor amendments to its asserted damages, incorporating certain audit findings. Hardrives also stated that it was "in the process of confirming that one of its subcontractors may wish to abandon its portion of certain claims" and that any resulting changes would be completed within 45 days. Appellant concluded that the parties would cooperate concerning any unresolved discovery and that the appeals should be ready for hearing in November or December 1990. By order dated June 28, 1990, the Board reinstated the appeals. By request dated June 25, 1990, Hardrives sought reinstatement of appeals 2319 and 2514, stating that, within 45 days, it anticipated making minor amendments to the damages claimed, in light of the audit. By order dated July 30, 1990, the Board reinstated those appeals.

On August 1, 1990, the Government moved to stay all of the pending appeals, except IBCA-2515 (and apparently 2414, which is essentially the same as 2515 and consolidated with it), on the ground that the United States Department of Justice (DOJ; Justice) was about to file a civil fraud action against Hardrives involving all of the claims in the stated appeals. The Government suggested that the issues involved in 2515 are matters of law and can be resolved by dispositive motion. It expected that the civil fraud complaint would be filed by September 17, 1990, although that did not occur.

By response dated September 24, 1990, appellant opposed the Government's motion and requested oral argument. On October 26, 1990, DOJ filed its civil fraud complaint. By order dated November 2, 1990, the Board granted appellant's request for oral argument; directed that it be provided with a copy of the complaint and the audit; and noted that any submission by DOJ was to be filed prior to argument. We received copies of the complaint, the audit report, and an extensive DOJ memorandum in support of the stay motion. After the parties rescheduled oral argument several times and, ultimately, counsel did not call as scheduled to discuss the matter, by order dated December 6, 1990, the Board rescinded its prior order allowing argument. The considerable written materials now before the Board are sufficient to dispose of the motion.

Hardrives has not amended or withdrawn any of its pending claims.

II. Nature of the Appeals and Civil Complaint Allegations[1]

Hardrives' fixed-price contract, awarded May 15, 1986, was in the amount of $6,769,710, including modifications. It subcontracted with MRT, Inc., for $1,347,446, to perform earthwork; with Valley Ditch Lining, Inc., for $595,516, to perform trenching and canal lining; and with Pacific Boring, Inc., for $96,060, to tunnel for siphon placement. The contract completion date was March 11, 1987, but BOR did not deem the work substantially complete until March 17, 1988.

Hardrives' claims, most of which are pending before us, total $4,844,039; the Government's auditors question $4,307,322. They state that the $536,717 balance represents verified costs, but do not endorse it for payment, noting that it remains subject to a liability determination.

DOJ's civil complaint, filed in the United States District Court, District of Arizona, Phoenix Division, seeks recovery under the fraudulent claims provision of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 604,[2] and civil penalties under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733 (1988).[3] It encompasses all appeals now pending

[1] Our summary is based upon the record before us to date and is not intended to constitute factfinding on the merits of Hardrives' appeals in any respect. For convenience, the claim amounts and cost figures are taken from the audit report and DOJ's complaint. No attempt has been made to match them against the amounts stated in the contractor's claims and various revisions.

[2] Sec. 604 provides in pertinent part:

"If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim."

[3] The portions of the FCA upon which the Government relies provide:

"Any person who -

"(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval;

"(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

"(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * * * * * *

is liable to the United States Government for a civil penalty of not less than $5000 and not more than $10,000." 31 U.S.C. § 3729(a) (1988).

before the Board, except 2515 and 2414, as well as claims that are not now pending.

Hardrives' claims at issue in the stay motion, and the Government's related allegations, which the contractor denies, are as follows:

A. Sealant Claims - IBCA-2319 and 2514

These consolidated claims, in the amount of $456,030, are for extra costs and delay allegedly incurred because Hardrives had to install certain sealant in the canal's cement lining, which the company states was not required by the contract, and was not included in its bid. The Government alleges that: Hardrives knew the sealant was required; included it in its bid; incurred only 52 percent of the costs claimed; alleged days of delay that duplicated days when it performed other contract work so that it did not incur the claimed additional general and administrative overhead (G & A) costs; and stated that it would withdraw its claims when confronted with the auditor's findings, stipulated to dismiss them, yet reinstated them before the Board.

B. Earthwork Claims - IBCA-2375

The earthwork claims, in the amount of $3,866,052, are for excess costs and delay due to alleged defects in the contract's plans and specifications, including errors in described elevations; changes in borrow requirements; and unexpectedly hardened soil, called caliche, in some portions of the canal. Of the total amount sought, Hardrives claims $1,552,162.30, $281,111.75, and $49,718.43 on behalf of MRT, Valley Ditch, and Pacific Boring, respectively. The remaining $1,983,059.52 constitutes its own claim. The Government alleges that Hardrives knew of elevation discrepancies, tried to take advantage of them in its bid, subcontracted accordingly, but misjudged their nature and effect. The Government also claims that appellant conducted surveys which established that the discrepancies and amounts of earthen material involved were not sufficient for a variation in estimated quantity claim, so, to recover losses due to its bidding mistakes, it fashioned a delay claim.

The Government also alleges that there was no supporting data for the claim presented on Pacific Boring's behalf, 92 percent of which Hardrives added to its own claim for overhead and profit; that the subcontractor informed Hardrives that it wished to withdraw its claim; but that Hardrives caused the claim to be reinstated before the Board.

The Government contends that appellant's agents encouraged Valley Ditch to submit an inflated claim by using equipment rates supplied by Hardrives higher than those prescribed in the contract; that the subcontractor relied upon grossly inaccurate estimates when actual costs were known; and that the final claim for direct field overhead overstated actual costs by 119 percent. The Government's audit questioned 70 percent of the total claimed on behalf of Valley Ditch. The Government asserts that Hardrives exaggerated its own claim by

seeking profit and indirect costs as a percentage of the amount Valley Ditch claimed.

Concerning the claim alleged on behalf of MRT, the Government asserts that Hardrives' agents at least twice told MRT to revise its claim upward; that MRT's owner informed the agents that he believed the claim was unjustifiably high; that MRT's claim, based upon estimates of anticipated costs, never was revised to reflect that MRT's contract was terminated by Hardrives before MRT incurred the expected costs; that Hardrives included in its own claim the costs of 51 days of earthwork it performed to complete MRT's work, but also retained MRT's estimate of costs to complete the same work in the claim filed on behalf of MRT; that MRT's claim included improper equipment rates supplied by Hardrives and G & A costs not supported by MRT's records; that in April 1990, MRT informed Hardrives that it wanted to withdraw its claim, but Hardrives reinstated it with the Board anyway; that appellant's personnel advised the Government's auditor that Hardrives did not intend to pay MRT any portion of the $1.5 million claimed on its behalf, due to Hardrives' claims against MRT; and that Hardrives enlarged its claim against the Government by seeking an additional percentage of MRT's claim as its own profit and indirect costs.

The Government also contends that Hardrives claimed direct costs of $708,749, when its records reflect expenditures of only $362,941; that much of the additional claimed costs are due to improper and unsupported equipment rates; that the company claimed labor costs based upon estimates when it knew its actual costs; that Hardrives duplicated its claim for some supervisory salaries by including them as direct labor costs and as direct field overhead costs; that the contractor claimed canal cleanup costs as extra, although it had included them in its bid; that the contractor's records supported only $79,709, or 15 percent, of the $515,679 claimed for direct field overhead; that the records support only $55,391, or 18 percent, of the $310,612 claimed for G & A; that there are various other improperly claimed costs, including the use of incorrect tax rates and application of bond charges to all costs, when they were to be paid based upon a percentage of only direct costs; and that Hardrives' claimed days of delay duplicate days upon which other work was performed so that it did not incur additional G & A expenses for the entire period claimed.

In total, the Government questions $3,445,945, or 89 percent, of the $3,866,052 earthwork claims.

C. Pipe Bends Claim - IBCA-2510

Hardrives claims $117,486 for extra costs and delay due to an alleged change in the plans and specifications requiring it to encase pipe bends. The Government states that Hardrives' records support only $44,720, or 38 percent, of the $117,486 claimed, and alleges some of the

same improprieties in direct field and G & A, tax, bond and delay costs associated with the earthwork claims.

D. Storm Damage Claim - IBCA-2518

Hardrives claims $116,512 for extra costs and delay caused by storm damage to the canal allegedly due to defective specifications. The Government charges that Hardrives allocated some cleanup costs to the storm damage claim that were not caused by the storm and were part of the contract work covered by the company's bid; that some of the costs claimed contain the same type of direct field and G & A, tax, bond and delay deficiencies associated with the earthwork claims; and that the contractor's records supported only $29,938, or 26 percent, of the costs claimed.

E. Soil Stabilization Claim - IBCA-2511

Hardrives claims $76,146 in excess costs and delay for the application of a soil stabilizing compound to the slopes of the canal embankment, necessitated by alleged defective specifications. The Government challenges $51,975 of the claimed costs, alleging that the company incurred only 32 percent of the amount claimed and did not give credit for costs already included in its bid price. At least some of the allegedly unsupported costs are due to the same sort of direct field, G & A and other allegedly improper costs associated with the earthwork claims.

F. Siphon Lowering Claim - IBCA-2524

The contractor claims $44,460 in extra costs and delay because a siphon for the canal had to be dug deeper than originally planned due to alleged defective specifications. In addition to the deficiencies regularly cited by the Government with respect to Hardrives' delay claims, it alleges that there is no cost-support for this claim.

G. Well Capping Claim - IBCA-2519

Hardrives claims $11,479 in extra costs and delay, due to the discovery of two abandoned wells near the canal which had to be capped, and for the replacement of caliche with compacted embankment. The Government alleges that this claim duplicates amounts included in MRT's earthwork claim; that Hardrives had already been paid most of the alleged costs in connection with various earthwork claims; and that only $280, or 2 percent, of the amount claimed was supported.

H. Interest Claim - IBCA-2516

The contractor claims $17,216.38 for interest due to alleged delays in payments. The Government asserts that the claim ignores the

allegedly governing contract provision and demands more interest than that for which Hardrives is eligible.

I. Summary

The Government alleges that some of the claims are false and fraudulent in their entirety; that most are based upon misrepresentations concerning the reason for or factual bases for the claim; that all but the interest claim are based upon misrepresentations as to costs actually incurred; and that all were made knowingly with intent to mislead or deceive the Government.

III. Discussion

In its stay motion the Government notes an attached letter from DOJ to agency counsel which states that the "agency" now lacks jurisdiction over Hardrives' appeals because DOJ and the Office of the Solicitor for the Department of the Interior have determined that the contractor is liable for fraud. The Government, however, suggests that the practical issue is whether "the matter should proceed concurrently in two fora." In its subsequent submission to the Board, DOJ states that Boards lack jurisdiction to enter judgments against contractors who have committed fraud and that that is the basis for the stay motion.

This Board possesses jurisdiction to entertain Hardrives' appeals. The questions are whether, due to the Government's assertion of related fraud claims, we effectively can decide the contractor's appeals and, even if we could, whether it would serve the interests of the parties and judicial economy. We conclude that the answer is "no" to both questions.

A. The Board's Jurisdiction

[1] Under the CDA, a Board of Contract Appeals has jurisdiction to decide "any appeal from a decision of a contracting officer" relative to a contract within the Act's purview. 41 U.S.C. § 607(d). "All" such claims by a contractor against the Government, or by the Government against a contractor, are to be the subject of a decision, or deemed decision, by the contracting officer. 41 U.S.C. § 605(a) and (c)(5). Thus, a Board's jurisdiction is tied to a contracting officer's decision, the "linchpin" for appealing claims under the CDA. *Paragon Energy Corp.* v. *United States*, 645 F.2d 966, 967 (Ct. Cl. 1981). Hardrives' claims at issue have all been the subject of contracting officers' decisions and are properly before us.

We are not deprived of jurisdiction over the contractor's appeals merely because the Government makes its *own* claims of fraud in a different forum. *See, for example, Meredith Relocation Corp.*, GSBCA Nos. 9124, 9844, 10077, 90-2 BCA ¶ 22,677 (1989), *reconsideration*

denied, 90-3 BCA ¶ 23,129 (1990). The contracting officer has not purported to decide the Government's claims and the Government has not attempted to raise them as counterclaims before us. In fact, subsection 605(a) of the CDA, concerning the need for contracting officers' decisions on "all claims" by contractors and the Government, contains a qualification:

> The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

DOJ relies upon the last sentence of the qualification in support of its assertion that we now do not possess jurisdiction over these appeals. That sentence is unclear. For example, the terms "settle, compromise, pay, or otherwise adjust" do not include the word "decide." Also, the phrase "involving fraud" is nebulous. Under our system of jurisprudence, the responsibility for resolving liability for fraud rests with competent judicial fora. Hardrives denies all allegations of fraud. Finally, an "agency head" is not the same thing as a contracting officer, or a Board of Contract Appeals. A Board derives its authority from the CDA, not by delegation from an agency head. *Time Contractors, Jt. Venture*, DOT CAB Nos. 1669, 1691, 86-2 BCA ¶ 19,003 at 95,946.[4] "Accordingly, Board action is not precluded by the mere presence of fraud. The only resulting limitation on a Board's authority is that it cannot make a final determination as to whether fraud exists." *Id.* at 95,946-47.

Case law illustrates the elusive nature of subsection 605(a). In *Joseph Morton Co.* v. *United States*, 757 F.2d 1273 (Fed. Cir. 1985), after its conviction in a district court for conspiring to defraud the Government and for knowingly submitting false and fraudulent cost statements, the contractor filed an action in what became the Claims Court to convert the Government's termination of its contract for default into one for convenience. The Government sought to assert counterclaims for common law breach of contract and excess reprocurement costs, arguing that no contracting officer's decision was required, or allowed, because fraud was the basis for the counterclaims and the last sentence of subsection 605(a) removed the Government's claims from the jurisdiction of the contracting officer. The Federal Circuit affirmed the Claims Court's rejection of the Government's position, stating that a contracting officer and an agency head were not equivalents under the CDA. Additionally, Congress did not intend the word "claim," as used in that sentence, to mean the whole case between the contractor

[4] Under the CDA an agency Board of Contract Appeals may be established within an executive agency when the agency head, after consultation with the Administrator for Federal Procurement Policy, determines that the volume of contract claims warrants it. 41 U.S.C. §§ 607(a)(1) and 601(5). "Agency head" is defined to be "the head and any assistant head of an executive agency," and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency. 41 U.S.C. § 601(1). That the Board is not equivalent to an agency head or the agency itself is underscored by the fact that an agency head cannot reverse or modify a Board decision. The Board's decision is final unless the contractor appeals it to the United States Court of Appeals for the Federal Circuit, or an agency head secures the prior approval of the Attorney General to appeal. 41 U.S.C. § 607(g)(1).

and the Government. Instead, "claim" means "each claim under the CDA for money that is one part of a divisible case." The court found that, because Morton's fraud had already been determined, "liability for" reprocurement costs and damages would not be an issue before the contracting officer; the Government's counterclaims were "clearly not inextricably linked with liability for fraud"; and they must first be the subject of a contracting officer's decision. 757 F.2d at 1281.

Moreover, once Boards properly have had jurisdiction over a contractor's appeal, they have considered fraud matters, largely in the context of fraud established in another forum, as in *Morton*, and have *denied a contractor's right to recovery* based upon the fraud. Even if Boards were equated with agency heads under the CDA, which they are not, such denials of contractors' claims do not constitute settling, compromising, paying, or otherwise adjusting any claim involving fraud -- to the contrary. *See J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,569, *aff'd, J.E.T.S., Inc.* v. *United States*, 838 F.2d 1196 (Fed. Cir. 1988), *cert. denied*, 100 Law. Ed.2d 926 (S.Ct. 1988); *C&D Construction, Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256.

In *J.E.T.S.*, the Federal Circuit had the opportunity on appeal to address any jurisdictional impediments to the action of the Armed Services Board of Contract Appeals (ASBCA) in granting the Government's motion for summary judgment that the contractor's claim was barred by fraud, which rendered its contract voidable. The court of appeals did not do so. Rather, it affirmed the ASBCA's decision, stating: "Considering all the circumstances, we cannot say that the Board erred in concluding that J.E.T.S. had committed fraud in obtaining this contract by knowingly falsely certifying that it was a small business." 838 F.2d at 1201.

Nevertheless, the CDA precludes a Board from rendering *judgment against a contractor* based upon *a Government claim against the contractor* for civil penalties under the FCA or for violations covered by section 604 of the CDA, as here. Although the Government seems to rely entirely upon the last sentence of subsection 605(a) to establish these limitations, we find that the FCA claims are excluded from a contracting officer's decisionmaking authority by the penultimate sentence: "The authority of this section shall not extend to a claim or dispute for penalties or forfeitures [5] prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine." Although the sentence does not mention the word "litigate," it may be deemed to be included in the import of the other words.

The FCA specifically authorizes the Attorney General of the United States to bring civil actions under the statute. 31 U.S.C. § 3730(a)

[5] Even prior to the False Claims Amendments Act of 1986, P.L. 99-562, 100 Stat. 3153 (1986), 31 U.S.C. §§ 3729-3733 (Supp. IV 1986), which authorizes the recovery of civil penalties, the FCA provided for "forfeitures" in the amount of $2000. *See* 31 U.S.C. §§ 3729-3731 (1982), and predecessors.

(1988). He and his delegates necessarily have concomitant powers to settle them.[6] Indeed, in holding that the Claims Court had erred, in dismissing the Government's FCA and section 604 counterclaims (and its special plea in fraud under 28 U.S.C. § 2514 (1988)), the Federal Circuit opined in *Martin J. Simko Construction, Inc.* v. *United States*, 852 F.2d 540 (Fed. Cir. 1988), that "Congress could not have stated more clearly its intent to give the Attorney General specific authority to 'administer, settle, or determine' claims or disputes under the FCA" and that the FCA claims fell "squarely within the exception to" the authority of the contracting officer "carved out in section 605(a)." 852 F.2d at 548.

Similarly, although subsection 605(a) does not as plainly eliminate Government claims under section 604 from a contracting officer's authority, the Federal Circuit established in *Simko* that it was apparent from the CDA's legislative history that Congress intended to exclude such claims and that no contracting officer's decision was required to assert them. In fact, the court went further and determined that Congress meant to exclude *"all* fraud claims *by the government"* from the authority granted contracting officers by 41 U.S.C. § 605(a). 852 F.2d at 547 (italics added); *see also* 852 F.2d at 545.

However, the Federal Circuit did not go as far as DOJ would have us do here. Justice asserts that Congress anticipated occasions when the Government would bring fraud charges in connection with claims pending before a Board and expected, in DOJ's words, that the Boards "would thereby lose jurisdiction." DOJ states that the CDA's legislative history is clear that allegations of fraud need not be proved before the Government can invoke what it describes as the exclusive jurisdiction of the courts over matters of fraud. Justice relies upon the following Senate commentary concerning section 604 claims by the Government:

> Consistent with the limitations expressed in section 4(a) [41 U.S.C. § 605(a)], excluding issues of fraud against the United States from the authority of contracting agencies to consider [7] or resolve, actions to enforce the Government's rights under section 4(b) [41 U.S.C. § 604] would be solely the responsibility of the Department of Justice and would be instituted by the United States in a court of competent jurisdiction. * * *
>
> If such cases do arise and are thus handled in the courts, other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency board or in the Court of Claims where the claim originated.

S. Rep. No. 1118, 95th Cong., 2d Sess. 20, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5254.

We do not agree that the legislative history is clear and do not concur in DOJ's interpretation, although it is one feasible reading (at

[6] Also, agencies which have authority under the Debt Collection Act of 1982 to compromise, suspend, or terminate collection of certain Government claims cannot do so when fraud or false claims or misrepresentation by a party with an interest in the Government's claim appears to be involved. *See* 31 U.S.C. § 3711(c)(1) (1988). This is consistent with the strictures of the last sentence of 41 U.S.C. § 605(a). Moreover, with regard to any claim as to which there is "an indication of fraud, the presentation of a false claim, or misrepresentation," the agency is advised in the *Code of Federal Regulations* that it "should refer the matter promptly to the Department of Justice." 4 CFR 101.3(a).

[7] In fact, nothing in the language of subsec. 605(a) excludes issues of fraud from the authority of contracting agencies to *consider*. This would be an anomaly, as agencies must necessarily at least consider the issues before they refer them to DOJ.

least concerning contractors' claims countered by the Government's section 604 claims). In this setting, in our opinion, in contrast to the context discussed in *Morton*, the word "claim" most logically, if not literally, refers to the entire case or dispute between the parties. For example, CDA "claims" do not originate in a Board or court. A non-fraud contract claim originates with one of the parties and is presented to a contracting officer for decision. An "appeal," "case," or "action," originates before a Board, or the Claims Court, when the party making a claim appeals from the contracting officer's decision on it, and brings the dispute to either forum.

Moreover, the reference to "possible fraud" seems merely a recognition that the fact that the Government has claimed fraud, does not mean that it will ultimately prove it. Contractors typically, as here, would vehemently deny that their claims are in any way "associated with" possible fraud. Only the Government's claim *clearly* would be associated with possible fraud.

Further, the thrust of the "other parts of the claim" language is that the contractor's claims "*will continue on* in the agency board," not that the Board will lose existing jurisdiction. (Italics added.) Also, *Simko* established that the Claims Court *can* adjudicate section 604 fraud claims, an example that the legislative history relied upon by DOJ was not intended to have literal jurisdictional import.

Most significantly, we are confident that Congress would not have left such an important jurisdictional matter to the vagaries of retrospective analysis. If Congress had intended to make the major point that Boards would "lose" jurisdiction over a contractor's CDA appeals once the Government asserted its own fraud charges in connection with the contractor's claims, it simply could have said so in the statute. There is no such language in sections 604, 605, 607 or elsewhere. The commentary that "actions *to enforce the Government's rights*" under section 604 would be instituted in a competent court and "*other parts of the claim* not associated with possible fraud or misrepresentation of fact will continue on in the agency Board or in the Court of Claims where the claim originated" forms too flimsy a sword with which to strike a Board's jurisdiction over a contractor's claims. (Italics added.)

The Federal Circuit in *Simko* discussed the legislative commentary advanced by the Government here:

> First, the possibility of bifurcated claims was squarely addressed by the Judiciary Committee. *The Committee plainly stated its intent to separate fraud claims under section 604 from other contract claims* when it stated ["If such cases do arise * * *"]. * * *
>
> * * * Second, the court, in *Joseph Morton*, noted that under the CDA each claim is independent from the others, thus it does not affect the overall purpose of the CDA *to separate fraud claims*. [Citation omitted; italics added.]

852 F.2d at 546-47. The court of appeals' reasoning confirms our conclusion that it is resolution of a contractor's liability for fraud claims brought by the Government which contracting officers, and the Boards, cannot decide. We retain jurisdiction over the contractor's claims against the Government.

Consistently, to our knowledge, the majority of published Board decisions in the last decade have denied stay motions based upon allegations of fraud against a contractor. While not purporting to assume jurisdiction over the Government's fraud claims, the Boards have continued to consider the contractor's own claims. Stays have been denied even when the Government, as here, has filed a civil fraud complaint against a contractor and DOJ or another Governmental entity has sought or supported a stay. In *Meredith, supra*, the Government filed suit in district court alleging that the contractor had engaged in false claims and fraud in connection with the contract under which Meredith was claiming entitlement to an equitable adjustment before the General Services Board of Contract Appeals (GSBCA). Despite the fact that the General Service Administration's (GSA's) Office of Inspector General and DOJ both supported GSA's motion to stay, the GSBCA denied it, emphasizing that "the claim of fraud qua fraud is not and could not be before us"; that it had "not been requested to adjudicate a claim of fraud nor to fashion a remedy for such alleged conduct"; that it was "empowered to make the findings of fact necessary to resolve the purely contractual claims" before it; and that "the Government's suggestion that resolving these appeals may take us beyond our statutory jurisdiction is without merit." 90-2 BCA at 113,913. *Accord TDC Management Corp.*, DOT BCA No. 1802, 90-1 BCA ¶ 22,627; *Warren Beaves*, DOT CAB Nos. 1160, 1324, 83-2 BCA ¶ 16,648.

Justice notes that none of the cases proffered by Hardrives in opposition to the stay motion, which include the Board cases just cited, involved a Government claim pursuant to section 604 of the CDA. However, in a predecessor to the cited *Warren Beaves* opinion, the Transportation Board dismissed, for lack of jurisdiction, a segment of the case constituting an appeal from a portion of the contracting officer's decision that asserted a claim against the contractor under section 604.[8] The Board noted that it could not exercise jurisdiction "over the issue of the existence of fraud in any form" and, therefore, had no jurisdiction over *the Government's fraud claim*. Nevertheless, the Board stressed that it could exercise jurisdiction over "all other issues and facets of the parties' claims." *Warren Beaves*, DOT CAB No. 1324, 83-1 BCA ¶ 16,232 at 80,648.

In sum, we do not have jurisdiction over the Government's fraud claims against Hardrives, we have jurisdiction over Hardrives' claims.

[8] The question of the contracting officer's authority to issue such a decision was not addressed.

B. Factors Favoring A Stay

[2] As appellant concedes, we have the inherent power to suspend these proceedings. *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936); *Sentry Insurance*, VABCA No. 2617, 88-1 BCA ¶ 20,318. In *Landis*, the Supreme Court held that a district court had abused its discretion in granting a motion to stay proceedings until ultimate resolution, including possible appeal to the Supreme Court, of similar proceedings, pending in a different district court. The Securities and Exchange Commission, which sought the stay, was a common party to both district court proceedings, but the private parties were not identical. Although the Court decided that the extent of the stay granted was excessive, it confirmed a judicial body's broad powers to grant a stay:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance * * * the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. Considerations such as these, however, are counsels of moderation rather than limitations upon power. [Citations omitted.]

299 U.S. at 254-55.

Hardrives and the Government are parties to both proceedings in question. There are, additionally, two individual defendants in the district court action, but they are alleged to have been an officer and a principal employee of Hardrives. If these Board proceedings are stayed, Hardrives will not be standing aside while an unrelated party litigates facts and issues that will determine its fate. Hardrives will be responsible for its own destiny in district court. Thus, we find that the Government's burden of proof to support a stay here is less than it would be if the parties to the proceedings were different.

We, nonetheless, perform the balancing test advocated in *Landis* to determine whether a stay is warranted. Traditionally, Boards have identified at least four situations in which they "should give consideration to suspending proceedings * * * balancing the estimated duration of the suspension against each party's right to a timely resolution." *Fidelity Construction Co.*, DOT CAB Nos. 1113, 1123, 80-2 BCA ¶ 14,819 at 73,142. They are: (1) when a criminal or civil action has been filed in a competent court involving issues directly relevant to the claims before the Board; (2) when DOJ or other authorized investigatory authority formally has requested suspension to protect a civil action or avoid conflict with a criminal investigation; (3) when the Government can demonstrate that a real possibility of fraud exists of such a nature effectively to preclude a Board from ascertaining the

facts and circumstances surrounding a claim; and (4) when an appellant requests a suspension to avoid compromising rights in a potential or actual criminal proceeding. *Id.; Meredith*, 90-2 BCA at 113,914; *Triax Co.*, ASBCA No. 33899, 88-3 BCA ¶ 20,830 at 105,336.

The Government has satisfied the three criteria, (1), (2), and (3), relevant to our case. We have made a detailed examination of the district court complaint and Hardrives' appeals and have determined that the issues involved in the civil action are directly relevant to the claims before us. DOJ formally has supported the Government's request for a stay and has presented detailed allegations, not mere generalities. *See Fleischzentrale Sudwest GmbH*, ASBCA No. 37273, 89-3 BCA ¶ 21,956 at 110,444. Finally, the alleged fraud, pertaining to the bases and facts in support of Hardrives' claims in most cases, the amount of alleged costs in all but the interest claim, and the nature, and act of submitting (or refusal to withdraw), claims in other cases, is inextricably intertwined with Hardrives' appeals at issue. As in *Sentry Insurance*, 88-1 BCA at 102,725, there is no identifiable segment of the appeals that is unencumbered by an allegation of fraud. Thus, any factfinding by us could, in effect, lead to at least some determination on the issue of the contractor's alleged liability for fraud -- a determination in which we will not engage.

Moreover, although we do not accept DOJ's contention that the Government's filing of 41 U.S.C. § 604 fraud charges against Hardrives in district court deprives the Board of jurisdiction over the contractor's claims, we do find that the filing of such an action, especially when directly related to the legitimacy of the submission, nature, factual support for, and amount of the contractor's claims, should be given considerable weight in the balancing process.

Not all of Justice's arguments are meritorious, though. DOJ notes that the Government requires discovery in connection with its civil fraud action, but erroneously states that "discovery before the Board is limited to depositions and interrogatories." In actuality, applicable regulations and the Board's parallel rules encourage the parties to engage in voluntary discovery, which may include the panoply of discovery procedures. If voluntary discovery fails, we will entertain applications for permission to take depositions and/or serve interrogatories, document production requests, and requests for admissions. We also have the power to subpoena witnesses and documents. *See* 43 CFR 4.115, 4.116, 4.120, and the Board's rules 4.115, 4.116, and 4.120. In practice, although there may be exceptions, we liberally grant discovery applications.

However, discovery considerations are relevant in another sense. Appellants are likely to contest discovery directed solely at liability for fraud and to seek protective orders from a Board. Similarly, the Government's use of the fruits of fraud-oriented discovery before a Board could be limited.

We have accorded careful attention to Hardrives' currently relevant assertions in opposing a stay.[9] Appellant accuses the Government of deliberate delaying tactics; notes that the CDA is designed to provide efficient and speedy resolution of disputes; states that it desires a prompt hearing; and urges that it needs the money it seeks.

As to delay, we find no evidence that the Government delayed in its audit of Hardrives' and its subcontractors' multiple claims or that DOJ deliberately delayed in filing the civil fraud complaint. DOJ offers examples of delay by appellant or its subcontractors. The Board has experienced, or been made aware of, delays attributable to both parties. We give far greater weight to appellant's desire for a speedy resolution of its claims and its need for any money due it. It is most certainly true that an agency Board is to provide "*to the fullest extent practicable*, informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e) (italics added). In the present case, however, it is neither practical, nor efficient, nor expeditious in any meaningful way, for us to proceed. If we were to do so, the result could only be more expense to appellant. Hardrives would have to pay for concurrent litigation in two fora.

Moreover, even if, severely hampered by the limitations upon our ability to adjudicate matters involving liability for fraud, we were to find that Hardrives was entitled to some recovery on its claims, the agency would be likely to withhold payment if DOJ continued to assert that they were barred by, or subject to set-off for, fraud. *See* footnote 6 concerning authority to compromise, pay, or set-off claims, and *TDC Management Corp.*, 90-1 BCA at 113,493.

As DOJ points out, the legislative commentary to section 604 recognizes that there will be occasions when amounts legitimately due contractors will be delayed because of the fraud resolution process, but that contractors will recover interest accordingly: "[T]o the extent any delay should occur in payments eventually found to be owing to a contractor, section 12 of the act [41 U.S.C. § 611] requires that the contractor be compensated by the payment of interest." S. Rep. No. 1118, *supra*.

Furthermore, the instant appeals are not clearly ready for hearing. Appellant has indicated that further discovery may be contemplated. Additionally, Hardrives has stated that it is pressing for a prompt trial in the district court. This does not appear to be a case, envisioned by the Board in *Meredith*, in which "we could be left some years down the road where we stand today, with memories dimmed, witnesses no longer available, and evidence lost, to the prejudice of appellant." 90-2 BCA at 113,914. Evidence established in district court will be directly relevant to Hardrives' proof of its claims here. We believe that

[9] When the stay motion initially was filed, the Government had not yet filed its civil complaint, and appellant's arguments addressed that key fact.

resolution of the district court proceedings may well dispose of many of the issues in the appeals subject to this stay motion.

Finally, as the Board noted in *Mayfair Construction Co.*, NASA BCA No. 478-6, 80-1 BCA ¶ 14,261 at 70,252, "considerations of comity and promotion of judicial efficiency" also will favor staying proceedings. If we were to deny the stay requested, Hardrives, the Board, the district court and the Government inevitably would be required to engage in duplicative procedures and evaluations, costly to all in time, money and use of resources.

In sum, under the facts and circumstances before us, we find that no practical prejudice to appellant would be engendered by a stay of these proceedings; and that the factors favoring a stay, including the interests of judicial economy, greatly outweigh any other considerations.

Decision

The Government's motion for a stay of proceedings is granted. As to IBCA-2515 and 2414, which were not included in the stay motion, appellant is to advise the Board within 20 days of the date of this order whether it wishes to proceed with the appeals and, if so, whether it concurs with the Government that they may be resolved through dispositive motion. At that time, because we do not maintain a suspense docket, all appeals covered by the stay motion, and IBCA-2515 and 2414–if appellant does not wish to proceed with them, will be dismissed without prejudice to their reinstatement within 60 days after the date of final resolution of the district court proceedings.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

PACIFIC COAST COAL CO., INC.

118 IBLA 83 Decided: *February 28, 1991*

Petition for discretionary review of a decision by Administrative Law Judge Ramon M. Child sustaining agency denial of a permit revision. Hearings Division Docket No. IBLA 90-201 (Permit No. WA-0007A).

Petition granted; Administrative Law Judge decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally--Words and Phrases

"Excess spoil." Spoil needed for returning disturbed land to its approximate original contour is not "excess spoil."

2. Surface Mining Control and Reclamation Act of 1977: Federal Program: Permits--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Postmining Land Use: Generally--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for Pacific Coast Coal Co., Inc.; John R. Kunz, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Harold P. Quinn, Jr., Esq., for *amicus curiae* National Coal Assn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF LAND APPEALS

Pacific Coast Coal Co., Inc. (Pacific Coast), has filed a petition for discretionary review of a decision by Administrative Law Judge Ramon M. Child, dated December 5, 1990, sustaining the denial by the Chief, Federal Programs Division, Office of Surface Mining Reclamation and Enforcement (OSM), in Denver, Colorado, of Pacific Coast's application to revise OSM permit No. WA-0007A for the John Henry No. 1 Mine in King County, Washington.[1]

OSM issued Permit No. WA-0007 for the John Henry No. 1 Mine under the Washington Federal Program effective June 13, 1986. On February 27, 1989, Pacific Coast submitted a permit revision application with respect to Permit No. WA-0007, proposing to revise the approved reclamation plan to reclaim Pit No. 1 as a permanent impoundment, and to reclaim the spoil piles to no greater than 3h:1v [33%] slopes when mining operations cease under the permit. By memorandum dated October 27, 1989, the Project Manager, Federal and Indian Permitting Branch, OSM, recommended to the Chief, Federal Programs Division, OSM, that the permit revision application be disapproved (Decision Memorandum). By letter dated October 30,

[1] The National Coal Assn (NCA) has filed a "Petition to Intervene as Amicus Curiae in Support of Appellant Pacific Coast Coal Company." We grant the petition and have considered NCA's arguments in reaching our decision. 43 CFR 4.1110(e).

1989, the Chief, Federal Programs Division, notified Pacific Coast that OSM "has disapproved the permit revision application submitted * * * for a revision to the reclamation plan to create a 'final-cut lake' at the John Henry No. 1 Mine," and that Pacific Coast "may appeal this decision under the procedures set out in 43 CFR 4.1280 to 4.1286."

Accordingly, Pacific Coast appealed the decision of the Chief, Federal Programs Division, to this Board. However, the Board dismissed Pacific Coast's appeal and referred the matter to the Hearings Division in accordance with the regulations at 43 CFR 4.1370-.1379, which "set forth the procedures for obtaining review of decisions by OSM concerning permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permits." 43 CFR 4.1370; *see Pacific Coast Coal Co.*, 113 IBLA 384 (1990). Judge Child's consequent decision is the subject of Pacific Coast's petition for discretionary review. We have given the matter expedited consideration. *Pacific Coast Coal Co., supra* at 386; *see* 43 CFR 4.1379; 56 FR 2139, 2144-45 (Jan. 21, 1991).

On July 26, 1990, Pacific Coast and OSM submitted to Judge Child a "Stipulation of Undisputed Facts," which we set forth below in order to provide the factual background of this case:

A. The petitioner, PCCC, currently operates its John Henry No. 1 surface coal mine (the John Henry Mine) in King County, Washington, under Washington Federal program Permit No. WA-0007. Permit No. WA-0007 was issued to PCCC by the respondent, OSM.

B. The John Henry Mine is located 25 miles southeast of Seattle, Washington. The current 5-year mine plan covers a permit area of 422 acres, and the life-of-mine plan includes 516 acres. The current bonded disturbance area within the permit area covers approximately 185 acres.

C. The Technical Analysis ("TA") for PCCC's approved permit application package states that the permit area is located in the southeastern portion of the Puget Sound lowland, a broad undulating glacial drift plain. The Green River flows through a deep gorge approximately 2 miles east of the site. The topography of the area is generally low in surface relief, with elevations in the permit area ranging from 600 to 850 feet above mean sea level.

D. The pre-mining land use of the property was forestry.

E. Pursuant to Permit No. WA-0007, the approved post-mining land use of the property is forestry.

* * * * * * *

G. * * * [T]he three (3) overburden spoil piles on Exhibit "C" are identified and hereafter referred to as follows: the overburden spoil pile to the northeast of Pit No. 2 is "Spoil Pile No. 1;" the overburden spoil pile to the northwest of Pit No. 2 is "Spoil Pile No. 2;" and the overburden spoil pile to the southwest of Pit Nos. 1 and 2 is "Spoil Pile No. 3."

H. Pursuant to the approved permit application package for Permit No. WA-0007, Spoil Pile Nos. 1, 2 and 3 are temporary structures. The approved permit application package also provides that Pit Nos. 1 and 2 will be completely backfilled and graded to within three (3) feet of the original topography using materials from these temporary structures. Pursuant to the permit application package described in OSM's TA and the life-of-mine reclamation plan described in both the NEPA and SEPA EIS's for Permit

No. WA-0007, Spoil Pile No. 1 is designated as a permanent structure, approximately 40-60 feet higher than the pre-mining topography, and is designated as excess spoil. [2]

I. In the life-of-mine plan described in the NEPA and SEPA EIS's for the John Henry Mine, Pit No. 1 is to be reclaimed as a permanent impoundment.

J. On or about February 27, 1989 (as modified through the date of OSM's decision of October 27, 1989), PCCC submitted to OSM a permit revision application for Permit No. WA-0007. PCCC's permit revision application proposes that the approved permit be revised to allow: (1) the final reclamation of Pit No. 1 as a permanent impoundment and (2) the retention of Spoil Pile Nos. 1 and 2 and a portion of Spoil Pile No. 3 as permanent topographical features. * * *

K. * * * [P]roposed permanent Spoil Pile No. 2 would be approximately 80 feet higher than the pre-mining topography, and its slopes would be graded to 3h:1v or less.

L. * * * [P]roposed permanent Spoil Pile No. 3 would be approximately 20-40 feet higher than the premining topography and would be graded relatively flat on top, with a maximum of 3h:1v slopes along portions of its perimeter.

M. Pursuant to PCCC's permit revision application, mined-out Pit No. 1 would remain as a permanent impoundment. To create the permanent impoundment, mined-out Pit No. 1 would be partially back-filled from Spoil Pile No. 3 and graded to a 3h:1v slope down to approximately 6 feet below the low-water elevation of the proposed impoundment.

N. Pursuant to PCCC's permit revision application, the proposed permanent impoundment would have an approximately 31-acre surface area and would impound approximately 1,600 acre feet of water, with a maximum depth of approximately 150 feet and an arithmetic average depth of approximately 55 feet.

O. Pursuant to the permit application package described in OSM's TA and the life-of-mine reclamation plan described in both the NEPA and SEPA EIS's for approved Permit No. WA-0007, the slopes and configuration of Spoil Pile No. 1 are suitable for the post-mining forestry land use.

P. The topographic map attached hereto as Exhibit A illustrates that the slopes in the vicinity of the John Henry Mine site often exceed 3h:1v.

Q. In order to obtain complete recovery of the surface minable reserves at the John Henry Mine, approximately 7,000,000 cu. yds. of spoil from Pit Nos. 1 and 2 will be removed and placed in external Spoil Pile Nos. 1, 2 and 3 during the first five (5) years of operation. Pursuant to its permit revision application, PCCC would return approximately 1,300,000 cu. yds. from Spoil Pile No. 3 to Pit No. 1.

R. Pursuant to the life-of-mine reclamation plan as described in the original permit application package and the NEPA and SEPA EIS's for Permit No. WA-0007, after the first five (5) years of operation, approximately 21,000,000 cu. yds. of spoil will be mined and retained directly in the pits.

S. There are no known differences between the overburden material (spoil) in Spoil Pile Nos. 1, 2 and 3, except for the location of placement. Each pile represents spoil

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[2] In order to clarify any apparent contradiction between the last sentence of this stipulation and the first two, we observe that in its technical analysis of Pacific Coast's permit revision application, dated July 11, 1989, OSM stated:

"Under the reclamation and operation plan of the currently approved permit application, Pit 1 and Pit 2 will be completely backfilled using the spoil from the approved temporary spoil piles, and any remaining spoil will be graded to the approximate original contour. As currently approved, the reclaimed postmining topography will be within 3 feet of the premining topography."

In his memorandum dated Oct. 27, 1986, recommending to the Chief, Federal Programs Division, OSM, that Pacific Coast's permit revision application be disapproved, the Project Manager, Federal and Indian Permitting Branch, OSM, set forth the factual background of this case, including the following statement regarding the return of the spoil to approximate original contour:

"The current reclamation plan, approved in 1985, requires both Pit 1 and Pit 2 to be completely backfilled using the materials from the temporary out-of-pit spoil piles. Any remaining spoil will be used to restore the approximate original contour. As currently approved, the reclaimed postmining topography will be within 3 feet of the premining topography."

In its appeal brief before Judge Child, Pacific Coast stipulated to the facts as narrated by the Project Manager (Appeal Brief before Judge Child at 4).

removed from the mined out areas which could not be immediately backfilled because it would interfere with mining and coal recovery operations.

T. The Washington State Department of Natural Resources (the responsible State agency for review and comment on Federal mining and reclamation applications), King County Grading Section (Building and Land Development Division), and the U.S. Fish & Wildlife Service have reviewed the proposed permit revision and have not raised any objections regarding the retention of Spoil Pile No. 2 and a portion of Spoil Pile No. 3 as permanent topographical features.

U. The landowner, Palmer Coking Coal Company, supports the proposed permit revision.

V. For the sole purpose of this adjudication, PCCC's compliance with applicable permanent impoundment criteria and the proposed post-mining land use is not disputed.

On October 27, 1989, the Chief, Federal Programs Division, OSM, formally disapproved Pacific Coast's John Henry No. 1 Mine permit revision application, citing the following reasons:

1. The proposed revision does not comply with the requirements of 30 CFR 816.102(a) to eliminate spoil piles and achieve approximate original contour [AOC].

2. PCCC did not provide the information required at 30 CFR 816.133 for approval of the alternative land use of the proposed permanent impoundment.

3. PCCC has not demonstrated that the proposed impoundment will be suitable for its intended uses as fish and wildlife habitat and for fire protection. PCCC has not demonstrated that the size and configuration of the proposed permanent impoundment is adequate for its intended purpose.

4. The permit revision application does not include a fish and wildlife resources protection and enhancement plan that discusses how, to the extent possible using the best technology currently available, PCCC will minimize disturbances and adverse impacts on fish and wildlife and related environmental values during the surface coal mining and reclamation operations, and how enhancement of the fish and wildlife resources will be achieved in the affected area.

5. The revegetation success standards in the revegetation plan do not comply with 30 CFR 947.780.18(b)(5)(vi) and 947.816.116(b)(3).

6. PCCC has not adequately updated the probable hydrologic consequences (PHC) determination and hydrologic reclamation plan (HRP).

7. PCCC has not adequately demonstrated the long-term stability of the impoundment slopes.

(Decision Memorandum at 12).

On July 26, 1990, Pacific Coast and OSM jointly filed with Judge Child a "Request for Dismissal of Undisputed Issues and Stipulation of Disputed Issue" (Stipulation Dismissing and Designating Issues). They agreed that OSM's reasons numbered 3 and 5 for denying Pacific Coast's application were resolved in Pacific Coast's favor and are no longer in dispute. Moreover, they agreed that, contingent upon Pacific Coast's submission of additional technical information, OSM's reasons numbered 2, 4, 6, and 7 were resolved in favor of Pacific Coast and are not disputed by the parties. Finally, Pacific Coast and OSM stipulated that the sole remaining issue for adjudication is "[w]hether PCCC's modified permit revision application was legally deficient because it failed to comply with the requirements of 30 CFR 816.102(a) to eliminate spoil piles and achieve approximate original contour." *Id.* at 3.

On July 31, 1990, Judge Child entered an order approving, as modified, the Stipulation Dismissing and Designating Issues. He

dismissed all the issues set forth in the Stipulation, and stated that "[t]he sole issue to be adjudicated in this proceeding is: Do the requirements of 30 CFR 816.102(a) render PCCC's modified Permit Revision Application legally deficient by reason of failure to eliminate spoil piles and achieve approximate original contour" (Order dated July 31, 1990, at 2).

Thus, we turn our attention to the "sole issue" involved in this appeal. At this point, we will set forth the statutory and regulatory framework within which Pacific Coast's permit revision application must be evaluated. We begin with section 515(b) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1265(b) (1988), which provides in relevant part:

> General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to--
>
> * * * * * * *
>
> (3) *except as provided in subsection (c) of this section* with respect to all surface coal mining operations backfill, *compact* (where advisable to insure stability or to prevent leaching of toxic materials), *and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated*[.] [Italics added.]

Subsection (c) of section 515 of SMCRA sets forth a rather specific exception to the requirement to restore the AOC of lands affected by surface coal mining and reclamation operations. Subsection (c)(2) provides that

> a permit without regard to the requirement to restore to approximate original contour set forth in subsection (b)(3) or (d)(2) [[3]] and (3) of this section may be granted for the surface mining of coal *where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill* * * * by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmining uses in accord with the requirements of this subsection. [Italics added.]

The applicability of section 515(c)(2) of SMCRA is plainly limited to the removal of an "entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill." Pacific Coast does not argue that it meets the exception embodied in section 515(c)(2) of SMCRA. Thus, the general AOC requirement of section 515(b)(3) would appear to be applicable to Pacific Coast's John Henry Mine No. 1 operations, since the stated exception, by its terms, does not apply.

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[3] Subsec. (d)(2) of sec. 515 of SMCRA, 30 U.S.C. § 1265(d)(2) (1988), applies the AOC requirement to steep-slope surface coal mining. Subsec. (e)(2) of sec. 515 of SMCRA provides for a variance from the requirement to restore disturbed land in steep-slope areas to AOC, provided the operator meets the criteria set forth in subsec. (e)(3) and (4). In *In re Permanent Surface Mining Regulation Litigation*, 620 F.Supp. 1519 (D.D.C. 1985), the U.S. District Court for the District of Columbia ruled that regulations promulgated by the Department allowing variances from the AOC requirement in non-steep-slope areas were inconsistent with SMCRA. *See* 30 CFR 785.16 and 816.133(d) (48 FR 39904, Sept. 1, 1983). The District Court's ruling was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit (Circuit Court) in *National Wildlife Federation* v. *Hodel*, 839 F.2d 694, 761-64 (D.C. Cir. 1988). Accordingly, OSM suspended 30 CFR 785.16 and 816.133(d), effective Dec. 22, 1986, insofar as those regulations authorize any variance from AOC for surface coal mining operations in any area which is not a steep-slope area. 51 FR 41952, 41961-62 (Nov. 20, 1986).

Section 701(2) of SMCRA, 30 U.S.C. § 1291(2) (1988), defines "approximate original contour" as

that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, *closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated*[.] [Italics added.]

This definition provides, however, that "water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 1265(b)(8) of this title[.]"

Section 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(8) (1988), provides that the permittee may "create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities[.]" Such an impoundment may be approved only when the operator has adequately demonstrated that:

(A) the size of the impoundment is adequate for its intended purposes;

(B) the impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Public Law 83-566 (16 U.S.C. 1006);

(C) the quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable Federal and State law in the receiving stream;

(D) the level of water will be reasonably stable;

(E) *final grading will provide adequate safety and access for proposed water users*; and

(F) such water impoundments will not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial[,] recreational, or domestic uses. [Italics added.]

Section 515(b)(8)(A)-(F) of SMCRA, 30 U.S.C. § 1265(b)(8)(A)-(F) (1988).

The Departmental definition of "approximate original contour," set forth at 30 CFR 701.5, is parallel with the definition at section 701(2) of SMCRA, set forth above. Similarly, the definition at 30 CFR 701.5 provides that "[p]ermanent water impoundments may be permitted where the regulatory authority has determined that they comply with 30 CFR 816.49 [4] and 816.56, [5] 816.133 [6] or 817.49 [7], 817.56, and 817.133."

[1] The provisions of 30 CFR 816.102 provide:

(a) Disturbed areas shall be backfilled and graded to–

[4] The provisions of 30 CFR 816.49(b) set forth the criteria applicable to the creation of permanent impoundments, and parallel the criteria found at sec. 515(b)(8)(A)-(F), concerning size and configuration of the impoundment, quality of impounded water, final grading of the impoundment, water quality and quantity utilized by adjacent or surrounding landowners, and suitability for the approved postmining land use.

[5] Under 30 CFR 816.56, the operator is subject to specific rehabilitation requirements with regard to impoundments before abandoning the permit area or seeking a bond release.

[6] As noted in footnote 3, on Nov. 20, 1986, the Department suspended 30 CFR 816.133 insofar as it authorized any variance from AOC for surface coal mining operations in any area which is not a steep-slope area. 51 FR 41962.

[7] The regulations at 30 CFR 817.49, 817.56, and 817.133 set forth the criteria applicable to the creation of permanent impoundments incident to underground coal mining, and mirror the regulations at 30 CFR 816.49, 816.56, and 816.133. On Nov. 20, 1986, 30 CFR 817.133(d) was suspended by the Department to the extent it provided authority for granting a variance from AOC requirements in non-steep-slope areas. *See* 51 FR 41962 (Nov. 20, 1986).

(1) Achieve the approximate original contour, except as provided in paragraph (k) [8] of this section;

(2) Eliminate all highwalls, spoil piles, and depressions, except as provided in paragraph (h) (small depressions) and in paragraph (k)(3)(iii) (previously mined highwalls) of this section[.]

* * * * * * *

(b) Spoil, except excess spoil disposed of in accordance with §§ 816.71 through 816.74, shall be returned to the mined-out area.

* * * * * * *

(d) *Spoil may be placed on the area outside the mined-out area in non-steep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain if the following requirements are met:*

* * * * * * *

(3) *The spoil shall be backfilled and graded on the area in accordance with the requirements of this section.* [Italics added.]

This regulation is quite clear that if the spoil is not "excess spoil," it shall be returned to the mined-out area. 30 CFR 816.102(b). However, spoil (even though it is not "excess spoil") may be placed outside the mined-out area in *non-steep-slope areas* to restore AOC by blending the spoil into the surrounding terrain if certain conditions are met. 30 CFR 816.102(d). Notably, one such condition is that the spoil be backfilled and graded on the area in accordance with the requirements of this section, *e.g.*, backfilled and graded on the area to achieve the AOC of the land. 30 CFR 816.102(a)(1).

This interpretation of 30 CFR 816.102 is supported by reference to the definitions of "spoil" and "excess spoil" at 30 CFR 701.5. "Spoil" is defined as "overburden that has been removed during surface coal mining operations." The term "excess spoil" is defined as "spoil material disposed of in a location other than the mined-out area; *provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(d) and 817.102(d) of this chapter shall in non-steep slope areas not be considered excess spoil.*" (Italics added.)

Pacific Coast's argument that Spoil Pile Nos. 1, 2, and 3 are composed of "excess spoil" not subject to AOC requirements is based upon the provision in the AOC definition at section 701(2) of SMCRA which allows the creation of water impoundments when the regulatory authority determines that they are in compliance with section 515(b)(8) of SMCRA. The only mention of "grading" contained in section 515(b)(8) is that it "provide adequate safety and access for proposed

[8] Para. (k) of sec. 816.102 provides that "[t]he postmining slope may vary from the approximate original contour when * * * [a]pproval is obtained from the regulatory authority for * * * [a] variance from approximate original contour requirements in accordance with § 785.16 of this chapter." The provisions of 30 CFR 785.16 reflect the exception to the general requirement to return disturbed areas to AOC found at sec. 515(c) of SMCRA, 30 U.S.C. § 1265(c) (1988), concerning proposed postmining uses of the affected land. Thus, this exception only applies to situations where the operator proposes to "remove an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill," and only steep-slope areas.

water users." Section 515(b)(8)(E) of SMCRA, 30 U.S.C. § 1265(b)(8)(E) (1988). Pacific Coast maintains that this is the *only* grading requirement with regard to spoil and AOC when a water impoundment is involved. *See* Applicant's Appeal Brief before Judge Child at 14-15. In our view, this adequate safety and access provision does not even address the question of how the operator is to dispose of the spoil which would otherwise be returned to the mine pit that becomes the impoundment. It cannot be read as superseding the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102.

In his Decision Memorandum, the Project Manager, Federal and Indian Permitting Branch, OSM, interpreted and applied the AOC requirements of section 515(b)(3) and 30 CFR 816.102 in accordance with our summary set forth above. He recommended denial of Pacific Coast's permit revision application on the basis that Pacific Coast was required to eliminate Spoil Pile Nos. 1, 2, and 3, and achieve AOC in accordance with section 515(b)(3) of SMCRA and 30 CFR 816.102. We set forth the Project Manager's supporting analysis below:

> The land disturbed was a gently-sloped bench between hills to the east and south and an escarpment on the west and north which slopes down to broad valley bottom of Rock Creek. Most slopes in the disturbed area were less than 10h:1v [10%]. The surrounding terrain consists of rounded hills with slope steepness generally decreasing with elevation.
>
> Postmining slopes may vary from the approximate original contour only under certain circumstances, none of which occur at the John Henry No. 1 mine. [30 CFR 816.102(a) and (k)]
>
> To achieve approximate original contour, the reclaimed area should closely resemble the general surface configuration of the land prior to mining. The general terrain should be comparable to the premined terrain; that is if the area was basically level or gently rolling before mining, it should retain those general features after mining. Water intercepted within or from the surrounding terrain should flow through and from the reclaimed area in an unobstructed and controlled manner. All highwalls and spoil piles must be eliminated in a manner which blends in with the surrounding terrain. [OSMRE Directive INE-26, Approximate Original Contour.]
>
> * * * * * * *
>
> In its response to OSM's [Sept. 19, 1989, technical deficiency letter stating that the proposed surface configuration does not closely resemble the pre-mining configuration], PCCC asserted that requirements to eliminate spoil piles and achieve approximate original contour do not apply to the "excess spoil" created by the proposed impoundment. PCCC asserted that the U.S. Court of Appeals decision on retention of underwater highwalls supported its position.
>
> In the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *National Wildlife Federation v. Hodel*, [839 F.2d 694 (D.C. Cir. 1988)], the court affirmed that approval of permanent impoundments constitutes a specific variance from approximate original contour requirements at 30 CFR 816.102(a) in that "the water impoundment grading requirements do not include a highwall elimination requirement." The court did not state that the specific variance extended to spoil piles and the requirement to achieve approximate original contour elsewhere in the disturbed area.

(Decision Memorandum at 4-6).

In its brief before Judge Child, Pacific Coast maintains, contrary to OSM's decision, that section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), which requires an operator to restore the affected land to AOC, with all highwalls and spoil piles eliminated, is not applicable to its

permit revision application. Pacific Coast argues that the only requirements which pertain to the creation of permanent water impoundments are found at section 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(8), quoted *supra*, and more specifically, that the only requirement with respect to "final grading" of permanent impoundments is to "provide adequate safety and access for proposed water users." Section 515(b)(8)(E) of SMCRA, 30 U.S.C. § 1265(b)(8)(E) (1988).

In Pacific Coast's view, "premised upon the appropriateness of a statutorily authorized permanent impoundment herein, the pivotal issue is: what is to become of the excess overburden or other spoil and waste material that is not returned to the mine pit, which is to become a permanent impoundment or 'final-cut' lake" (Applicant's Appeal Brief at 16). Pacific Coast contends that the spoil and waste material which is not returned to the mine pit is "excess spoil," to be disposed of in accordance with section 515(b)(22) of SMCRA, 30 U.S.C. § 1265(b)(22) (1988), which does not mention AOC requirements, but provides that the "final configuration" of excess spoil is to be 'compatible with the natural drainage pattern and surroundings and suitable for intended uses' " (Applicant's Appeal Brief at 17). *See* 30 U.S.C. § 1265(b)(22)(G) (1988). Thus, according to Pacific Coast, the controlling standards with respect to permanent impoundments and excess overburden or spoil material are found exclusively at sections 515(b)(8) and (22) of SMCRA.

Further, Pacific Coast asserts that the Department's regulations "confirm the above conclusions" (Brief at 17). Pacific Coast reviews the regulations set forth *supra*, and emphasizes in particular 30 CFR 816.102(b), which provides that "[s]poil, except excess spoil disposed of in accordance with §§ 816.71 through 816.74, shall be returned to the mined-out area." Pacific Coast's reasoning that it is not required to return the spoil piles to AOC is set forth below:

> Again premised upon the appropriateness and approval of the permanent impoundment herein, the mined overburden or spoil would not, and could not, be returned to the "mined-out area." If such "spoil" is not returned to the mined-out area, it is not subject to AOC (see § 701.5 definition of AOC) and is by definition "excess spoil" (see § 701.5 definition). As recited in 30 CFR 816.102(b), excess spoil is to be disposed of in accordance with §§ 816.71 through 816.74 and not in accordance with § 816.102(a).

(Applicant's Appeal Brief before Judge Child at 19). Thus, Pacific Coast concludes that since it "has complied with the provisions of § 816.71 with respect to excess spoil, the Modified Permit Revision Application should have been approved by OSM." *Id.* at 20.

Pacific Coast maintains that

> the 2 pertinent cases do confirm (i) that by definition, the AOC requirements of Section 515(b)(3) of SMCRA are only applicable to the 'mined area,' (ii) that the provisions of Section 515(b)(8), and not Section 515(b)(3), are applicable to permanent impoundments, and (iii) that the spoil created by an approved permanent impoundment is to be treated as 'excess' spoil.

Id.

The two cases upon which Pacific Coast relies are *National Wildlife Federation* v. *Hodel*, 839 F.2d 694 (D.C. Cir. 1988), and *Illinois South Project, Inc.* v. *Hodel*, 844 F.2d 1286 (7th Cir. 1988), which we will consider *infra*.

Should the Board conclude that the disposal and reclamation of spoil from the John Henry No. 1 Mine is not subject to section 515(b)(22) of SMCRA and 30 CFR 816.71 through 816.74, but rather is subject to section 515(b)(3) of SCMRA and 30 CFR 816.102(a) with regard to AOC, Pacific Coast advances the following alternative argument. Pacific Coast states that neither section 515(b)(3) of SMCRA nor 30 CFR 816.102(a) "specifically quantify the postmining configuration; rather, both require grading to restore the AOC of the land, with all highwalls, spoil piles, and depressions eliminated" (Brief at 34). Pacific Coast recognizes that both section 701(2) of SMCRA and 30 CFR 701.5 define AOC to mean "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area * * * closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." However, Pacific Coast quotes OSM Directive INE-26, "Approximate Original Contour," dated May 26, 1987, as not "necessarily requiring spoil from the first cut to be transported to fill the last cut in area mining, provided highwalls are eliminated and both cuts are graded to blend in with the surrounding terrain" (Brief at 35, quoting OSM AOC Directive at 3).

Pacific Coast places its mining operation into the context of "box-cut" mining, stating that in *Illinois South Project, Inc., supra*, the Seventh Circuit "specifically recognized the concepts of first-cut spoil, 'box-cut' mining, leaving the last cut as a lake, and leaving the first-cut spoil outside the mined-out area as excess spoil" (Brief at 35). Moreover, Pacific Coast states that "[t]his 'box-cut' mining sequence is also recognized and sanctioned pursuant to the OSM AOC Directive." *Id.* at 38. Thus, Pacific Coast concludes that OSM's denial of its permit revision application on the basis that the spoil piles must be eliminated under sections 515(b)(3) and 816.102(a) is in error.

In his decision dated December 5, 1990, Judge Child rejected Pacific Coast's arguments, concluding that "PCCC's logic fails by reason of its misreading of the statutes and the regulations" (Decision at 8). He emphasizes initially that the definition of AOC at section 701(2) of SMCRA includes the statement that "water impoundments *may be permitted* where the regulatory authority determines that they are in compliance with section 1265(b)(8) of this title" (Decision at 8, *quoting* Section 701(2) of SMCRA (italics added by Judge Child)). Thus, in his view, Congress "left the discretion with the regulatory authority whether to permit or authorize the proposed water impoundment in furtherance of the purposes of SMCRA" (Decision at 9). He reasons as follows:

In exercising that discretion, respondent [OSM] is free to consider what adverse effects, if any, a permitted water impoundment would have upon the surrounding landowners, the principal landowner, the community, the environment, society and such other factors as may pertain to accomplish the purposes of SMCRA as set forth at Section 102 of the Act (30 U.S.C. § 1202). Necessary in such deliberation would be a weighing in the balance of the relative need or utility of an impoundment viz a viz [sic] the possibly excessive spoil material which could remain as a result of not utilizing it as backfill as otherwise contemplated by the Act and implementing regulations.

(Decision at 9).

Judge Child quotes from section 515(b)(8) of SMCRA, which provides for the creation of permanent impoundments of water, "if authorized in the approved mining and reclamation plan and permit." In his view, this section "makes it clear that only *if* the permanent impoundment of water on the mining site is *authorized in the approved mining and reclamation plan* will the mandatory criteria governing creation of the impoundment come into play or necessarily be effected" (Decision at 9; italics in original). Thus, "the regulatory authority after due deliberation might well decide that spoil piles which would remain in the event an impoundment is permitted would be too high a price to pay absent a showing of overriding need for the impoundment." *Id.* at 10.

Judge Child rejects Pacific Coast's contention that OSM Directive INE-26 countenances its permit revision application, even though the OSM Directive "appears to permit deviation from the objective of achieving approximate original contour in accomplishing reclamation under particular circumstances and particularly points up the practice in 'area mining' of not necessarily requiring the spoil from the first cut to be transported to backfill the last cut." *Id.* Judge Child states:

According to the Directive, the practice could be excused only if both the first and last cuts are graded to blend in with the surrounding terrain. There has been no showing here that spoil in proposed permanent Piles Nos. 1, 2 and 3 came from the "first cut;" nor is it evident that the proposed impoundment would be at the "last cut" of its mining operation. Finally, INE-26 is speaking of accomplished reclamation which fails to achieve approximate original contour and whether to require corrective measures in the face of newly sewn seeding or vegetation.

Id.

Judge Child was unpersuaded that under *Illinois South Project, Inc.*, "allowing the last cut to become a lake in the course of 'Box Cut' or 'Area mining' would render the spoil removed from the first cut in effect 'excess spoil' subject to the regulations applying to the treatment of 'excess spoil.' " *Id.* at 10-11. He disposed of this argument in the following terms:

PCCC's reliance on the *Illinois* case is without basis. After discussing the nature of excess spoil and describing the distance which sometimes occurs between the first and last cuts in following 'area mining,' the court there said: 'Illinois cannot protest that the spoil created by *permitted* lakes is treated as excess.' (italics added) PCCC's proposed impoundment has not been *permitted* and the spoil presently or projected to occupy the disturbed area in the course of mining is by the approved permit deemed to be

temporary structures contemplated to be removed for purposes of backfill and attaining approximate original contour of the disturbed area. [Italics in original.]

Id. at 11.

Judge Child recognized that 30 CFR 816.102(k) provides for certain exceptions to the general requirement that disturbed areas shall be backfilled and graded to achieve AOC and that all spoil piles be eliminated, but he concluded that Pacific Coast had "not established that any of said exceptions here apply." He concluded:

PCCC's Permit Revision Application fails to accommodate the requirements of the regulation at 30 CFR 816.102(a) by its gross failure to provide for (1) elimination of spoil piles and (2) achievement of approximate original contour. As such, absent a showing of exception or authorized variance, the modified Permit Revision Application is legally deficient and was properly disapproved.

Id.

In its petition for discretionary review, Pacific Coast states that "OSM's authority, discretionary or otherwise, to approve or deny a permanent impoundment has never been an issue herein. Rather, the issue is: what disposal standards are applicable in OSM's review of the Modified Permit Revision Application with respect to the surplus (excess) spoil which is attendant to the creation of a permanent impoundment" (Petition at 10). Pacific Coast emphasizes that OSM stipulated for purposes of this appeal that "PCCC's compliance with applicable permanent impoundment criteria and the proposed post-mining land use is not disputed" (Stipulation of Undisputed Facts *supra* at "V"). Pacific Coast maintains that Judge Child erred in rejecting its argument that "the express exception of 30 CFR 816.102(b) supersedes the general provision of 30 CFR 816.102(a) with respect to the disposal of excess spoil attendant to the creation of a permanent impoundment or final-cut lake," and that "[i]n the alternative, Pacific Coast argue[s] that the Modified Permit Revision Application does comply with the statutory regulatory requirements for box-cut mining, final-cut lakes, and the reclamation of attendant spoil piles," again citing *Illinois South Project, Inc.* and OSM Directive INE-26 (Petition at 12).

[2] For the reasons set forth below, we affirm Judge Child's December 5, 1990, decision. The definition of "approximate original contour" at section 701(2) of SMCRA simply provides, in pertinent part, that "water impoundments *may* be permitted where the regulatory authority determines that they are in compliance with section 515(b)(8) of this Act" (italics added). We construe this provision to mean that *if* OSM permits the creation of a water impoundment, the impoundment must comply with section 515(b)(8) of SMCRA. However, whether OSM properly denies an application which proposes the creation of a permanent water impoundment depends not merely upon whether it meets the criteria of section 515(b)(8) of SMCRA. Other factors may be determinative. In the instant case, a critical factor in evaluating Pacific Coast's permit revision application concerns what Pacific Coast

proposes to do with the spoil which otherwise would be returned to Pit No. 1 in accordance with the permit as approved by OSM.

In this connection, Pacific Coast maintains that because OSM must approve the permit revision application since it complies with section 515(b)(8) of SMCRA, the spoil that otherwise would have filled the impoundment must be disposed of as "excess spoil" under section 515(b)(22) of SMCRA and 30 CFR 816.71. In its view, section 515(b)(3) of SMCRA and 30 CFR 816.102(a) do not apply.

We cannot agree. In our view, the mandate of section 515(b)(3) of SMCRA and 30 CFR 816.102(a) is quite clear. We find no support in the plain wording of the statute or in the legislative history to support the proposition that in providing for the creation of water impoundments, Congress intended that spoil from permitted impoundments would automatically and necessarily become excess spoil not subject to section 515(b)(3) of SMCRA, thus relieving the operator of the obligation to "backfill * * * and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated."

National Wildlife Federation, which, according to Pacific Coast, supports its argument that Spoil Pile Nos. 1, 2, and 3 contain excess spoil not subject to the AOC requirements of section 515(b)(3) of SMCRA and 30 CFR 816.102(a), involved regulations promulgated by the Department on September 26, 1983 (*see* 48 FR 44004), including 30 CFR 816.49(a)(9). This regulation permits vertical highwalls to remain in permanent impoundments provided "[t]he vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of highwall to provide adequate safety and access for the proposed water users."[9]

In considering the validity of this regulation, the Circuit Court noted that "[e]ven where Congress allowed exceptions to the general AOC restoration requirement, it still explicitly required the elimination of highwalls. *See* SMCRA § 515(c), (e)." 839 F.2d at 759. Even so, the Circuit Court felt that "water impoundments constitute a third specific variance from AOC requirements (in addition to those found in § 515(c), (e))." [10] However, the court stated:

> Unlike the other two AOC variances, the water impoundment grading requirements do not include a highwall elimination requirement. Instead, an operator wishing to create a

[9] The District Court had remanded the regulation as inconsistent with the AOC requirements of SMCRA, stating that it was "wary of permitting highwalls to remain in impoundments under an 'implied' exception to AOC, when Congress did not even permit the retention of highwalls when granting express exemptions from AOC." *In re Permanent Surface Mining Regulation Litigation, supra* at 1571.

[10] As noted *supra*, sec. 515(c) of SMCRA provides for a variance from AOC requirements when the "mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill * * * by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining." Sec. 515(e)(2) of SMCRA allows for a variance from AOC in situations where such variance will "render the land, after reclamation, suitable for an industrial, commercial, residential, or public use," provided that "complete backfilling with spoil material shall be required to cover completely the highwall * * *." *See* 30 U.S.C. § 1265(e)(1) (1988).

permanent water impoundment must show, among other things, that "final grading will provide safety and access for proposed water users." SMCRA § 515(b)(8)(E).

839 F.2d at 760.

Pacific Coast infers from *National Wildlife Federation* that if highwalls need not be eliminated from permanent impoundments, then spoil which would otherwise be returned to an impoundment is not subject to AOC. We disagree. As noted, the court viewed the regulation allowing the retention of highwalls in water impoundments as a specific third variance from the AOC standard. What Pacific Coast neglects to consider is that the court, in a separate portion of its decision, addressed the subject of OSM's general authority to grant variances from AOC pursuant to section 515(e) of SMCRA. The court was presented with the question whether the variance power described in section 515(e) relates solely to the steep slope requirements set out in section 515(d)(2), or should be read to permit a general variance to the requirements of section 515(b)(3) that operators restore the disturbed land to AOC. The court, having reviewed the legislative history of section 515(e), concluded:

> Ultimately we rely on the text of § 515(e)(2) which specifically states that variances may be granted from the AOC requirements of § 515(d)(2), the steep slope mining provision; it does not, as enacted, state that non-steep slope mining AOC requirements may be waived or excused, and neither does it reference § 515(b)(3), the general AOC provision. A variance provision similar in structure, § 515(c), expressly allows for disregarding the AOC requirements of *both* § 515(b)(3) *and* 515(d)(2) under certain circumstances. *See* 515(c)(2). Although we might speculate about the reasons why the reference to § 515(b)(3) (which was once a part of the variance amendment), was deleted by the Conference Committee, that unexplained deletion alone does not persuade us to read into a statute a provision that is not there. [Italics in original.]

839 F.2d at 763-64.

Thus, the AOC variance provisions of section 515(c) and (e) of SMCRA relate solely to steep-slope mining. We conclude that Pacific Coast's proposal to retain the three spoil piles as permanent topographical features in a non-steep-slope area is contrary to section 515(b)(3) of SMCRA, which requires an operator to return disturbed land to AOC, "except as provided in subsection (c) of [section 515]." In recognizing the retention of underwater highwalls as a third exception to the AOC requirement, the Circuit Court in *National Wildlife Federation* observed that "Congress * * * has not stated that highwalls completely submerged in an authorized impoundment must be removed." 839 F.2d at 760. We draw a distinction between a completely submerged highwall on the one hand and a spoil pile which is retained in an area where the terrain is described as "gently rolling" on the other hand. While Congress has not mandated that highwalls completely submerged in an authorized impoundment must be removed, it has mandated that an operator must return the spoil, as well as the areas upon which the spoil is placed, to AOC in accordance with section 515(b)(3) of SMCRA and implementing regulations.

A review of the applicable regulations leads inevitably to the same conclusion. For example, in the preamble to the final rule pertaining

to alternative post-mining land uses, OSM stated that "[a]pproval of an alternative land use does not itself relieve the operator of the responsibility to return the land to its approximate original contour." 44 FR 14902, 15243 (Mar. 13, 1979).

Moreover, as initially proposed, 30 CFR 816.102(a)(2) provided that "[s]poil shall be-- (1) [r]etained in the mined-out area, unless disposal elsewhere in the permit area is approved; [and] (2) [b]ackfilled and graded to * * * [e]liminate all highwalls, spoil piles, and depression[s] * * *." 47 FR 26760, 26767 (June 21, 1982) (proposed § 816.102 (b)). However, as promulgated, the word "spoil" was changed to "disturbed areas" for the following reason: "OSM has replaced the word 'spoil' with the more inclusive term 'disturbed areas' to indicate that there are other areas that may require backfilling and grading in addition to the mined-out area * * *." 48 FR 23356, 23358 (May 24, 1983). In the preamble to this final rulemaking, OSM pointed to the definition of "disturbed area" at 30 CFR 701.5 as meaning "an area where vegetation, topsoil, or overburden is removed or upon which * * * spoil * * * is placed by surface coal mining operations." 48 FR at 23358. Thus, contrary to Pacific Coast's contention, an operator must backfill and grade an area upon which spoil is placed to achieve AOC, in addition to backfilling and grading the mined-out area.

Further, the preamble to the excess spoil disposal regulations at 30 CFR §§ 816.71 through 816.74 removes any doubt that the AOC requirements apply to Pacific Coast's spoil piles. As previously noted, the term "excess spoil" is defined as "spoil material disposed of in a location other than the mined-out area, provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(c) * * * of this chapter in nonsteep slope areas shall not be considered excess spoil." In its preamble to the final rulemaking, OSM explained the definition:

> Before spoil can be moved from the mined-out area to an excess spoil fill, the operator must meet the approximate original contour (AOC) restoration and highwall elimination requirements, or fall within variances thereto, in sections 515 and 516 of [SMCRA] and in §§ 816.102 - 816.107 * * *. The excess spoil is then subject to the requirements of Section 515(b)(22) of [SMCRA] and the provisions of §§ 816.71 - 816.74 * * *.
>
> * * * * * * *
>
> In the final rule, spoil used to merely blend the mined out area with the surrounding terrain need not be treated as excess spoil. Thus, spoil from box cuts or first cuts in non-steep slope areas would not be excess spoil when it is used to achieve approximate original contour, *i.e.*, to blend the mined-out area into the surrounding terrain according to § 816.102 of the backfilling and grading rules. Even though the spoil in these cases is disposed of in a location other than the mined out area, specifically around the box cut or first cut to blend it into the terrain, the rules for excess spoil would not be applicable. Rather, the standards for backfilling and grading would govern.

48 FR 32910, 32911 (July 19, 1983).

We find ourselves in agreement with OSM's summary of the regulations applicable to Pacific Coast's permit revision application:

> [E]ven assuming, *arguendo*, that Pacific Coast's proposed permanent impoundment is permitted, and further acknowledging that the box cut spoil[27] in Spoil Pile Nos. 1, 2 and 3 will be disposed of outside the mined-out area, because of the requirement to return the disturbed area, *i.e.*, the area underlying Spoil Pile Nos. 1, 2 and 3, to its pre-mining approximate original contour, the spoil in Spoil Pile Nos. 1, 2 and 3 *is* not, and *cannot* be treated as, excess spoil. Thus, even though Spoil Pile Nos. 1, 2 and 3 will be disposed of outside the mined-out area, in the words of the preamble to the excess spoil disposal regulations, "the rules for excess spoil [will] *not* be applicable. Rather, the standards for backfilling and grading [at 30 C.F.R. § 816.102(a) will] govern."

[27] On page 30 of its brief, Pacific Coast concedes that the spoil in Spoil Pile Nos. 1, 2 and 3 is "box cut" spoil. [Italics in original.]

(OSM's Response to Applicant's Appeal Brief at 26-27).

We likewise reject Pacific Coast's alternative argument, *i.e.*, if the "excess spoil" from the John Henry No. 1 Mine is not subject to section 515(b)(22) of SMCRA and 30 CFR 816.71 - 816.74, its permit revision application still complies with the applicable statutory and regulatory criteria with regard to box-cut spoils, final-cut lakes, and the reclamation of spoil piles attendant thereto. *See* Pacific Coast's Brief at 33 *et seq.* As previously noted, Pacific Coast supports this alternative argument with OSM Directive INE-26 and *Illinois South Project, Inc.* v. *Hodel, supra.* We agree with OSM that "(1) Pacific Coast has misapplied the provisions of OSM Directive INE-26 to the facts of the present case; and (2) the ruling in the *Illinois South* case is not directly applicable to the facts of the present case" (OSM Response at 29).

In *Illinois South*, the Seventh Circuit summarized Illinois South's description of the practice of box-cut in the following terms:

> [T]he mine operator removes the overburden in a long, thin strip known as a "box cut" and lays the spoil on the ground away from the seam of coal. Then the operator removes the coal from the first cut and makes a second box cut, putting the spoil from the second cut in the pit produced by the first. This reduces costs; instead of removing overburden, storing and returning it (handling everything twice), the operator moves most of the spoil only once. The process continues until the mining is completed. The last cut may be far away from the first. The operator leaves the first cut spoil where it is and neglects to fill the last cut. Eventually nature fills the last cut with water.

844 F.2d at 1292.

Assuming, *arguendo*, that Pacific Coast's operations at the John Henry No. 1 Mine fit the above description, we fail to see how OSM Directive INE-26 absolves Pacific Coast of the responsibility of returning the spoil piles to AOC. OSM issued Directive INE-26 to "provide policy guidance and procedures for determining whether backfilling and grading have met the requirements of approximate original contour as defined in sections 701(2) of the Act, sections 701.5 and 710.5 of the regulations and the corresponding definitions in approved State programs." With regard to spoil piles, the OSM Directive states:

All highwalls, spoil piles, and depressions, * * * shall be eliminated in a manner which blends in with the surrounding terrain. This element should not be interpreted as necessarily requiring spoil from the first cut to be transported to fill the last cut in area mining, provided highwalls are eliminated and *both cuts are graded to blend in with the surrounding terrain.* See 43 *FR* 62643, December 13, 1977; 44 *FR* 15227, March 13, 1979; and 48 *FR* 32911 (July 19, 1983). [Italics added.]

Based upon the facts in the record, we are unable to determine whether the spoil in Spoil Pile Nos. 1, 2, and 3 does, in fact constitute Pacific Coast's "first cut" spoil, and that the site of its impoundment is, in fact, the "last cut" of its mining operation. OSM argues that "Pacific Coast's 'life-of-mine' plan appears to indicate that Pacific Coast's final cut will, in fact, be located some distance to the southwest of the site now proposed for the permanent impoundment" (OSM Response at 31). Given the wording of OSM Directive INE-26, we need not resolve the issue of whether Pacific Coast's operations fit precisely into the practice of "box-cut" mining described in *Illinois South Project.* To adopt OSM's analysis, "[e]ven assuming, *arguendo,* that the site of the proposed impoundment is the final cut, and that the spoil in Spoil Pile Nos. 1, 2 and 3 is the first cut, both cuts must still, in the words of OSM Directive INE-26 'be graded to '*blend*' in with the surrounding terrain' " (OSM Response at 31).

Paragraph 3.c.(2)(b) of OSM Directive INE-26 indicates that "[t]he test applied to determine if the reclaimed area blends into and complements the drainage pattern of the surrounding area is whether water intercepted within or from the surrounding terrain flows through and from the reclaimed area in an unobstructed and controlled manner." However, the OSM Directive makes clear that whether the reclaimed area "blends" with the drainage pattern of the surrounding area is one criterion to be applied in determining whether AOC has been achieved, not the sole criterion. Paragraph 3.c.(2)(a) indicates that in reaching an AOC determination, OSM must consider whether "[t]he reclaimed area * * * closely resemble[s] the general surface configuration of the land prior to mining." The directive sets forth the following parameters:

This should not be interpreted, however, as requiring that postmining contours exactly match the premining contours or that long uninterrupted premining slopes must result in the same. Rather, the general terrain should be comparable to the premined terrain; that is, if the area was basically level or gently rolling before mining, it should retain these general features after mining.

(OSM Directive INE-26, paragraph 3.c.(2)(a)). We observe that this directive closely tracks the definition of AOC embodied in section 701(2) of SMCRA and 30 CFR 701.5.

Thus, Judge Child properly concluded that OSM Directive INE-26 does not support Pacific Coast's argument that it need not return the spoil piles to AOC. In our view, the directive supports the opposite conclusion, *i.e.,* Pacific Coast's proposal to leave Spoil Pile Nos. 1, 2, and 3 at the elevations proposed, in an area which, according to the

parties' Stipulation of Undisputed Facts, is "generally low in surface relief," is contrary to the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102.

Moreover, Pacific Coast's reliance upon *Illinois South Project* is equally misplaced. Pacific Coast asserts that "the *Illinois South* Opinion specifically recognized the concepts of first-cut spoil, 'box-cut' mining, leaving the last cut as a lake, and leaving the first-cut spoil outside the mined-out area as excess spoil" (Applicant's Appeal Brief at 35). A reading of *Illinois South* indicates that while the court recognized such concepts, it by no means countenanced their unfettered practice. As to the practice of "box-cut" mining in which "[t]he operator leaves the first cut spoil where it is and neglects to fill the last cut," the court stated: "[W]e do not doubt that if things are as stark as this, Illinois is out of compliance with the Act." 844 F.2d at 1292. Illinois South argued that "the practice persists because Illinois 'allows operators to automatically treat their box cut spoil as excess spoil' * * * that may be left in place." *Id.* The court responded that it did not "see in the state regulations blanket permission for the practice Illinois South describes."

> There is nothing "automatic" about the privilege to treat spoil as "excess"; that may be done only when "the final thickness is greater than 1.2 of the initial thickness", §1816.105(a), *and even then only when "surface mining activities cannot be carried out to comply with the Section 1816.101 [sic] to achieve the approximate initial contour."* [Italics added.]

844 F.2d at 1292-93.

In response to Illinois South's objection that 62 Ill. Admin. Code § 1816.71(g)(2) allows operators to leave a final slope as steep as 25 percent on excess spoil, the court quoted the language of the regulation, which provides that "[b]ox cut spoils shall *blend with undisturbed land* with a *maximum* outslope steepness of twenty-five (25) percent (4h:1v)." 844 F.2d at 1293, *quoting* 62 Ill. Admin. Code § 1816.71(g)(2) (italics in original). According to the court's interpretation of this regulation, "the mine operator *may select* a slope as steep as 25% in order to match a hilly terrain. It is hard to read this language as permitting disruptive, unsightly walls of spoil to be scattered willynilly through Illinois." 844 F.2d at 1293.

We find no reason to interpret the court's analysis of 62 Ill. Admin. Code § 1816.71(g)(2) as inconsistent with the definition of AOC embodied in section 701(2) of SMCRA and 30 CFR 701.5, *i.e.*, "that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area * * * closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." As noted by OSM, the court "merely said that operators must match hilly terrain with hilly terrain, and implicitly, that operators must match flat terrain with flat terrain" (OSM Response at 39). Further, we agree with OSM's application of *Illinois South* to Pacific Coast's case:

[I]f the *disturbed area* was "gently rolling" or relatively flat prior to mining, notwithstanding the fact that there might be some 33% slopes "in the general vicinity", the *disturbed area* must, in the words of the court, "match" that same general surface configuration after mining. In the present case, this can *only* be done if, consistent with section 515(b)(3) of SMCRA, and 30 C.F.R. § 816.102(a), Spoil Pile Nos. 1, 2 and 3 are eliminated, or at least graded to achieve the pre-mining approximate original contour. [Italics in original.]

(OSM Response at 39-40).[11]

In conclusion, we rule that OSM properly denied Pacific Coast's permit revision application. Pacific Coast's proposal to retain Spoil Pile Nos. 1 and 2, and a portion of Spoil Pile No. 3, as permanent topographical features, with Spoil Pile No. 2 about 80 feet higher, Spoil Pile No. 3 approximately 20 to 40 feet higher, and Spoil Pile No. 1 approximately 40-60 feet higher than the pre-mining topography, is clearly inconsistent with the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Pacific Coast's petition for discretionary review is granted, and Administrative Law Judge Child's December 5, 1990, decision is affirmed.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

WILL A. IRWIN
Administrative Judge

[11] Our ruling herein does not mean that Pacific Coast is required to return the areas upon which the spoil piles are located to their exact original contour. In its response to Pacific Coast's brief filed before Judge Child, OSM placed the AOC requirements, as they apply to Pacific Coast's John Henry No. 1 Mine, into the following perspective:

"OSM recognizes that in lieu of completely eliminating Spoil Pile Nos. 1, 2 and 3, it would be possible for Pacific Coast to level or otherwise grade such piles in a manner which would achieve the approximate original premining contours of the disturbed area. OSM further recognizes that such an action might well result in the over-all elevation of the post-mining topography being higher than the elevation of the pre-mining topography. However, as evinced by the following legislative history of SMCRA, the Congress never intended that a mere increase in elevation of the post-mining topography would violate AOC provisions:

"In area mining, the ability to reclaim to approximate original contour depends primarily on the quantity of spoil available in relation to the amount of coal removed. * * * The environmental standard imposed intends that the overburden from the first cut will be blended into the undisturbed landscape and mine site and the final cut is backfilled with spoil from several previous cuts as well as from the top of the highwall if desired. In such instances, *the actual elevation of the reclaimed land might be higher than the premined lands due to the swell of spoil material.*" (OSM's Response at 27 n.28, *quoting* H.R. Rep. No. 218, 95th Cong., 1st Sess. 103 (1977) (italics added)).

October 16, 1990)

RIGHTS TO COALBED METHANE UNDER AN OIL & GAS LEASE FOR LANDS IN THE JICARILLA APACHE RESERVATION *

M-36970 *October 16, 1990*

Indians: Mineral Resources: Oil and Gas: Generally

Under Bureau of Indian Affairs Lease Form 5-157 (1947), paragraphs 1 and 10, the term "natural gas" unambigously includes coalbed methane.

Under Bureau of Indian Affairs Lease Form 5-157 (1947), paragraphs 1 and 10, the word "deposit" does not exclude methane found in coal from oil and gas deposits.

Indians: Reservations: Generally

Where the general intent to lease all gases is clear, the absence of specific intent to include coalbed methane as a gas in Bureau of Indian Affairs Lease Form 5-157 (1947), cannot create a reservation of that gas.

Indians: Mineral Resources: Oil and Gas: Generally

Before approving drilling permits for wells on the lease, the Department, pursuant to the Federal Government's trust responsibility to protect tribal resources, needs to satisfy itself that the proposed activities will be carried out with due regard for possible future coal mining operations.

To: Secretary

From: Solicitor

Subject: Rights to Coalbed Methane Under an Oil and Gas Lease for Lands in the Jicarilla Apache Reservation

The Area Director of the Albuquerque Area Office, Bureau of Indian Affairs (BIA), has requested this Office's opinion on whether an oil and gas lease, between the Jicarilla Apache Tribal Council and Mobil Producing Texas & New Mexico Inc. (Mobil), authorizes Mobil to produce natural gas from coal seams deposited in the Fruitland Formation in New Mexico. Such gas is often referred to as "coalbed methane." Having reviewed the terms of the lease, we find that the lease unambiguously granted Mobil the right to produce any coalbed methane found within the lease.

BACKGROUND AND ISSUES

The March 7, 1902, lease between the Jicarilla Apache tribe and the Magnolia Petroleum Co. (predecessor to Mobil) employs the November 1947 version of the BIA's lease Form 5-157.[1] Like most oil and gas

* Not in chronological order.

[1]The land subject to the lease is within the reservation set aside for the Jicarilla Apache Tribe. The reservation was established in 1887 by Executive Order. 1 C. Kappler, *Indian Affairs, Laws and Treaties* 875 (1904).

Oil and gas leasing on executive order reservations was first authorized by the Indian Oil Act of 1927, 25 U.S.C. § 398a. *Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. 1698, 1709-10 (1989). The 1927 Act permitted the leasing of unallotted lands within an executive order reservation "for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title." 25 U.S.C. § 398a. Sec. 398, enacted in 1924, permitted the Secretary to

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leases, the basic economics of this lease are that the Jicarillas received a bonus and receive royalties on production; the lessee received the rights to explore for and produce the oil and gas. More specifically, the Jicarillas received a bonus of $54,330 and "a royalty of 12½ percent of the value or amount of all oil, *gas*, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein." Lease Form 5-157 ¶3(c) (italics added). The lessee received the "exclusive right * * * to drill for, mine, extract, remove and dispose of all the oil and natural *gas* deposits" in Tract 178; that right was granted for "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or *gas* is produced in paying quantities from said land." Lease Form 5-157 ¶1 (italics added). Lease Form 5-157 specifically defines what the word "gas" was intended to mean: paragraph 10 provides that "[i]t is covenanted and agreed that helium gas, carbon dioxide gas, and *all other natural gases* are included under the term 'gas' as used in this lease * * *." (Italics added).

Broadly speaking, our inquiry here is whether this lease may be reasonably construed to *exclude* from the grant of rights to Mobil the right to produce natural gas found in coalbeds within its lease. For if that interpretation is reasonable, and if it better promotes the Tribe's interests than another interpretation would, then we are obliged to adopt it. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., dissenting in part), *adopted as majority opinion en banc*, 782 F.2d 855 (1986), *supplemented en banc*, 793 F.2d 1171 (1986), *cert. denied* 479 U.S. 970 (1986). However, for our obligation under *Jicarilla* to arise, there must be an ambiguity sufficient to permit more than one reasonable interpretation; for "the canon of construction regarding the resolution of ambiguities [in favor of a tribe] * * * does not permit reliance on ambiguities that do not

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lease certain unallotted land on reservations "for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities * * *" provided the Secretary had the "consent of the council speaking for such Indians."

These statutes were needed to authorize oil and gas leasing of these lands after Attorney General (and later Chief Justice) Stone determined that Interior could not lease minerals on executive order reservations under the Mineral Leasing Act of 1920. 34 Op. Atty. Gen. 171 (1924), *rejecting E. M. Harrison*, 49 L.D. 139 (1922). *See* S. Rep. No. 985, 75th Cong., 1st Sess. 1 (1937).

The Indian Oil Act was revised by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, the authority under which the lease in question was issued. The 1938 Act authorizes the Secretary to approve the issuance of leases "for mining purposes * * * for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a. More specifically, it requires that "leases for oil- and/or gas-mining purposes" are to be offered to the highest responsible bidder, at public auction or on sealed bids, "upon such terms and subject to such conditions as the Secretary of the Interior may prescribe." 25 U.S.C. § 396b. Sec. 7 of the Indian Mineral Leasing Act of 1938 repealed "all Acts or Parts of Acts inconsistent herewith * * *" 52 Stat. 347 (1938).

It is beyond question that the Secretary had the authority to approve under the 1938 Act a lease which granted rights to coalbed methane as a part of the rights to oil and gas. Under "[t]he Indian Mineral Leasing Act of 1938, * * * [t]he Secretary is delegated the authority to define the terms of the leases and to 'make such rules and regulations as may be necessary for the purpose of carrying the provisions of [the] section into full force and effect * * *'" *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir. 1990).

In granting the Secretary and the Tribes broad discretion to fashion the terms of the leases, Congress followed the pattern it established when it enacted the first law authorizing mineral leasing on Indian lands, the Act of February 28, 1891. 25 U.S.C. § 397. That law authorized the leasing of "lands * * * occupied by Indians who have bought and paid for the same, * * * for a period not to exceed * * * ten years for mining purposes in such quantities and *upon such terms and conditions as the agent in charge of such reservation may recommend*, subject to the approval of the Secretary of the Interior." (Italics added). *See Cotton Petroleum Corp., supra* at 1709.

exist * * *," *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986), and the Department is not "compelled to go contrary to and beyond the regulations and the leases" in fulfilling its obligation to the tribe. *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987), *cert. denied* 486 U.S. 1032 (1988).

In Solicitor's Opinion, M-36935, 88 I.D. 538 (1981), this Office concluded (among other things) that coalbed methane was a gas leasable under the provisions of the Mineral Leasing Act governing "oil and gas deposits." 30 U.S.C. § 226(a). Here we will consider three similar questions. First is whether coalbed methane is a "natural gas" within the meaning of ¶10 of the lease. We conclude that it is. Second is whether by agreeing that Mobil would receive rights to "oil and gas *deposits*," as opposed to "oil and gas," the parties intended to exclude natural gas found in coalbeds. We conclude the parties did not so intend. Third is whether the lease would be rendered ambiguous if it could be shown that the parties did not specifically intend to grant rights to coalbed methane. We conclude it would not.

ANALYSIS

I. Coalbed Methane is a "Natural Gas" Found in "Oil and Gas Deposits" within the Meaning of the Lease

Paragraph 10 expressly includes within the meaning of "gas" "all other natural gases." Long before 1952 the Department and the minerals industries understood coalbed methane to be a gas. *See, e.g.*, N. H. Darton, *Occurrence of Explosive Gases in Coal Mines* 12-16, 225-26 (1915) (Bureau of Mines Bulletin No. 72). As explained in Opinion M-36935, "Coalbed methane is both scientifically defined and legally regarded as a gas * * * [A]lthough coalbed gas exists in coal deposits, the two resources are distinct, and are potentially severable." 88 I.D. at 540 (footnotes omitted). The only case addressing this point since Opinion M-36935 was issued has reached the same conclusion. *See United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1382 (Pa. 1983) ("coal and coalbed gas are * * * separate physical entities"; coalbed gas contains same elements as other natural gas). We have found no definition of "natural gas" which would exclude coalbed methane. Paragraph 10 therefore includes coalbed methane as a "gas" covered by the lease.[2]

Nor is our analysis altered by the physical state methane may be in while in the coalbed. Technical analysis of coal in the San Juan Basin indicates that some coalbed methane exists in the "gaseous phase" just as methane exists in a sandstone or other reservoir. But much of it is either adsorbed on or absorbed in the molecules of coal, and may be

[2] *Accord, Exxon Corp. v. Lujan*, 730 F.Supp. 1535, 1543-45 (D. Wyo. 1990), *appeal docketed* No. 90-8036 (10th Cir.) (carbon dioxide is a natural gas under sec. 28 of Mineral Leasing Act, relying in part on Solicitor's Opinion, M-36935).

more accurately regarded as a condensed fluid, which becomes gaseous as the pressure in the coalbed is decreased. Kelso, Wicks, and Kuuskraa, *A Geologic Assessment of Natural Gas from Coal Seams in the Fruitland Formation, San Juan Basin* 45 (Gas Research Institute Topical Report 1988). But this phenomenon, where hydrocarbons change from a gas to a liquid or a liquid to a gas, is not a novelty in oil and gas leasing. Some hydrocarbons are gaseous when under pressure in the reservoir, but become liquids at atmospheric pressure: these are called condensate. Some, under a natural process called retrograde condensation, convert from gas to liquid while still in the reservoir, and at sufficiently low pressure may reconvert to gas. Still others become liquids when treated at a natural gas processing plant. Craft and Hawkins, *Applied Petroleum Reservoir Engineering* Chap. 2 (1959); Slider, *Practical Petroleum Reservoir Engineering Methods* Chap. 4 (1976); *Field Handling of Natural Gas* 26-27 (3rd ed. 1972) (Petroleum Ext. Serv., Univ. of Texas Austin). Yet all are "hydrocarbon substances" subject to royalty under ¶3(c) of Lease Form 5-157. *See generally Jicarilla Apache Tribe v. Supron Energy Corp., supra* (royalty due on both natural gas and liquid products). So, too, any methane which may be a condensed fluid within the coalbed before production is a "hydrocarbon substance" subject to royalty.

Nor can we find that the word "deposit" was intended to exclude coalbed methane from the rights granted under the lease. "Deposit" has a common usage in the minerals industries. Its accepted meaning provides no basis to exclude methane found in coal from "oil and gas deposits." The Department's Bureau of Mines defines "deposit" as a term "used to designate a natural occurrence of a useful mineral * * * in sufficient extent and degree of concentration to invite exploration." *A Dictionary of Mining, Mineral and Related Terms* 313 (Bureau of Mines 1968). A "mineral deposit" is similarly defined as "a body of mineral matter in or on the Earth's surface which may be used for its industrial mineral or metal content." *Id.* at 710. In the oil and gas context, a "deposit" has been defined as "an accumulation of oil, gas or other minerals capable of production." Williams and Meyers, *Manual of Oil and Gas Terms* 146 (4th ed. 1976). All these definitions plainly include methane found in coalbeds as a "deposit" of gas, and none limit the term "deposit" by the structure or stratum in which it is found.[3]

On Federal lands, the Department has always used the phrase "oil and gas deposits" to refer to the full range of rights granted in an oil and gas lease. The phrase appeared in the first lease form implementing

[3]The word "deposit" had a similarly broad meaning in 1920, when Congress used it in the Mineral Leasing Act. *See* Fay, *A Glossary of the Mining and Mineral Industry* 211 (Dept. of the Interior 1920) ("the term mineral deposit or ore deposit, is arbitrarily used to designate a natural occurrence of a useful mineral or ore in sufficient extent and degree of concentration to invite exploitation").

the Mineral Leasing Act of 1920, see 44 L.D. 447, 448 (1920), and has been used in subsequent forms.[4]

Congress has used the phrase itself in that Act, authorizing the Secretary to lease lands "known or believed to contain oil or gas deposits." 30 U.S.C. § 226(a). This Office has previously indicated that grants of rights to oil and gas deposits include the rights to coalbed methane. 88 I.D. at 545-46. Given that there is no commonly used definition of "deposit" which supports a narrower view, we find no reasonable basis for construing the phrase "oil and gas deposits" differently when it appears in Indian leases, as opposed to Federal leases, on forms issued by this Department. *Accord, Navajo Tribe of Indians v. United States*, 364 F.2d 320, 324-27 (Ct.Cl. 1966) (phrase "oil and gas deposits" in Indian lease includes helium, even though helium is not a hydrocarbon gas).

We therefore find that paragraphs 1 and 10 of the lease unambiguously grant the right to produce coalbed methane.

II. Where the General Intent to Lease All Gas Is Clear, the Absence of Specific Intent to Include Coalbed Methane as a "Gas" Under This Lease Cannot Create a Reservation of That Gas

In cases interpreting whether an oil and gas lease grants rights to a certain kind of gas, it is common for a party to argue that it did not specifically intend to grant the right to that gas. In carrying out our trust responsibility to act in the best interest of the Tribe, we consider whether such an argument could be used to make what would otherwise appear to be clear language ambiguous. Two cases on ownership of coalbed methane have been decided since Opinion M-36935 was published. Neither provides a reasonable basis for relying on an absence of "specific intent" to depart from the plain language of the lease.

The first case is an unreported decision of the Northern District of Alabama, Civ. No. 85-G-2261-W, affirmed without opinion by the Eleventh Circuit, *Rayburn v. USX Corp.*, 844 F.2d 796 (11th Cir. 1988). At issue was the language of a private warranty deed severing from the estate all minerals "except oil and gas." There the district court avoided deciding whether coalbed methane was a "gas" or whether it was a mineral severed from the estate. The district court also reviewed evidence of knowledge and usage of coalbed methane in the area at the time the deed was executed (slip op. pp. 2-4); but the court based its ruling solely "on the language of the deed in question." *Id.* at 4. The court determined that the two parties could not have intended for coalbed gas to be produced with other gas because the deed required

[4]For example, for lease forms in use around the time this Jicarilla lease was executed, see Bureau of Land Management Form 4-213 (Dec. 1949), Form 4-213 (Feb. 1952), and Form 4-1097 (Jan. 1957).

that "all coal seams * * * penetrated in * * * [oil and gas] drilling operations shall be encased or grouted off." The district court stressed that its "decision * * * is not a declaration that in all instruments the interpretation will be the same." *Id.*

In the matter before us, we too base our interpretation on the language of the instrument, here the lease. That language, however, stands in contrast to the language of the deed in *Rayburn*. Here the lease does not require the oil and gas lessee to case off the coalbed, and instead requires the lessee to test the coalbearing Fruitland formation for gas production. "Special Stipulation A" required the lessee to drill a well within the first 5 years of the lease "to test thoroughly *all formations* down to and including the Point Lookout Sandstone." (Italics added). One of the formations above the Point Lookout Sandstone is the Fruitland Formation, in which the Fruitland coalbeds were deposited.[5] Thus, under the stipulation, the lessee was obliged to test this formation to determine whether it could produce oil or gas in paying quantities. Given that the first coalbed methane well in the San Juan basin was completed in the Fruitland Formation just one year after this lease was executed,[6] it is difficult to argue that production of coalbed methane from this formation would be inconsistent with the terms of this lease.

The second case is a decision of the Supreme Court of Pennsylvania. Pennsylvania has adopted the rule that gas present in the coal belongs to the owner of the coal, but coalbed gas which has escaped into surrounding strata belong to the owner of those strata. *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983). *Hoge* concerned not a mineral lease, but a 1920 deed severing ownership of the coal from the other rights in the land. In the deed the grantor reserved the right "to drill and operate through said coal for oil and gas." The Pennsylvania Supreme Court's decision appears to have been powerfully influenced by its "strata" theory of ownership. Under that theory, "the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata." *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893). Accordingly, anything found in the coal stratum would belong to the owner of the coal. *Hoge*, 468 A.2d at 1383-84. Additionally, the court considered "the conditions existing at the time of [the deed's] execution" in 1920. "[A]t the time this coal severance deed was entered into, although commercial exploitation of coalbed gas was known such operations were very limited and sporadic." *Id.* at

[5]Fassett, "Coal-bed Methane – A Contumacious, Free-Spirited Bride; the Geologic Handmaiden of Coal Beds," p. 139, fig. 10. Fassett, an employee of the U.S. Geological Survey, published this article in *Energy Frontiers in the Rockies* (Albuquerque Geological Society 1989).

[6]"What has come to be recognized as the most famous Fruitland coalbed methane well in the San Juan Basin, the Phillips Petroleum Company No. 6-17 San Juan 32-7 Unit well * * *, was completed in 1953 * * * The well was completed open-hole in a thick sequence of interbedded Fruitland coal beds, sandstones, siltstones, and mudstones, between 3055 and 3240 [feet] * * * with no stimulation." Fassett, *supra* at 142.

Where, as here, the coal may be interbedded with other gas-bearing strata, it could be unusually difficult to seal off the coal or to account separately for gas produced from the coal and non-coal strata.

1384. Furthermore, although coalbed methane and other natural gases "are found in the same geographic areas of Pennsylvania," the record before the court showed that "the gas which has commonly been referred to as 'natural gas' is generally found in strata deeper than coal veins * * *" *Id.* at 1382. Therefore, the court concluded, "[a]lthough the unrestricted term 'gas' was used in the reservation clause, * * * we find it inconceivable that the parties intended a reservation of all types of gas." *Id.* at 1384-85.

> We find implicit in the reservation of the right to drill through the severed coal seam for "oil and gas" a recognition of the parties that the gas was that which was generally known to be commercially exploitable. It strains credulity to think that the grantor intended to reserve the right to extract a valueless waste product with the attendant potential responsibility for damages resulting from its dangerous nature. * * * We find more logical and reasonable the interpretation offered by the Appellant that the reservation intended only a right to drill through the seam to reach the unconveyed oil and natural gas generally found in strata deeper than the coal.

Id. at 1385.

Under *Hoge*, Pennsylvania courts need not inquire whether the parties to the deed specifically intended to convey coalbed methane. Instead they are to look at the "language of the deed * * * in its entirety, giving effect to all its terms and provisions, and construing the language in light of conditions existing at the time of its execution." *Id.* at 1384. In the matter before us, we are not dealing with language reserving or granting a "right to drill and operate through said coal for oil and gas" that may lie beneath. Instead, we have unambiguous language granting rights to all gas deposits and to all forms of natural gas.[7]

There are aspects of *Hoge*, however, which render its analysis inapplicable to our inquiry. Most important is its reliance on a "stratum theory" of ownership. This theory is inapplicable to leases issued under the Indian Mineral Leasing Act. Under that law, the Secretary is not authorized to approve grants of fee rights to the various strata underlying the reservation. Instead, he is authorized to approve leases for "mining purposes." 25 U.S.C. §§ 396a, 396b. The rights granted are not fee rights, like those granted by severance deeds in Pennsylvania, but instead are rights needed to fulfill the purpose of the lease. Thus, the Tribe's lessee does not own the shales, the sandstones, the coal, or any other formation in which natural gas may be found. But it does own the rights to extract all the oil and natural gas.

Of lesser importance, but still significant, is that the court's interpretation of the deed is partly based on the geology of Pennsylvania, where the "conventional" gas reservoirs reportedly lie

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[7]Indeed, as noted above, in the lease for Tract 178 "Special Stipulation A" requires that the lessee drill through and test the formation in which the coalbed lies.

deeper than the coal seams. But as explained above, the coal seams in the San Juan Basin are often interbedded with the conventional reservoirs. So the inferences the Court drew from "conditions existing" in Pennsylvania, 468 A.2d at 1384, are not useful in the matter before us.

Several other cases have addressed whether various gases occurring in nature are "gas," "natural gas," or "gas deposits." Though none deal with coalbed methane, the gases have adopted a broad definition of these phrases as including even non-hydrocarbon gases. *E.g., Navajo Tribe of Indians v. United States*, 364 F.2d 320, 327 (Ct.Cl. 1966) (as matter of law, term "gas" in Indian oil and gas lease includes helium); *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 714-15 (10th cir. 1971), *cert. denied* 404 U.S. 951 (1971) (under State law, court looks to "general" intent of parties, grant of "gas" in lease includes helium).

On the question of the parties' specific intent with respect to coalbed methane, the *Navajo Tribe* case is the most instructive because it involves an Indian oil and gas lease. One of the issues there was whether a Navajo lease granting the rights to "all the oil and gas deposits" included the right to helium. The Tribe argued that "gas deposits" referred to hydrocarbon gases, that helium was not a hydrocarbon gas, and that the Government[8] had the burden of proving that the parties specifically intended for the lease to include helium. 364 F.2d at 325. The Tribe "point[ed] out that helium was not specifically mentioned in the 1923 lease and * * * that knowledge of helium was extremely limited during the period in question." *Id.*

The court rejected these arguments. The helium was found in reservoirs commingled with the hydrocarbon gases, and the two could not be separated before they were produced.[9]

> Perhaps, plaintiff [the Tribe] would impose upon the lessee an obligation to produce the gas, extract the helium and deliver the refined helium to the lessor. * * * However, the lease in question contains no such provisions, and there is no basis for holding that such an understanding arose by implication. * * * Although the parties to the lease may have been thinking mainly of fuel-type gases, it is still more realistic to presume that the grant included not only hydrocarbons but the other gaseous elements as well. * * * To summarize, plaintiff's "specific intent" theory must be rejected.

364 F.2d at 326-27.[10] The court recognized that ruling against the Tribe on this issue appeared "inconsistent with the notion that ambiguities

[8] The United States had entered into an agreement with the Navajo and its lessee, under which the United States took control of the lease. 364 F.2d at 320, 324. The Tribe argued that the lease had not granted rights to the helium, and therefore claimed the Government had unlawfully produced and removed the helium.

[9] As indicated in note 6 above, this can also be true of coalbed methane and other natural gas when the coal seams are interbedded with other reservoir rocks.

[10] The court added that plaintiff probably would not prevail even under a specific intent theory.

> Although the evidence regarding the circumstances at the time of the signing of the 1923 lease is scant, there appears to be some merit in defendant's view that the existence of helium was generally known. Also, it is significant that the Department of the Interior acted for the tribe and certainly the Department was familiar with helium.
> 364 F.2d at 327. In the matter before us, the existence of methane in coal was generally known in 1952, and it is clear from Stipulation A in the lease for Tract 178 that the Department was very familiar with the geology of the San Juan basin.

in oil and gas leases are to be construed in favor of the lessor." *Id.* at 327. But the plaintiff's interpretation of the lease "would be in conflict with the general intent of the parties." *Id.*

Even if it could be shown that coalbed methane was not economically or technologically producible when this lease was issued in 1952, the circumstances would not appear germane to the proper interpretation of the lease. When the lease was signed, the parties knew that the lessee might discover a gas deposit (even of the "conventional" kind) which would not have enough gas to make production economically feasible at that time. But the lease did not limit the grant to those deposits of gas appearing economically producible in 1952. It granted rights to "all" deposits. In *Utilities Production Corp. v. Carter Oil Co.*, 2 F.Supp. 81 (N.D. Okla. 1933); *aff'd* 72 F.2d 655 (10th Cir. 1934), the court stated in relevant part:

> * * * improved methods of drilling and producing are necessary for the successful operation of the leases, and it was undoubtedly within the contemplation of the parties to the leases that improved and modern methods should be used for the production of oil from the lands which would be advantageous to both the lessor and the lessee. * * *

2 F.Supp. at 86. A lease takes into consideration improving methods of development.

Furthermore, in this respect there is a similarity between coalbed methane and geothermal steam. In *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir. 1977), the court found that although the Stock-Raising Homestead Act of 1916 did not specify geothermal resources in its reservation of "coal and other minerals," the language in the Act was sufficient to "encompass geothermal resources." *Id.* at 1274. This was so even though Congress had given no thought to geothermal steam in 1916.

> There is no specific reference to geothermal steam and associated resources in the language of the Act or in its legislative history. The reason is evident. Although steam from underground sources was used to generate electricity at the Larderello Field in Italy as early as 1904, the commercial potential of this resource was not generally appreciated in this country for another half century. * * * Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to them.

Id. at 1273. But Congress's intent in the legislative history was "to retain subsurface resources, particularly mineral fuels, in public ownership for conservation and subsequent orderly disposition in the public interest." *Id.* at 1274. In addition to this general intent, the court found that each of the elements of geothermal resources could be considered a mineral. *Id.* This case illustrates that a resource, not perceived as valuable when a reservation was originally made, could be found included in a reservation merely through the general language of the reservation. Thus, "geothermal resources" or "coalbed methane," though their value may not have been originally foreseen,

can easily fall within the broader language of a lease grant or patent reservation.

Here, the general intent of the parties to include all natural gases is clear from the express terms of the lease. As the *Navajo Tribe* and *Union Oil* cases teach, it is irrelevant that the parties may not have specifically intended to include coalbed methane or that the resource was not economically recoverable when the lease was executed. This conclusion is consistent with the purpose of the Indian Mineral Leasing Act. As the Supreme Court has indicated, "a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue." *Cotton Petroleum Corp. v. New Mexico, supra* at 1709. Coalbed methane produced under this lease will earn the Tribe royalties at the rate of 12½ percent of the value or amount of the production. Additionally, the production is subject to the Tribe's power to impose a severance tax. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Tribe will therefore receive substantial revenues from coalbed methane produced under this lease.

III. The Lessee's Right to Produce the Coalbed Methane Is Subject to Regulation to Protect the Coal

As we indicated above, while the lessee here has the right to extract methane found in the coalbeds of the San Juan Basin, it does not have the right either to extract the coal or to cause unauthorized damage to the coal resources without compensating the Tribe. Coalbed gas extraction techniques may, in some cases, damage the coal seam and render the coal unminable or more expensive to mine, thus discouraging future development. We therefore believe a few observations are in order concerning the lessee's duties with respect to the lessor's coal.

As the Department noted in Solicitor's Opinion M-36935,

> an oil and gas lessee does not have a license to develop the coalbed gas resource in any manner. * * * Should the lessee propose any drilling which would in the judgment of the Geological Survey cause damage to the coal deposit or create a safety hazard for subsequent coal mining, the application to drill may be denied. * * * We are prepared to render any further advice you may deem appropriate regarding legal issues raised by * * * the possibility that coalbed gas development could harm or preclude subsequent recovery of the coal.

88 I.D. at 549-50. The coal in the San Juan Basin within the Jicarilla reservation apparently is not currently regarded as a resource which can be mined economically. However, the economics of mining this coal may change to the Tribe's benefit in the years ahead; and the Department should have due regard for this possibility when reviewing an oil and gas lessee's application for permission to complete a well in the coalbed.

The statutes, regulations, lease provisions, and case law have put lessees on notice that the Department will take all necessary actions to protect tribal resources. The lease for Tract 178 contains several

provisions concerning the protection of the Tribe's coal resources. For example, ¶3(f) requires the lessee "to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for * * * the preservation and conservation of the property for future productive operations * * *" That paragraph also requires the lessee to "carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property * * *" Paragraph 8 provides the Department with broad authority to enforce those obligations:

> the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor * * *

Paragraph 3(g) commits the lessee to honor "any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases," other than rules concerning the royalty rate or annual rental. The "Forest and Land Protection Stipulations" attached to this lease further protect the Tribe by requiring the lessee, in ¶(2), to reimburse the Tribe "for any and all damage to or destruction of property of the lessor caused by lessee's operations hereunder and not authorized by this lease * * * "

The regulations provide similar authorities and protection. 25 CFR 211.19, 211.20, and 211.21 (1989). Specifically, "[i]n the exercise of his judgment the Secretary * * * may take into consideration, among other things, the Federal laws, State laws, * * * and any regulatory action desired by tribal authorities." 25 CFR 211.21(a).

Before approving drilling permits for wells on the lease, the Department, pursuant to the Federal Government's trust responsibility to protect tribal resources, needs to satisfy itself that the proposed activities will be carried out with due regard for possible future coal mining operations.

CONCLUSION

For the reasons stated in Parts I and II of this opinion, we find that the lease form used for Tract 178 unambiguously granted to the lessee the right to produce coalbed methane.

THOMAS L. SANSONETTI
SOLICITOR

GATEWAY COAL CO. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, JUNE S. STOUT (INTERVENOR)

118 IBLA 129 Decided: *March 6, 1991*

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying application for review of Notice of Violation No. 82-1-31-9 (CH 2-50-R).

Reversed in part, affirmed in part.

1. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Occupied dwelling." The definition of "occupied dwelling" set forth at 30 CFR 761.5 does not require that the dwelling be used solely for human habitation. So long as the "building is currently being used on a regular or temporary basis for human habitation," the structure falls within the scope of the regulatory definition. A building is properly determined to be an "occupied dwelling" notwithstanding the fact that an occupant also operates a fulltime antique business in the building.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

3. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e) (4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

4. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operation." Notwithstanding a State regulatory authority's determination that a portal building and adjacent parking lot did not fall within the State definition of a surface coal mining operation, the building and parking lot will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (1988), when the evidence establishes that these surface facilities exist to support and are "incident to" underground mining.

5. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

Under sec. 522(e)(4) and (e)(5) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272 (e)(4) and (e)(5) (1988), no surface impacts incident to underground mining may be created within 100 feet of a road and 300 feet of an occupied dwelling unless the mine operator had a valid existing right on Aug. 3, 1977. To have valid existing rights on Aug. 3, 1977, under the regulatory scheme currently applicable to adjudications arising under the interim program, the operator conducting underground mining must have held property rights which were created by a legally binding document authorizing the operator to create those surface impacts incident to an underground mining operation being contemplated, and must have made a good faith effort to obtain all permits required to conduct such operations prior to Aug. 3, 1977, or show that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

6. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

When approval of an erosion and sedimentation control plan was the only "permit" a coal company was required to obtain before creating the surface impacts located within the 100- and 300-foot buffer zones, and it is shown that application was made prior to Aug. 3, 1977, and the plan was approved on Aug. 12, 1977, a good faith effort to obtain all permits required to conduct surface impacts incident to mining within the 100- and 300-foot buffer zones has been demonstrated for purposes of establishing valid existing rights on Aug. 3, 1977.

7. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A coal mine operator failed to show that a valid existing right to create surface impacts on the lands in question existed on Aug. 3, 1977. The right to mine coal had been severed from the surface right prior to Aug. 3, 1977, and the operator failed to demonstrate that: (1) a merger of title prior to that date; (2) all of the coal to be mined in conjunction with the surface impacts was within the lands held by the grantor at the time of severance; (3) the conveyance document at the time of severance included the right to create the surface impacts for the purpose of extracting coal from lands other than that conveyed by the grantor; (4) the existence of a lease or other express agreement granting such right; or (5) the existence of any other contractual relationship between the coal owner and the surface owner binding the surface owner to dedicate the land to the coal mining operation.

8. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A disparity in the consideration term of a surface lease executed after Aug. 3, 1977, and a letter preceding Aug. 3, 1977, precluded a finding under Pennsylvania law that a legally enforceable lease was in existence on Aug. 3, 1977, affording the valid existing rights claimant the right to create the surface impacts within the 100- and 300-foot buffer zones.

APPEARANCES: Henry Ingram, Esq., and Thomas C. Reed, Esq., Pittsburgh, Pennsylvania, for Gateway Coal Co.; Joseph M. Wymard,

Esq., and Robert J. Fall, Esq., Pittsburgh, Pennsylvania, for Intervenor, June S. Stout; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Gateway Coal Co. (Gateway or appellant) appeals from a November 25, 1988, decision of Administrative Law Judge Joseph E. McGuire (Judge) denying Gateway's application for review of Notice of Violation (NOV) No. 82-1-31-9.

Factual Background

Between 1924 and 1962 Hillman Coal and Coke Co. (Hillman), owned and operated the Gateway Mine, then known as the Edwards Mine (Transcript of Proceedings (Tr.), Volume 2, pages 227-28).[1] The Gateway Mine is an underground mine, producing bituminous coal from the Pittsburgh seam in Greene County, Pennsylvania (Gateway Statement of Reasons (Gateway SOR) at 7).

Hillman discontinued operations in 1962 and leased the mine to Gateway (Decision at 2), a partnership between Jones & Laughlin Steel Corp. (J&L) (75% owner) and Wheeling Pittsburgh Steel Co. (Wheeling) (25% owner) (Tr. 3 at 7), with J&L acting as the managing partner. This partnership operated the mine until 1980, when J&L withdrew, and Diamond Gateway Coal Co. (Diamond) became Wheeling's partner. *Id.* Diamond assumed the role of managing partner (Tr. 3 at 8).

Under the March 1, 1962, lease between Hillman and Gateway (Tr. 2 at 228; Gateway Exh. A-19), Gateway was granted the right to mine coal beneath various tracts identified in Schedule "A"of the lease, including a "portion of [the] Thomas Ross Heirs Tract No.2 – 12.2819 Acres" (Thomas Ross tract) (Tr. 2 at 229-30; Exh. A-19), which includes the coal underlying the Ruff Creek Portal site (Tr. 2 at 230). The granting clause of the 1962 lease (§ 1.01) provides:

> Hillman, in consideration of the covenants and agreements hereinafter contained to be kept and performed by Gateway, has leased, let and demised, and by these presents does lease, let and demise to Gateway, for the term hereinafter defined, Eighty-six (86%) percent of the presently remaining unmined and recoverable coal of the Nine-Foot, Pittsburgh or River Seam or Vein, and the mining rights, other rights, privileges and restrictions connected therewith, located within and underlying the coal tracts and portions of coal tracts situate in Jefferson, Morgan, Franklin and Washington Townships, Greene County, Pennsylvania, described in Schedule "A" attached hereto and made a part hereof.

The description of the Thomas Ross tract, found in Schedule A, contains the following language:

[1] Volume 1 of the transcript covers the Apr. 29, 1985 proceedings; Volume 2 covers proceedings on Apr. 30, 1985, and Volume 3 covers proceedings on May 1, 1985.

ALL of said coal underlying the easterly portion of the Thomas Ross Heirs Tract No. 2, situate in Washington Township, Greene County, Pennsylvania, having an original area of 219.9807 acres, of which area approximately 12.2819 acres is hereby leased, described as Tract XIX in the Jennings-Emerald Land Deed.

TOGETHER with the right to mine and remove all of said coal, without being required to provide or leave support for the overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof, or by the manufacture of this or other coal into coke; and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever for the transportation of said coal, and of coal, minerals and other things to and from other lands.

The Pittsburgh seam coal is mined and transported to the surface by underground conveyor belts. According to Gateway's witness, the use of this mining method makes it necessary to have "all the main entries and the sub mains [constructed] on straight lines that intersected at ninety degrees" (Tr. 2 at 237). Given the coal depth, ventilation shafts must be sunk at 2-mile intervals. *Id.*[2] Every second ventilation facility site is equipped to move men and equipment (Tr. 3 at 31-32). With this general mine layout, Hillman and Gateway were able to predict the future location of the Ruff Creek facility shafts and portal site, with a margin of error of 1,000 feet, as early as 1962 (Tr. 2 at 247). The Ruff Creek portal, the fourth ventilation facility developed in the Gateway Mine under the Gateway mining plan, was also designed and built to move men and equipment (Tr. 3 at 31).

Owing to the projected need for portal and shaft sites, and in expectation of Gateway's exercise of an option lease to mine an additional 5,300 acres within 10 years of the date of the 1962 lease agreement (Tr. 2 at 251-52; Exh. A-20), Hillman purchased the surface of the 71-acre Ruff Creek portal site in 1964. The specific purpose for acquiring this surface tract, known as the Smadbeck tract (Tr. 2 at 252), was to meet Gateway's ventilation needs (Exh. A-20; Tr. 2 at 247, 249).

After purchasing the Smadbeck tract, Hillman received several third-party offers to purchase or lease the site, but Hillman refused to do so to ensure that this surface tract would be available for Gateway's use as a shaft site (Tr. 2 at 255-57; Exh. A-23). On February 14, 1975, Hillman sent written confirmation of an earlier oral understanding that the Smadbeck tract was being held for shaft and portal facilities (Tr. 2 at 261-62; Exh. A-25) and offered to lease the tract to Gateway for a term of 20 years at a rental of $12,000 per year, payable in monthly installments. On June 23, 1977, Gateway responded to Hillman that it desired to acquire or lease the site for use as a portal and supporting facilities for 25 years or more (Exh. A-31; Tr. 2 at 262-63). On July 15, 1977, Hillman responded stating that it would lease the Smadbeck tract as a site for a portal and supporting facilities for

[2]Gateway's witness testified that this distance was the economic limit for moving air through a coal mine (Tr. 2 at 238).

$1,500 monthly rental for so long as Gateway's needs dictated, but was not interested in having property sublet (Tr. 2 at 263-65; Exh. A-32).

A formal lease agreement was executed by Hillman and Gateway on November 15, 1977, providing for a monthly rental of $1,250 per month, and restricting the subleasing to "any company into which Lessee, or any successor, may be merged" (Exh. A-34 at 5). Since 1964 Gateway has been given access to the Smadbeck tract to drill test holes (Tr. 2 at 305 and Tr. 3 at 87), and was allowed to do the site evaluation, mapping, and inspection necessary to apply for and obtain approval of an erosion and sedimentation plan for the tract (application filed June 16, 1977). An onsite inspection relative to approval of that plan took place on May 11, 1979 (Exh. A-45). Final placement of the portal and related support facilities was determined after consulting hydrologists and geologists, and analyzing test holes bored between February 1976 and May 1977 (Tr. 3 at 71-75).

The Ruff Creek facility consists of air intake and exhaust shafts (Tr. 3 at 10-11; Exh. A-1), with large fans at the exhaust or return shaft (Tr. 3 at 11, 31, 40). The intake shaft at Ruff Creek also serves as a mine entrance with hoisting facilities (Tr. 3 at 10, 30). A portal building located adjacent to the intake shaft contains locker and shower facilities for the miners, a waiting room, Gateway management offices, and a first aid station (Tr. 3 at 29; Exhs. A-1, A-8 through 12). The surface facilities also include a parking lot for miners, a chain link fence, an electrical transformer, two water treatment plants, and a sedimentation pond (Tr. 3 at 9, 11; Exh. A-1).

A home owned by June S. Stout (Stout) is situated directly across State Route 221 from Gateway's portal facility. Stout purchased her home in December 1966 and has occupied it since April 1967 (Tr. 2 at 193). The house occupied by Stout is a 150-year-old Georgian-styled home, which has been restored and registered in the Pennsylvania Historic Registry (Tr. 2 at 204). It is furnished with antiques which she offers for sale to the public in her fulltime antique business (Tr. 2 at 197-98).

The Gateway surface facilities, or impacts, lying within the 100- and 300-foot buffer zones for Stout's home (which will be discussed in detail later in this opinion) include most of the portal building (Tr. 1 at 18, 24; Exh. A-2 through A-14), a painted chain link fence (Tr. 1 at 33) and part of the blacktopped parking lot, and electrical facilities (Tr. 2 at 23-24; Tr. 3 at 9). All other Ruff Creek surface facilities (impacts) lie outside the buffer zone.

Procedural History

On April 2, 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) issued NOV No. 82-1-31-9 to Gateway (Tr. 2 at 160) after an investigation made pursuant to a citizen complaint filed by Stout (Exh. R-3). The NOV cited Gateway for two violations of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 (1988). The first citation was for disturbing areas within 300 feet

of an occupied dwelling in order to facilitate mining, in violation of section 522(e)(5) of SMCRA (30 U.S.C. § 1272(e)(5) (1988)) (Exh. R-2). The second was for disturbing areas within 100 feet of a public road in order to facilitate mining activities, in violation of section 522(e)(4) of SMCRA (30 U.S.C. § 1272(e)(4) (1988)) (Exh. R-2). In order to abate the violation Gateway was required to either (1) obtain a written waiver from the owner of the occupied building and secure a variance from the State regulatory authority, or (2) reclaim the affected areas (Exh. R-2). The abatement was to be completed by May 24, 1982 (Exh. R-2).

On April 26, 1982, Gateway filed an application for review of the NOV contending, *inter alia*, that it had not violated SMCRA because it had "valid existing rights" to conduct activities in the 100- and 300-foot buffer zones. Gateway filed an application for temporary relief on May 10, 1982, and OSM consented to that request and filed an answer to Gateway's application for review on May 17, 1982. On December 16, 1982, Stout, the owner of the dwelling within the 300-foot buffer zone petitioned for leave to intervene in proceedings before the Judge, who granted that petition on August 15, 1983.

The matter was scheduled for hearing on January 26, 1984. On January 16, 1984, OSM issued an order purporting to vacate the NOV (OSM Exh. 1), and the January 26, 1984, hearing was canceled. On February 13, 1984, Stout filed an application for review of the notice vacating the NOV, and on February 21, Gateway filed preliminary objections to Stout's application for review. OSM filed its answer to Stout's application on February 27, 1984.

In an April 20, 1984, decision, Judge McGuire rejected OSM's assertion that it had vacated NOV No. 82-1-31-9; found that Stout had a statutory right to involvement in the subject proceedings and would be adversely affected if the NOV were vacated without her consent; and reset the hearing. Gateway then filed a motion for reconsideration or, in the alternative, certification of the issue for interlocutory appeal to this Board. Judge McGuire certified the ruling to this Board on May 4, 1984, pursuant to 43 CFR 4.1124 and certification was accepted by order of May 22, 1984. *See* 43 CFR 4.1272(c).

The Board issued its decision in *Gateway Coal Co.* v. *OSM*, 84 IBLA 371 on January 25, 1985. In that decision, we found that when Gateway filed a timely application for review of the NOV, subject matter jurisdiction lodged with the Hearings Division, Office of Hearings and Appeals, and OSM therefore no longer had jurisdiction to vacate the NOV. The case was remanded to the Judge with instructions to treat OSM's attempt to vacate the NOV as a motion to vacate.

On February 25, 1985, the Judge denied OSM's motion to vacate the NOV, and scheduled an April 30, 1985, hearing on Gateway's application for review. At Gateway's request, a physical inspection of the site was conducted on April 29, 1985 (Tr. 1 at 1-41). OSM and

Gateway again filed motions to vacate the NOV with supporting memoranda prior to the hearing, and oral arguments on the motion were presented on April 30, 1985.

The Gateway and OSM motions to vacate were denied. The ensuing hearing on the merits concluded on May 1, 1985. All parties submitted posthearing briefs, and, by order dated July 15, 1986, the Judge suspended consideration of Gateway's application pending promulgation of a final rule defining valid existing rights consistent with this Board's February 25, 1986, order in *Valley Camp Coal Co.* v. *OSM*, IBLA 84-632. *See Valley Camp Coal Co.* v. *OSM*, 112 IBLA 19, 23-24, 96 I.D. 455, 458 (1989).

On September 27, 1988, OSM filed a motion to lift the stay of proceedings.[3] The Judge issued a decision on November 25, 1988, denying Gateway's application for review and finding, among other things, that Gateway lacked valid existing rights under the 1979 definition of valid existing rights. He also found that Gateway lacked a property interest in the buffer zone, because its surface lease with Hillman had not been executed until November 15, 1977, which was subsequent to August 3, 1977, the date of enactment of SMCRA. Finding that Gateway "had not been granted approval of its erosion and sediment control plan until August 11, 1977" (Decision at 7), he concluded that Gateway had not satisfied the "all permits test" of the valid existing rights definition appearing at 30 CFR 761.5.

Arguments on Appeal

Gateway filed a notice of appeal on December 22, 1988, and a Gateway SOR on January 26, 1989. Intervenor Stout filed her brief on February 16, 1989 (Stout SOR), and OSM filed its brief on March 6, 1989 (OSM Answer). Gateway assigns several errors to the Judge's decision, and we address them *seriatim*.

Gateway maintains that the Judge erred in concluding that Stout's house constitutes an occupied dwelling within the scope of the prohibition of section 522(e)(5) (Gateway SOR at 53-54). The Judge concluded that "[b]ecause intervenor has used the structure as her sole place of residence since the spring of 1967, she is clearly entitled to statutory and regulatory protection" (Decision at 6). Gateway notes that both 30 CFR 761.5 and the Pennsylvania regulation found at "25 Pa. Code § 86.1," define "occupied dwelling" as any building currently being used on a regular or temporary basis for human habitation (Gateway SOR at 55). Gateway contends that the fact that Stout has resided in her house on a fulltime basis since 1967 (Tr. 2 at 193) is not controlling, because both the legislative history of SMCRA and permanent program regulations have emphasized that

[3] A motion to lift the stay was contemporaneously filed in the *Valley Camp* case, and the Board granted OSM's motion to lift the stay, noting that it had not intended its Feb. 25, 1986, order to preclude consideration of matters involving valid existing rights. *See Valley Camp Coal Co.* v. *OSM*, *supra* at 24-27, 96 I.D. at 458-60. A thorough and accurate recitation of the proceedings leading to this appeal is found in OSM's Answer (OSM Answer) at 1-5. We have adopted much of that recitation.

interpretations of section 522(e) are subject to the property law decisions of the state courts.

Specifically, Gateway relies on the following language from the House of Representatives Conference Report: "[T]he prohibition (against) strip mining * * * is subject to previous state court interpretation * * *. The language of Section 522(e) is in no way intended to abrogate previous state court decisions" (H.R. Conf. Rep. No. 1522, 93d Cong., 2d. Sess. 85 (1974)), and language in the preamble to OSM's 1982 valid existing rights regulations, appearing at 47 FR 25282 (June 10, 1982).

Relying on a Pennsylvania case, *Smith* v. *Penn Township Municipal Fire Assn*, 323 Pa. 93, 186 A. 130 (1936), interpreting the words "occupied as a dwelling house," Gateway contends that the Pennsylvania Supreme Court held that the general and comprehensive use of the structure is the determinative factor. In *Smith*, the Pennsylvania Supreme Court affirmed a lower court finding of no coverage under an insurance policy covering structures "occupied as a dwelling house" because Smith lived in a structure which also housed a bar. The decision held that the mere fact that Smith lived in the structure did not make the structure a dwelling house.

The structure in this case is used to house a fulltime antique business which is operated 7 days a week (Tr. 2 at 202, 197-98). Gateway contends that, under Pennsylvania property law, Stout's house is not a dwelling protected under section 522(e) of SMCRA, but is a "building devoted to the systematic operation of a commercial enterprise," citing *Smith* v. *Penn Township Municipal Fire Assn, supra* at 132.

In response, Stout contends that her undisputed testimony was that she resides in her house on a fulltime basis (Tr. 2 at 193) meeting the requirement that the building currently be used on a regular or temporary basis for human habitation (Stout SOR at 9-10). Citing from *Smith*, she avers "[t]he incidental use of the house as a display case for antiques, given the house's 150 year old history, is not inconsistent with [her] use of the house as a dwelling" (Stout SOR at 10).

[1] Appellant's reliance on the language of the legislative history and the *Federal Register* notice is misplaced. Neither statement purporting to require application of state law was made in the context of defining words contained in the prohibition, *e.g.*, "occupied dwelling." These statements were made in specific reference to the words "subject to valid existing rights" contained in the opening paragraph of 30 U.S.C. § 1272(e) (1988). The thrust of the cited language is designed to ensure that a state's property law is not abrogated when a document conveying a mineral interest is construed to determine whether the document gives rise to a valid existing right to conduct surface coal mining operations. The statement appearing in the *Federal Register* was made in the context of document(s) authorizing one to conduct

surface mining for purposes of establishing the "ownership" part of the valid existing rights test (47 FR 25281, 25282, June 10, 1982). The portion of that *Federal Register* notice directed to "occupied dwellings" (47 FR 25282 (June 10, 1982)) makes no reference to state law. Quoting fully, rather than partially, the House Report relied on by Gateway states: "The language 'subject to valid existing rights' in Section 522(e) is intended to make clear that the prohibition of strip mining *on the national forests* is subject to previous state court interpretation of valid existing rights." (Italics added.) When examined in full context, there is no doubt that the cited language has no relevance to defining "occupied dwelling" or other words contained in the prohibition.

Nor is Gateway's analogy to the *Smith* case persuasive. The terms of the homeowner insurance policy in *Smith* insured the building "all while occupied as a dwelling house." Coverage was denied because the owner's tenant was conducting an illegal bar business on the premises and the cost to insure a business similarly occupying the premises legally would have been four times that of the insurance premium on the dwelling house. Key to the interpretation espoused in the *Smith* case was the Pennsylvania Court's recognition that the cost of insuring a bar or business is not comparable to the cost of insuring a dwelling house.

The *Smith* court's narrow interpretation of dwelling house and emphasis on the comprehensive use of the structure was reasonable in the context of that case. We have no reason, however, to extend the *Smith* definition to this case by giving the word "occupied dwelling" a narrow meaning. The regulatory definition of "occupied dwelling" found at 30 CFR 761.5 is clear and unequivocal -- a dwelling need not be used solely for human habitation – and Stout's house falls within the purview of the regulatory definition.

Gateway maintains that the Judge erred in failing to find the proceedings moot. The Judge, Gateway contends, erroneously construed its mootness argument as suggesting that the issuance of the valid existing right coal mining activity permit retroactively invalidated the NOV. Gateway reasons that the proceedings were moot because Pennsylvania's regulatory authority had found the structures at the Ruff Creek Facility within the buffer zones not to be subject to the corresponding Pennsylvania buffer zone regulations.

Pennsylvania was granted "primacy" on July 31, 1982 (30 CFR 938.10). Gateway notes that in September 1989, the Commonwealth regulatory authority held that the "structures in the buffer zone were not prohibited under the state regulatory program because they did not fall within the Pennsylvania definition of surface mining activities codified at 25 Pa. Code § 86.1" (Gateway SOR at 24). On September 28, 1988, Gateway was issued a mining activities permit for its Gateway Mine (Decision at 3; Gateway SOR at 22).

Gateway asserts that the Judge can give no meaningful adjudication in this case (Gateway SOR at 23), and no meaningful relief can be afforded because Pennsylvania has primary authority to regulate

surface mining and make valid existing rights determinations. Relying on the Preamble to the OSM Final Rule on Evaluation of State Responses to Ten-Day Notices (TDN), 53 FR 26728, 26737 (July 14, 1988), *Haydo* v. *Amerikohl Mining, Inc.*, 830 F.2d 494 (3rd Cir. 1987), and *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514 (D.C. Cir. 1981), Gateway contends that when Congress enacted SMCRA it intended to have a coal operator's compliance measured against the approved State program, rather than directly against SMCRA or OSM's regulatory program.

Gateway maintains that enforcing the NOV after state primacy would be enforcing Federal law in a primacy state, contrary to the intent of Congress in enacting SMCRA (Gateway SOR at 25). According to Gateway, OSM must give the State a TDN of an alleged violation, and OSM may take enforcement action only when the State has failed to take appropriate action, or to show "good cause" for such failure. 30 CFR 842.11(b)(ii)(B), 53 FR 26728, 26744 (July 14, 1988). Gateway notes that, according to the new TDN rules, "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so. 30 CFR 842.11(b)(1)(ii)(B)(2), 53 FR 26728, 26744" (Gateway SOR at 25). Additionally, it observes "[g]ood cause" includes a finding that the violation does not exist under the State program. 30 CFR 842.11(b)(1)(ii)(B)(4).

Gateway urges a finding that OSM is precluded from taking direct enforcement action absent a TDN (Gateway SOR at 25). It surmises that OSM recognized this fact when OSM issued an order vacating the NOV and then sought to have the Judge vacate the NOV. Gateway thus urges this Board to issue an order vacating the NOV and dismissing these proceedings (Gateway SOR at 27).

[2] Pennsylvania's permanent program obtained primacy on July 13, 1982, and Gateway was granted a State permanent program permit in 1988. Neither of these events operates to divest OSM of its authority to act upon NOVs issued during the Federal interim program, or divests OSM of its authority to subsequently enforce a previously issued interim program NOV. In *Harman Mining Co.* v. *OSM*, 114 IBLA 291, 295 (1990), and in *Peabody Coal Co.* v. *OSM*, 101 IBLA 167 (1988), relying on 30 CFR 710.11(a)(3)(iii), we held that state primacy did not excuse an operator from a prior failure to comply with the interim program. The language of 30 CFR 710.11(a)(3)(iii) requires compliance with the interim program until issuance of a permit to operate under a permanent State or Federal regulatory program and does not divest OSM of its authority to redress violations OSM had cited during the interim program. The "until" language in the regulation confirms that the permanent program permit, and the effects flowing from its issuance, operate prospectively from the date the permit is issued.

They do not operate to preclude OSM enforcement of interim program violation citations.

This case arises under the citizen complaint procedures set forth in the interim program. This simply is not an appeal from an OSM decision refusing to order an inspection in response to a citizen complaint under the TDN permanent program procedures. Accordingly, we do not reach and deem it unnecessary to address those issues raised by appellant in the context of OSM's new TDN rules.

[3] Gateway's contention that OSM had the burden of proving that Gateway did not have valid existing rights (Gateway SOR at 16-17) must fail. This Board has consistently held an applicant seeking to take advantage of the valid existing rights exception to application of an act provision bears the burden of proving the existence of the rights giving rise to such entitlement. *Valley Camp Coal Co.* v. *OSM*, 112 IBLA 19, 41, 96 I.D. 455, 467 (1989); *Blackmore Co.*, 108 IBLA 1, 8 (1989).

Before addressing the question of whether Gateway has met the valid existing rights test, we note that Gateway maintains that the portions of the Ruff Creek facility located within the buffer zone do not fall within the scope of SMCRA's definition of surface coal mining operations (Gateway SOR at 51, 52). It reasons that, because the lengthy definition of "surface coal mining operations" in section 701(28) of SMCRA (30 U.S.C. § 1291(28) (1988)) does not include "office buildings, bath-houses and parking areas (very common underground mining surface support facilities)," this definition does not include portions of the Ruff Creek facilities which lie within the buffer zones in question. *Id.* at 52. This construction, Gateway avers, is supported by the Pennsylvania Department of Environmental Resources (DER) interpretation of the definition of surface coal mining operations when it responded to Gateway's coal mining activity permit application. Gateway notes that in September 1988 DER concluded that the portions of the Ruff Creek facility lying within the buffer zone did not fall within the Pennsylvania definition of surface coal mining operations (Gateway SOR at 52). This was the basis of OSM's attempt to vacate the NOV, according to Gateway, and it urges this Board to defer to OSM's and DER's interpretation on this issue. *Id.*

Responding to this argument, Stout points to the "broad" definition found at section 710(28) of the Act, 30 U.S.C. § 1291(28) (1988), which, according to Stout, includes "any adjacent land and other areas upon which are sited structures, facilities, or other property and materials on the surface, resulting from or incident to mining activities," and avers the Secretary intended to include all surface disturbances within 300 feet of a residence (Stout SOR at 9).

For its part, OSM states that the broad definition of "surface coal mining operations," as set forth in 30 U.S.C. § 1291(28) (A) and (B) (1988), encompasses the subject portal building used in connection with an underground mine. Citing 30 CFR 701.5, OSM maintains that it interprets section 701(28) of the Act to include "mine buildings" and

"bath houses" within the definition of "surface coal mining operations," and the 1979 Federal definition of valid existing rights is applicable to support facilities (OSM Answer at 16). OSM concedes that when it proposed the rules found at 53 FR 12374, 12378 (Apr. 14, 1988), it requested comments on whether surface coal mining operations not involving the extraction of coal, *i.e.*, support facilities, should be included. Nonetheless, OSM observes that such facilities are currently regulated, albeit pursuant to somewhat different standards. *See* 30 CFR 817.181 (OSM Answer at 16 n.4).

[4] In *Valley Camp Coal Co.* v. *OSM, supra*, we addressed the scope of 30 U.S.C. § 1291(28) (1988), and found "[t]he use of the phrases '[s]uch activities' in subsection (A) and '[s]uch areas' in subsection (B) indicates that Congress did not intend to provide an exhaustive list of activities or areas which meet the definition." 112 IBLA at 30, 96 I.D. at 461. This interpretation is consonant with the language in 30 U.S.C. § 1266(b)(10) (1988), contemplating surface impacts resulting from or incident to underground mining.

The portal building in the instant case contains offices, a first-aid station, a shower room and locker facilities for the coal miners, and a waiting room for miners ready to enter the mine at shift change (Tr. 3 at 29). The offices in the portal facility are used by Gateway's General Manager and support staff (Tr. 3 at 52; Exh. A-9). The additional rooms in the office building include an engineering and drafting room (Tr. 3 at 52; Exh. A-12), conference room (Tr. 3 at 52; Exh. A-10), and reception area (Tr. 3 at 52; Exh. A-8). Gateway's miners use the portal facility to change and shower before and after shifts (Tr. 3 at 131). The firstaid station at the Ruff Creek portal is significantly closer to present mine workings than the old Grimes portal location, thus affording more immediate first aid (Tr. 3 at 47, 53; Exh. A-13).

Miners enter the mine by going from the waiting room to the elevator in the intake shaft located adjacent to the portal facility, but outside the 300-foot buffer zone (Tr. 3 at 10). The hoisting facility lowers miners into the mine workings (Tr. 3 at 29, 30). Having the portal facility at the Ruff Creek site significantly reduces underground travel time to the mine face, allowing miners to devote more of their shift time to producing coal (Tr. 3 at 32, 131). A portion of the parking lot is used by Gateway miners to park their vehicles while on their shift.

To the extent that DER concluded that Gateway did not need a permit to erect the building and construct the parking lot within the buffer zones because the administrative offices found at Ruff Creek were no different than those located in Washington, Pennsylvania (which would not normally be considered part of the coal mining operations), DER's conclusion fails to withstand reasoned analysis. If the building in question were erected for the sole purpose of housing administrative support facilities, the DER conclusion may well have

merit. In fact, however, the miner's change and waiting room, showers and lockers, the nurse's office, and a portion of the miner's parking lot are within the 100- and 300-foot buffer zones. There can be no serious contention that these facilities are anything other than "incident to" underground mining. The building and parking lot are subject to the applicable SMCRA or Pennsylvania permanent program permitting requirements even though they also serve as administrative support facilities. The record fully supports the conclusion that the Ruff Creek portal facility exists to support and is "incident to" Gateway's underground mining of the Pittsburgh seam.

Gateway next argues that the Judge failed to use the "good faith effort to obtain all permits" revision to the regulatory definition adopted by OSM in its August 4, 1980, notice (45 FR 51547, 51548) suspending the "all permits" portion of the regulatory definition, and failed to employ the "needed for and immediately adjacent to" test of the OSM definition.

Gateway also insists that the Judge improperly applied Federal and State regulatory property rights tests when finding that Gateway lacked sufficient property interests for valid existing rights. Gateway avers that its mining rights under the 1962 lease included the right to construct the support facilities in question, and, in the alternative, that the 1975-77 correspondence between Hillman and Gateway established an enforceable State law property right to construct the Ruff Creek Facility on the Smadbeck tract well before August 3, 1977.

Addressing the 1962 lease, and relying on *Schuster* v. *Pennsylvania Turnpike Commission*, 395 Pa. 441, 149 A.2d 447 (1959), Gateway argues that the common law in Pennsylvania since 1854 has been that one possessing the right to mine coal has the implied right to use so much of the overlying surface "as is necessary to the conduct of underground mining operations" (Gateway SOR at 31). Gateway quotes extensively from *McMillen* v. *Rochester & Pittsburgh Coal Co.*, 21 Pa. D. & C.3d 371 (1973), which states:

> It has been repeatedly held by Pennsylvania courts that a grant of coal carries with it the right to do all things necessary and reasonable for the full use of the grantee's estate in the coal. In *Turner v. Reynolds*, 23 Pa. 199, 206 (1854) it is stated as follows: "One who has the exclusive right to mine coal upon a tract of land has the right of possession [of the surface] even as against the owner of the soil, so far as it is necessary to carry on his mining operations." In *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 296, 25 Atl. 597 (1893), it is stated as follows: "As against the owner of the surface each of the several purchasers [of mineral estates] would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of this shaft, drift, or well, as might be necessary to operate his estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof." In *Baker v. Pittsburgh, Carnegie & Western, R. R. Co.*, 219 Pa. 398, 404, 68 Atl. 1014 (1908), it is stated as follows: "An express grant of all the minerals and mining rights in a tract of land is by natural implication the grant also of the right to open and work the mines, and to occupy for those purposes as much of the surface as may be reasonably necessary." In *Oberly, et al. v. Frick Coke Co.*, 262 Pa. 80, 89, 104 At. 864 (1918), it is stated, *inter alia*, as follows: "The removal of gas is a necessary incident to the mining of coal in order that mining operations may be carried

on with safety. It is one of the implied rights incident to every grant of minerals." In *New Charter Coal Co. v. McKee*, 411 Pa. 307, 191 A.2d 830 (1963), it is stated upon page 313 as follows: "Where there is a clear right to deep mine coupled with a waiver of the right to support of the surface one does not have to be a mining expert to deduce that the owner of the coal has the power to sink as many shafts as he chooses and to come as close to the surface as he chooses to dig and remove all and every particle of the coal granted to him, without any responsibility as to the effect of his operations on the usability of the surface."

(Gateway SOR at 31-32).

Relying on *Schuster* and *Turner* v. *Reynolds, supra*, Gateway contends that, when the dispute is between the person holding the right to mine coal and a third party, who is not the surface owner, it is presumed that any related use of the surface is necessary for operation of the mine. Gateway insists that when this principle is applied to the dispute between Gateway, Stout, and OSM, Gateway's use of the surface of the Smadbeck tract is presumed to be necessary to the operation of the Gateway Mine (Gateway SOR at 32). It further contends that the evidence supports a finding that the Ruff Creek facility is necessary to the operation of the Gateway Mine.

Gateway insists that, as the lessee of the coal underlying the Smadbeck tract, it has held a valid property right under Pennsylvania common law since execution of the 1962 lease because it has continually held the right to the reasonable use of the surface of the Smadbeck tract for facilities supporting Gateway Mine underground operations (Gateway SOR at 33). Gateway relates that mining rights such as those granted by the 1962 lease have been construed to permit use of the surface reasonably necessary to operate the mine. By way of example, Gateway refers to *United States Steel Corp.* v. *Hoge*, 503 Pa. 146, 468 A.2d 1386 (1983), finding that a mining rights clause, which included the right to ventilate, granted the right to occupy the surface and drill wells to recover coal bed gas from the coal seam. *See also Oberly* v. *Frick Coke Co., supra*. In *Baker* v. *Pittsburgh, Carnegie & Western R. R. Co., supra*, a general reservation of underlying coal and all mining right and privileges appurtenant thereto reserved the right to go upon the land and sink a shaft to the coal seam. In *McMillen* v. *Rochester & Pittsburgh Coal Co., supra*, a grant of mining rights including the right to erect such chutes, tipples, buildings, and other structures as may be necessary in operation of the mine gave the coal owner the right to construct a ventilation shaft and erect a fan on the surface.

In its 1962 lease, Hillman granted mining rights, with "all reasonable privileges for ventilating, pumping and draining the mines" (Exh. A-19 at A-63). Citing *Oberly* v. *Frick Coke Co., supra*, as controlling, Gateway asserts that, under Pennsylvania law, the grant of specific mining rights does not limit the general implied right of necessary use of the surface, unless the grant specifically provides otherwise. Gateway reasons that, under Pennsylvania law, it acquired

the right to reasonable use of the surface of the Smadbeck tract in 1962 when it was granted the right to mine the underlying coal. It contends that this conclusion is further supported by the reservation clause in the 1964 deed from Smadbeck to Hillman which contains specific language excepting and reserving all coal underlying the tract, together with the mining rights and privileges appurtenant thereto (Exh. A-20 at 2; Tr. 2 at 249).[4] These reserved rights were the subject of a pre-1962 conveyance of the mining rights to Hillman, according to Gateway (Gateway SOR at 39).

Gateway notes that the Pennsylvania Supreme Court has specifically held that the right to reasonable use of the overlying surface land constitutes both a "property right" and "an interest in the overlying land." *Schuster* v. *Pennsylvania Turnpike Commission, supra* at 454. Thus, it urges a finding that the legal right granted to it in 1962 is sufficient to satisfy the property right test for both the 1980 OSM definition and the Pennsylvania definition of valid existing rights (Gateway SOR at 35). Gateway further refers to subpart (c) of the definition of valid existing rights appearing at 30 CFR 761.5, effective April 2, 1982. This section states:

> (c) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

Gateway avers that the mining rights granted to it by the 1962 lease are customarily interpreted and intended to include the right to reasonable use of the surface for facilities to support underground coal mining operations. Specifically, "Hillman and Gateway contemplated the right of Gateway to use the surface overlying the Gateway mine to construct a portal and ventilation shafts" (Gateway SOR at 35).

Gateway notes that, under the 1962 lease, it was obligated to provide Hillman with maps projecting future mining (Tr. 2 at 233), and the 1962 projection submitted to Hillman portrayed the Smadbeck tract as a future site for portals of ventilation shafts (Tr. 2 at 238, 243). Hillman purchased the Smadbeck tract in 1964 for use as a portal and ventilation shafts site for the Gateway Mine (Exhs. A-21 and A-22). Gateway contends that, considering this fact, there is little doubt that the parties to the 1962 lease contemplated using the Smadbeck tract for surface support facilities (Gateway SOR at 36-37).

Gateway asserts that 52 P.S. § 1396.4(a)(2) (1966) (Supp. 1988) provides additional support for its argument that, under Pennsylvania law, the mining rights acquired by Gateway under the 1962 lease included the right to reasonable use and access to the surface overlying the leased coal. It notes, specifically, that under section 1396.4(a)(2)F (1966) (Supp. 1988), bituminous coal operators are not required to

[4] Title to the coal underlying the Smadbeck tract and title to the surface came to Hillman through different chains of title (Tr. 2 at 299).

submit landowner consent of entry forms when filing permit applications for surface mining operations, including surface support facilities for underground mines, when the application is based on leases in existence on January 1, 1964. In those cases, an applicant need only submit a description of the documents creating its right to enter upon surface land and conduct mining activities. Gateway suggests that the use of a description of the documents creating the applicant's right to enter upon surface land and conduct surface mining activities as a substitute for a landowner's consent form is evidence of Pennsylvania's recognition of the effect of granting mining rights like those obtained by Gateway in 1962. OSM, Gateway notes, recognizes "[t]his same concept of relying upon documentation to establish the right of applicant to enter upon land and conduct surface coal mining activities is recognized at 30 CFR § 778.15 (right-to-entry information)" (Gateway SOR at 39).

Gateway asserts a separate and independent basis for the existence of a valid existing right "to use the Smadbeck Tract for surface support facilities for the Gateway Mine." This separate basis is found in the Hillman and Gateway actions and letters during the period between 1975 and early 1977. Relying on the "other document" language of the 1980 property rights definition, Gateway submits that, under Pennsylvania law, the letter of February 14, 1975, from Hillman to Gateway's partner, J&L (Exh. A-25), the letter of June 23, 1977, from Gateway to Hillman (Exh. A-31), and the letter of July 15, 1977, from Hillman to Gateway (Exh. A-34), constitute sufficient written documentation to vest an additional property right to use the Smadbeck tract for surface support facilities for the Gateway Mine. Blandford, the Hillman representative with whom Gateway communicated on this matter, testified that there was an oral agreement to lease the Smadbeck tract in the early part of 1977 (Tr. 2 at 266), and this oral lease agreement was ultimately reduced to writing on November 15, 1977 (Exh. A-34) (Gateway SOR at 40-41). According to Gateway, the letters prior to August 3, 1977, were sufficient to create an enforceable lease between Hillman and Gateway and must be viewed as sufficient written documents to satisfy the property right test for establishing valid existing rights (Gateway SOR at 41).

Employing the statute of frauds[5] to demonstrate that the letters were sufficient written documents to create an enforceable lease prior to August 3, 1977, Gateway relates that, under the Pennsylvania statute (68 P.S. § 250.202), leases for more than 3 years must be in writing, (Gateway SOR at 41).

[5]Gateway acknowledges that reference to statute of frauds is unusual in this context because this doctrine is normally available only to a party to the agreement in question, citing *Civic Center Investors Corp.* v. *Republic Insurance Co.*, 59 Pa. D. & C.2d 105 (1971) (Gateway SOR at 41 n.10). There is no dispute between Hillman and Gateway on this point.

Gateway states that Pennsylvania case law interpreting the statute of frauds supports its contention that the June 23 and July 15, 1977, letters satisfy the writing requirement of the statute and validate the oral agreement (Gateway SOR at 43). It notes that, under Pennsylvania case law, the written document need not be a contract (*Brown* v. *Hahn*, 419 Pa. 42, 213 A.2d 342 (1965)) and may consist of one or several documents (*Williams* v. *Stewart*, 194 Pa. Super. 601, 168 A.2d 729 (1961)), and designation of the property in general terms is sufficient. Gateway concedes that "[w]hat is required is a memorandum containing a description of the property, the consideration and the signature of the party charged. *American Leasing* v. *Morrison Co.*, 308 Pa. Super. 318, 454 A.2d 555 (1982)" (Gateway SOR at 43). Noting that parole evidence may be used to gain a more precise description (*Sawert* v. *Lunt*, 360 Pa. 521, 62 A.2d 34 (1948)), Gateway claims the June 23 and July 15 letters adequately describe the property:

> Gateway's letter sets forth a proposed term of [the] lease of at least 25 years and requests to be informed of the consideration that will be required. In response Hillman sets the consideration at $1,500 per month and agrees to any term of lease required by Gateway [and] [t]he letter is signed by the president of Hillman.

(Gateway SOR at 43-44). Gateway concludes that the basic elements necessary to satisfy the statute of frauds existed on July 15, 1977.

For her part, Stout contends that the Judge correctly determined that the surface lease was not executed until November 15, 1977 (Exh. A-34), and argues that it was "that document alone that gave Gateway the legally binding conveyance of the right to enter upon the surface of the land and use it for mining operations" (Stout SOR at 5). Stout charges that Gateway's allegation that its right to mine the coal underground gave it the right to use the surface wherever it pleases is the exact problem Congress sought to eliminate with SMCRA, noting that many surface mining operations disturb surface areas in a way that adversely affects the public welfare by destroying or diminishing the utility of land for residential purposes, citing 30 U.S.C. § 1201(c) (1988). Stout disputes Gateway's claim that the letters gave rise to a legally enforceable right to use the Smadbeck tract, contending that comparing the lease and the several letters expose Gateway's contentions as meritless. In conclusion, Stout avers that valid existing rights "does *not* mean mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining" and states that examples of rights which alone do not constitute valid existing rights include coal exploration permits, licenses, applications, or bids for leases (Stout SOR at 7; italics in original).

OSM contends that the Judge, Gateway, and Stout have all missed the issue. Initially, OSM contends that

> [s]ince the right to production of coal is not at issue in this case, the document granting the right to the coal is not the essential document in this matter. Rather, the right at issue is the right to use the surface within the statutory buffer zones established by SMCRA.

(OSM Answer at 17). OSM contends that Hillman satisfied the property rights test found in the 1979 definition of valid existing rights because it owned the surface upon which the Ruff Creek portal was built. OSM notes that Hillman had acquired this tract by a legally binding conveyance which, on its face, authorized the "surface coal mining operations" at issue. According to OSM, having acquired these rights prior to enactment of SMCRA, Hillman could transfer these rights to Gateway after the date of enactment, and thereby satisfy the property right portion of the definition.

OSM urges an interpretation of the 1979 definition that would require only that the right to conduct the surface coal mining operations at issue existed on August 3, 1977, and at the time of the mining, the operator possessed the right to conduct the mining operations. OSM asserts "that there is no requirement that the operator desiring to exercise the subject property rights actually have had them prior to August 3, 1977." OSM notes that the Secretary clarified this point in a notice published in the *Federal Register* at 53 FR 52378 (Dec. 27, 1988). Thus, OSM reasons that, to establish a valid existing right, the party need only have the right to conduct the surface coal mining operation at issue on August 3, 1977 -- the valid existing right can be transferred after that date. OSM contends that Hillman's transfer of surface property rights also transferred the right to construct portions of Gateway's portal building and parking lots within the 100- and 300-foot buffer zones (OSM Answer at 17-18).

[5] In *Valley Camp Coal Co.* v. *OSM, supra*, OSM issued an NOV for stockpiling coal within 100 feet of a road, in violation of section 522(e)(4) of SMCRA, 30 U.S.C. § 1272(e)(4) (1988). The NOV had issued on May 12, 1980, which was prior to the date (January 1981) West Virginia obtained State program approval. In *Valley Camp*, the Board quoted an order issued earlier in the same case reiterating our refusal to employ the definition of valid existing rights found in the State program, stating:

> As the State program was not approved when the NOV was issued we are not persuaded that the State definition is applicable in this case. * * * [T]he Board is of the opinion that the definition of "valid existing rights" to be applied herein is the one in effect at the time the NOV was issued. Thus, in determining whether Valley Camp has valid existing rights to stockpile coal in violation of section 522(e)(4), the Board will apply "the 1979 test, including the 'needed for and adjacent' test, as modified by the August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I) [14 E.R.C. 1083 (D.D.C. 1980)]." 51 FR 41954 (Nov. 20, 1986).

Id. at 28, 96 I.D. at 460, *citing* Order dated May 11, 1989, at 5-6.

The NOV served on Gateway was issued on April 2, 1982. Adhering to the rationale set out in *Valley Camp*, we will employ the definition of valid existing rights in effect when the NOV was issued -- the 1979 definition, as modified by the August 4, 1980, suspension notice. Under that definition, valid existing rights means:

(a) Except for haulroads,

(1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized the applicant to produce coal by a surface coal mining operation; and

(2) the person proposing to conduct surface coal mining operations on such lands either

(i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or

(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977[.]

Valley Camp Coal Co. v. *OSM, supra* at 39-40, 96 I.D. at 467.

In *In re: Permanent Surface Mining Regulation Litigation (I)*, 14 E.R.C. 1083, 1091 (D.D.C. 1980), Judge Flannery remanded the "all permits" test (30 CFR 761.5(a)(2)(i)) to the Secretary, and indicated that a "good faith attempt to obtain all permits before the August 3, 1977, cut-off date should suffice for meeting the all permits test." The Secretary subsequently modified the definition of valid existing rights found at 30 CFR 761.5(a)(2)(i):

To comply with the court's 1980 opinion, [OSM] suspended the definition only insofar as it required that to establish [valid existing rights] all permits must have been obtained prior to August 3, 1977 (45 FR 51547, 51548, August 4, 1980). The notice of suspension stated that, pending further rulemaking, [OSM] would interpret the regulation as including the court's suggestion that a good faith effort to obtain permits would establish [valid existing rights].

51 FR 41954 (Nov. 20. 1986).

Thus, for Gateway to have valid existing rights, it must demonstrate: (1) that on August 3, 1977, it posessed the property rights authorizing the creation of the surface disturbances in question; and (2) that it had either obtained all State and Federal permits necessary to conduct such operations prior to August 3, 1977, or had made a good faith effort to obtain all permits necessary to conduct such operations prior to that date. As applied to this case, the "operations" we must examine are those surface impacts within the buffer zones. The two questions thus posed are: (1) did Gateway have all permits necessary to create the surface impacts within the buffer zone (*i.e.*, portal building, parking lot and electrical facilities (substation)) prior to August 3, 1977; and (2) has Gateway demonstrated good faith efforts to obtain any necessary permit not obtained prior to August 3, 1977.

The Judge employed the all-permits test and therefore did not consider whether Gateway had exerted good faith efforts to obtain all necessary permits when he found that Gateway did not have valid existing rights on August 3, 1977. To the extent he failed to employ the "good faith efforts to obtain all permits" test, his decision is flawed.[6]

Gateway states that the Judge's failure to apply the correct test in no way affected his subsidiary finding that the only permits necessary for the construction of the Ruff Creek Facility structures and features

[6]The Judge's application of this more stringent standard is understandable. His decision issued prior to this Board's May 11, 1989, order in *Valley Camp* requiring application of the good faith efforts test.

located in the buffer zones were a Surface Support Permit and an Erosion and Sedimentation Control (E&S) Plan Approval (Gateway SOR at 30). Gateway asserts that it obtained the Surface Support Permit on April 4, 1977 (*see* Exh. A-44) and made a good faith effort to obtain the E&S Plan approval prior to August 3, 1977 (Tr. 3 at 170-72; Exh. A-45). Gateway notes that it applied for plan approval on June 16, 1977 (Tr. 3 at 170), and submitted revisions to the application requested by the U.S. Soil and Conservation Service (USSCS) on July 22, 1977, at which time it specifically requested prompt action on the application (Tr. 3 at 170). The application was approved on August 11, 1977 (Exh. A- 45), 8 days after the enactment of SMCRA.

Stout responds that mining had not progressed to this specific tract as of April 4, 1977 (the date of the mine subsidence permit (Tr. 3 at 296-97)), and Gateway's witness admitted that the application for the drainage permit was dated September 12, 1977 (Tr. 2 at 301). In support of the argument that Gateway had not obtained all permits, Stout refers to a January 17, 1978, DER letter stating that Gateway's permits were lacking.

[6] We do not believe the evidence supports a finding that Gateway was required to obtain a Surface Support Permit to create the surface impacts within the buffer zone. Notwithstanding the obvious fact that Gateway was required to obtain a Surface Support Permit to construct the shaft and conduct underground mining, neither of the activities giving rise to the need for the Surface Support Permit impacts the lands within the buffer zones.

Even if we were to assume error in this conclusion for the sake of argument, we find Gateway has demonstrated that it had either obtained or made a good faith effort to obtain the Surface Support Permit prior to August 3, 1977. Gateway has maintained throughout these proceedings that the DER Surface Support Permit it obtained on April 4, 1977, includes the Ruff Creek portal facility site (Tr. 3 at 167-69; Exh. A-44). Gateway acknowledges that, as a condition of the permit, it must submit new mine plans or projections describing where they expect to be in the next 6 months (Tr. 3 at 295, 298, 341). Gateway's Hanley explained on redirect examination:

> A six month projection is basically a requirement of the Department of Mine Subsidence that requires us to send in a mine map at 200 foot to the inch scale in our particular case showing all the workings as they currently exist in the mine, and projected over the next six months area where the area delineated on those maps wherein we will be mining within the next six months.
>
> And we show whether it is development mining, that is, initial driving of the entries or retreat mining where we are recovering the blocks of coal that previously [have] been developed.
>
> And it shows any protected dwelling, protected under the subsidence laws, it shows them on the map, along with highways and other surface features.
>
> And what protective support measures we are taking to leave support for any protected structures.

(Tr. 3 at 340-41).

Gateway contends that the individual 6-month projections are not permits, but reports filed pursuant to a permit issued prior to August 3, 1977. It argues that "under the terms of the Surface Support Permit we must file them every six months" (Tr. 3 at 341). According to Gateway, the updated projection map filed before the April 4, 1977, permit was issued had been filed in January, and the one after permit issuance would have been mailed May 1, 1977 (Tr. 3 at 343). It notes that the 6-month projection map filed before permit issuance did not encompass mining in the Ruff Creek area because Gateway's mining had not yet advanced to the Ruff Creek area (Tr. 3 at 344). Stout does not dispute Gateway's statement that the portal facility area was covered by subsequent 6-month projection maps.

An examination of the Surface Support Permit statute, found at 52 Pa. Cons. Stat. § 1406.1 (1966) (Supp. 1990), confirms Gateway's statement that new permits are not created each time a 6-month projection map is filed and approved. Such filings are *not* permit applications. Rather, the periodic filing of such maps fulfills a continuing obligation or condition under the permit, and is necessary to maintain the permit in force and effect. There has been no showing that, as of August 3, 1977, Gateway had not complied with any permit condition, including the required filing of the 6-month projection maps.

The fact that the projection map filed immediately before August 3, 1977, did not include the lands embraced in the buffer zone is not dispositive. To require this result would be to hold that, in Pennsylvania, the existence of valid existing rights turns on whether an operator had expressed an intent to affect the surface incident to an underground mine within 6 months of August 3, 1977, by filing a mine projection map under the Pennsylvania statute. Gateway obtained a Surface Support Permit covering the entire mine in April 1977 and had filed all necessary projection maps on August 3, 1977. The record demonstrates that on August 3, 1977, Gateway had obtained the necessary Surface Support Permit for the buffer zone in question.

The E&S Plan "is designed to ensure that construction activities on the surface will not result in excessive erosion and sedimentation" (25 Pa. Code Chapter 102 (OSM Answer at 20)). Approval of the E&S Plan is obtained from the USSCS, and "[a]pproval of this plan * * * is the first step to obtain a water quality management permit from the Pennsylvania Department of Environmental Resources" (Tr. 3 at 171).[7] The E&S Plan permit application embracing the impacts within the buffer zone was filed on June 16, 1977 (Tr. 3 at 170). The cover letter transmitting the application noted that E&S plan approval was necessary to obtain a Mine Drainage Permit, and stated that Gateway "wish[ed] to submit an Application for [the Mine Drainage Permit] to DER as soon as possible in order to get construction work started" (Tr. 3 at 171; Exh. A-45 at 2). Exhibit A-45 dated July 7, 1977, contains the

[7]The water quality management permit is also commonly referred to as the Mine Drainage Permit (Tr. 3 at 171).

report of an onsite investigation by USSCS in which USSCS recommended that Gateway supplement and revise its E&S plan. By transmittal letter and enclosures dated July 22, 1977, Gateway responded by supplementing and revising that Plan (Exh. A-45 at 8; Tr. 3 at 171-72). The E&S Plan was approved on August 11, 1977, 7 days after the effective date of SMCRA (Exh. A-45 at 14). The E&S Plan was a "permit" which Gateway was obligated to obtain before creating the challenged surface impacts. Gateway did not hold that permit on August 3, 1977, but it is clear that Gateway was making a good faith effort to obtain approval of its E&S Plan on August 3, 1977, and thus satisfied the permits portion of the valid existing rights definition with respect to this permit.

After receiving approval of the E&S Plan, Gateway filed an addendum to its "Permit No. 3071302" Mine Drainage Permit Application No. 3077304, on September 12, 1977 (Exh. A-46 at 4). The "purpose of the [Mine Drainage Permit] Application [was] to receive a permit for discharging ground water intercepted by the excavation of the proposed [Ruff Creek] shafts" (Exh. A-46 at 6). Both shafts and the point of discharge for which the permit was sought lie outside the buffer zone. Consequently, it was not necessary for Gateway to obtain (or use its best efforts to obtain) the Mine Drainage Permit, as the surface impacts covered by that permit are located outside the buffer zone (Tr. 3 at 173). Nor was Gateway required to obtain a Mine Drainage Permit to create the surface impacts lying within the buffer zone. Because Gateway has demonstrated good faith efforts to obtain all necessary permits for the creation of the surface impacts within the buffer zone, we need not reach the issue whether the "coal is needed for, and immediately adjacent to, an ongoing surface coal mining operation."

We now turn to the portion of the 1979 definition requiring property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which authorized the applicant *to produce coal by a surface coal mining operation*. Paragraph (a)(1) of 30 CFR 761.5 does not merely require that one demonstrate a property right to mine a specific tract. There must be an existing right to produce coal "by a surface coal mining operation."

The term "surface coal mining operation[s]" is defined by SMCRA, section 701(28), 30 U.S.C. § 1291(28) (1988), which provides, in part:

> (28) "Surface coal mining operations" means–
>
> (A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and *surface impacts incident to an underground coal mine*, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. [Italics supplied.]

In turn, Section 576(b)(10), 30 U.S.C. § 1266(b)(10) (1988), provides:

(10) with respect to other surface impacts not specified in this subsection including the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities, operate in accordance with the standards established under section 1265 of this title for such effects which result from surface coal mining operations: *Provided*, That the Secretary shall make such modifications in the requirements imposed by this subparagraph as are necessary to accommodate the distinct difference between surface and underground coal mining;

[7] Initially, we observe that while proof of a property right to strip mine and the property right "to produce coal by a surface mining operation," are the same, this comparison does not hold in the context of underground mining. The right to create surface impacts incident to mining may be granted by a "legally binding conveyance, lease, deed, contract or other document," or that right may be implicit in the right to underground mine under applicable state law. In either case, proof of a right to create surface impacts incident to underground mining is not established by mere proof of a right to mine coal under a specific tract by use of underground mining methods.

The question of whether a legal document between two private parties creates the right to cause the surface disturbance is dependent upon the application of state law. This reliance on state law is appropriate in light of the congressional expression that determinations of property rights for valid existing rights purposes should not abrogate state law and state court decisions (H.R. Rep. No. 218, 95th Cong., 1st Sess. 95 (1977)) and references found in the legislative history to *United States* v. *Polino*, 131 F.Supp. 772 (N.D. W.Va. 1955). Thus, in the context of underground mining, the inquiry to be made is whether property rights in existence on August 3, 1977, authorized the creation of the specific surface impacts incident to the applicant's underground mining operation.

We find the language of 30 CFR 761.5(e) to be helpful in this case.[8] This regulation provides:

(e) Interpretation of the terms of the document relied upon to establish the [valid existing] rights to which the standard of paragraphs (a) and (d) of this section applies shall be based either upon applicable State statutory or case law concerning interpretation of documents conveying mineral rights or, where no applicable State law exists, upon the usage and custom at the time and place it came into existence.

In determining whether, on August 3, 1977, Gateway had property rights authorizing it to create the challenged surface impacts within the 100- and 300-foot buffer zones, incident to underground mining, we turn to Pennsylvania law as it relates to the documents in existence prior to August 3, 1977.

Pennsylvania law recognizes three estates in land -- coal, surface, and right of support. In cases where the estates have never been

[8]The few valid existing rights cases to date have applied the predecessor of 30 CFR 761.5(e), 30 CFR 761.5(b)(2)(c) (1982), in the context of surface mining valid existing rights determinations rather than in underground mining valid existing rights determinations. The regulations on their face, however, appear to be applicable in both contexts.

severed and those in which the severed estates are later merged, the ownership of the combined estates would establish the right to produce coal by surface coal mining operations. In this case, the surface and coal estates had been severed, however, and there is no evidence of a subsequent merger of title. Therefore, we must examine Pennsylvania law applicable to the rights conveyed when the rights to the coal and the surface rights are severed. Had the grant to Gateway been limited to a right to mine coal under a tract of land, Pennsylvania law, by implication, would have construed the grant of that right to include the right to use of so much of the surface as was necessary to carry on and accomplish the work of mining and extracting coal from beneath the surface of the land. *Schuster* v. *Pennsylvania Turnpike Commission, supra.*

To the best of our knowledge, *Schuster* v. *Pennsylvania Turnpike Commission* remains the leading authority in Pennsylvania on this issue. In *Schuster*, the Pennsylvania Turnpike Commission condemned a 200-foot right-of-way for proposed construction of the Northeast Extension of the turnpike. The right-of-way embraced acreage which was the subject of an oral agreement between Schuster and Moffat (the owner of the property) authorizing Schuster and his wife to mine the coal to exhaustion under a 65-acre tract. At the time of condemnation Moffat owned all three estates, the coal (presuming the oral agreement was not a sale of the coal), surface, and the right to support. Thus, the issue before the Pennsylvania Supreme Court was whether, exclusive of Moffat's ownership, the Schusters had any property right or interest in the tract of land which was directly affected by the Commission's condemnation so as to entitle them to compensation. At the time of condemnation Schuster had driven a slope from the surface to the coal, built several roadways, and had erected several buildings including a cap house, steel garage, warehouse, powder house, oil house, and hoisting engine house.

The Commission contended that only the "land" was taken, and the Schusters neither owned the land nor a property interest in the land entitling them to compensation. The Pennsylvania Supreme Court found a property right in the surface of the land implicit in the right to mine, stating:

> The owner of the coal--Moffat--through his authorized agent gave Schusters the right to mine all the coal to exhaustion in a certain vein under a 65 acre tract of land. While nothing was *expressly* stated in the oral agreement, by *implication* Moffat thus gave Schusters the use of the surface of such tract of land to the extent that such use was necessary to carry on and accomplish the work of mining and extracting coal from beneath the surface of such land. Such a principle has been long recognized in Pennsylvania. In 1854 in *Turner* v. *Reynolds*, 23 Pa. 199, 206, this Court said: "One who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as it is necessary to carry on his mining operations * * *. As against an intruder * * * we will presume that the possession of the soil was requisite, in order to enable the plaintiffs to avail themselves of their mining privileges." To the same effect *Trout* v. *McDonald*, 83 Pa. 144, 146; *Chartiers Block Coal*

Co. v. *Mellon*, 152 Pa. 286, 296, 25 A. 597, 18 L.R.A. 702; *Baker* v. *Pittsburgh, Carnegie & Western Railroad Company*, 219 Pa. 398, 403, 68 A. 1014; *Oberly* v. *H. C. Frick Coke Company*, 262 Pa. 83, 86, 87, 88, 89, 104 A. 864; *Friedline* v. *Hoffman*, 271 Pa. 530, 534, 535, 115 A. 845; *Dougherty* v. *Thomas*, 313 Pa. 287, 295, 296, 169 A. 219. Schusters acquired by the agreement the right not only to the coal under this land but the right to the use of so much of the surface of the land as was necessary to the conduct of their mining operations. The Commission does not claim that the extent of the surface of this tract of land actually occupied by the buildings, etc. of Schusters was not necessary to the mining operations; on the contrary it will be presumed as against the Commission, a stranger to the agreement that such use as exercised was necessary. *Schuster's right was not only a "property right" but an "interest in the land"* [Italics in original and supplied; footnote omitted.]

Schuster v. *Pennsylvania Turnpike Commission, supra* at 453-54.

Rejecting arguments that the right granted was either a "tenancy at will" or a "mere license to take the coal" under Pennsylvania law, the Court concluded:

[t]he law is long and well settled in Pennsylvania that "The grant of a right to mine coal in the lands of the lessor, and remove it therefrom, although the instrument may be called a 'lease,' is a grant of an interest in the land itself, and not a mere license to take the coal."

Id. at 454-55, *citing Shenandoah Burough* v. *City of Philadelphia*, 37 Pa. 180, 186, 79 A.2d 433, 436.

Schuster is fully consistent with other Pennsylvania Supreme Court decisions addressing rights inherent or implied in the right to mine and remove coal. *Oberly* v. *H. C. Frick Coke Co., supra*; *Friedline* v. *Hoffman, supra*; *Baker* v. *Pittsburgh, Carnegie & Western Railroad Co., supra.*

Moreover, under Pennsylvania law, the "character and extent" of the rights appurtenant to the right to mine and remove coal, whether express or implied, exist to the full extent that they are not altered by express provision. *Oberly* v. *H. C. Frick Coke Co., supra* at 865.

As can be seen, under Pennsylvania law the mineral estate's right to use the surface estate is dominant to the extent the use is necessary for removal of the underlying minerals. *Schuster* and the authorities cited therein provide ample authority for this proposition. This broad authority to use so much of the surface as is necessary to conduct the underground operations is not unlimited, however. We must therefore examine those limitations.

We know of no cases extending this implied right to the use of the surface estate for production of minerals underlying lands other than those conveyed by the grantor.[9] A conveying party may, of course,

[9] In *Oberly* v. *H.C. Frick Coke Co., supra*, the Pennsylvania Supreme Court stated:

"It is a general rule of law that when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted; when uncontrolled by excess words of restriction all the powers pass which the law considers to be incident to the grant or the full and necessary enjoyment of it. Consequently, a grant or reservation of mines gives the right to work them, to enter and to mine unless the language of the grant itself provides otherwise or repels this construction. And this right is so inseparable from a grant of minerals, that not only is it necessarily an implied incident thereof, but it and its derived rights cannot be restrained or excluded by a special affirmative power to do other acts, or by a grant of other privileges necessary or convenient to the working of mines.

Continued

expressly grant such a right in the document severing the mineral estate from the surface estate, but there is no evidence of this being the case here, as the document severing the Smadbeck mineral estate from the surface estate was not placed in evidence. Consequently, we have no knowledge as to whether the severance document expressly granted the right to use the surface for removal of minerals from other tracts or only granted those rights normally implied at law. The absence of the severance document is doubly vexing because the Gateway Mine is extensive, and we are unable to ascertain the actual size and shape of the surface estate at the time of severance. This factor is important because subsequent partial surface conveyances would not alter or destroy the right to use any part of the original surface estate to produce minerals from beneath a part of the original estate now in the hands of another. Hence, the present size and shape of the Smadbeck tract is not necessarily dispositive of the issue of whether Gateway was granted a right to use the surface of the Smadbeck tract to produce minerals from another tract. Nevertheless, without evidence of the size and shape of the tract conveyed when the right to use the surface was established or evidence of the size or shape of the tract which would be served by the facilities in question, we have no choice other than to assume that the facilities were designed to serve a tract of coal larger than that conveyed when the interests in the land were severed.

The requirement that Gateway must independently satisfy the property rights test is undisputed. Gateway did not have title to both the surface and coal estates on August 3, 1977, and the evidence is not sufficient to support a finding that the conveyance grant expanded the implied right to use the surface to include the right to use the surface for production of minerals in adjacent lands. Nor does the evidence allow us to determine the geographical extent of the surface estate at severance. We must, therefore, examine whether a contractual arrangement existed on August 3, 1977, which formed the basis for the necessary right to use the surface of the Smadbeck tract or to create the surface impacts incident to underground mining within the 100- and 300-foot buffer zones.

"The right to work the mine involves the right to penetrate the surface of the soil for the minerals, to remove them in the manner most advantageous to the mine owner, and to use such means and processes in mining and removing them as may be necessary in the light of modern improvements in the arts and science * * *.

"The bare right to work carries with it the right to use so much of the surface as is reasonably necessary. The mine owner has the right to enter and take and hold possession even as against the owner of the soil * * *. What is necessary and reasonable may be determined by reference to what is customary, and is a question of fact.

"Most frequently the privileges above described as impliedly incident to the right to mine are expressly granted or reserved in the instrument creating a mineral estate; but their character and extent are not altered by this expression though there may be, of course, express privileges added which would not otherwise be implied. These rights do not create an estate in the surface, but are easements to do certain acts thereon.

"Surface rights and the incidental rights, such as that to use shafts, whether expressed or left to implication, may be used for the purpose only of mining under the particular premises conveyed, and not as a means of removing minerals from other lands. This, of course, may, however, be changed by the terms of the contract." *Id.* (italics supplied).

The most obvious document giving rise to this property right is the November 15, 1977, lease agreement between Hillman and Gateway. There is no question that this document grants the necessary rights. The problem is that it was executed after August 3, 1977, and, standing alone, cannot be the basis for the necessary property rights.

Gateway urges us to find that the November agreement merely memorializes an earlier binding agreement expressed by the actions and letters between 1975 and early 1977. It contends that these documents are sufficient to be construed as a binding contract between Hillman and Gateway. After examining the evidence in the record, we find that those documents did not create an enforceable lease in existence on August 3, 1977. Gateway concedes that Pennsylvania law requires a "memorandum containing a description of the property, the consideration and the signature of the party charged" (Gateway SOR at 43, referring to *American Leasing* v. *Morrison Co., supra*).

On July 15, 1977, in a letter from the President of Hillman to Johnston, Property Manager for Gateway, confirming a telephone conversation between the two, the President of Hillman stated that "[t]he lease can be for any term required by Gateway for a lease consideration of $1500 payable monthly" (Exh. A-32). The letter ends with the language "[w]e can discuss this proposal at your convenience." *Id.* The lease executed on November 15, 1977, provided for a monthly rental of $1,250. Comparing the November 1977 lease to the earlier documents we can see no meeting of the minds on the consideration issue prior to August 3, 1977. Without a meeting of the minds regarding consideration, the requirements of *American Leasing* v. *Morrison Co., supra*, are not satisfied, and we cannot conclude that a legally enforceable lease similar to the November 1977 lease was entered into before August 3, 1977.

We now look to the possibility of there being some other contractual relationship which bound Hillman to dedicate the land to the mining operation. That relationship could be in the form of a contract designating a mutual area of interest, a joint venture, or a partnership. If such contractual arrangement existed prior to August 3, 1977, and it could be shown that the terms and conditions of the agreement would bind either or both parties to the dedication of after-acquired property to the mining operation, that agreement would be sufficient to establish the basis for a finding that when Hillman acquired the Smadbeck tract it was obligated to dedicate the use of that tract to the Gateway Mine. The only document we know of which might create that contractual relationship is the March 1, 1962, lease agreement (Gateway Exh. A-19). When Exhibit A-19 was introduced Gateway chose not to introduce the entire document, and submitted only the grant provisions and a portion of Schedule A, containing the description of the Thomas Ross tract. We find nothing in the portion of the document submitted which would allow us to conclude that the 1962 lease created an obligation which would bind Hillman to subsequent conveyance of the Smadbeck tract. Accordingly, for the

reasons set forth above, we affirm the Judge's finding that on August 3, 1977, Gateway did not have a property right authorizing it to create the challenged surface impacts within the 100- and 300-foot buffer zones.

In light of our holdings herein and there being no material fact at issue, appellant's request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, for the reasons set forth herein, to the extent that Administrative Law Judge Joseph E. McGuire failed to properly employ the "good faith efforts to obtain all permits" test, his decision is in error, and we reverse his decision to the extent of such failure. In all other respects, his decision is affirmed; NOV No. 82-1-31-9 is affirmed; and the case remanded to OSM for action consistent with this decision.

R. W. MULLEN
Administrative Judge

I CONCUR:

JAMES L. BURSKI
Administrative Judge

UTAH POWER & LIGHT CO.

118 IBLA 181 Decided: *March 6, 1991*

Appeal from a decision of the Moab District Office, Bureau of Land Management, stating in part that Utah Power & Light Co. must pay royalties for coal that was not mined in accordance with its mine plan. SL-070645, U-1358, U-040151 *et al.*

Reversed in part and remanded.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

Under 43 CFR 3482.2(c)(2), a proposal to modify a mine plan must be submitted in writing, with a justification, by the operator or lessee. It is not effective until it has been approved in writing by the authorized officer.

2. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

The Bureau of Land Management does not have authority to require payment of royalties for coal that was not mined in accordance with a resource recovery and protection plan, in violation of 43 CFR 3481.1(b), before it is mined later in accordance with an approved modification of the plan.

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APPEARANCES: Denise A. Dragoo, Esq., and Paul Proctor, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

BOARD OF LAND APPEALS

We are asked to decide whether the Bureau of Land Management (BLM) may require a coal lessee to pay royalties now for a block of coal it did not mine in 1986, contrary to its then-current mine plan, and will not mine until 2015 in accordance with an approved modification of the mine plan. Utah Power & Light Co. (UP&L) has appealed the part of an April 18, 1988, decision of the Moab District Manager, BLM, requiring such royalties; it does not object to the part of the decision approving its proposal to modify its mine plan to delay mining this coal, among other things.

I. Factual and Procedural Background

The original mine plan (now, formally, a "resource recovery and protection plan," *see* 43 CFR 3480.0-5(a)(34), 30 U.S.C. § 207(c) (1988)) for UP&L's Deer Creek Mine, located in Emery County, northwest of Huntington, Utah, was approved in January 1978. A March 1981 modification of this plan called for mining the 2½ South block of coal, located in the Blind Canyon Seam on leases U-1358 and U-040151, in 1984 and 1985; a 1983 modification postponed this to 1986 (Statement of Reasons (SOR) at 3, and Exh. E).

In 1985 the company removed the continuous mining equipment and the shuttle cars from this area of the mine. Nevertheless, in several 1985-86 conversations with the mine manager and the chief mining engineer, BLM inspector James Ward was assured they wanted to mine the 2½ South block; "but the Technical Service Division [of UP&L] in the Huntington office was directly responsible for the mining sequence. These were the people that said mine or not" (Aug. 26, 1987, BLM Staff Report entitled "Leaving 2½ South Block, Deer Creek Mine, Unmined" (Staff Report) at 2).

On August 15, 1986, BLM's Area Manager wrote UP&L's chief mining engineer:

> [W]e encourage you to mine and recover as much as possible [of the 2½ South block] with regard for safety and standard mining practices. The trend of the mine is moving towards the north, and we do not want to by-pass this coal if it is possible to mine it. According to [43 CFR] Section 3480.0-5 [(a)(21)], maximum economic recovery means that, based on standard industry operating practices, all profitable portions of a leased federal coal deposit must be mined.

In April 1987, BLM discovered that UP&L had removed the conveyor belt drives from this area of the mine. In response to the BLM inspector's expression of concern about the 2½ South block, UP&L wrote the BLM Area Manager on May 8, 1987. UP&L provided several reasons why "the mine plan * * * is now in the process of being

changed" in ways that would postpone the mining of the 2½ South block and concluded: "Trust that this modification of our mining plan is acceptable to you." BLM representatives inspected the mine and discussed this proposal and alternatives with UP&L personnel on July 8, 1987. On July 17, 1987, BLM wrote the company, asking "exactly how" and when the block would be mined. This letter stated: "BLM also has a major concern as to why the coal in the 2½ [South] block was not mined when continuous miners were in the area." BLM asked UP&L to provide a "conceptual mine plan on the recovery of the 2½ South block * * * and the date in which this mining will occur" and to provide "scheduling and location of all continuous miners and longwall sections between the dates of June 1983 and December 1985."

UP&L's July 27, 1987, answer stated that the continuous miners were moved from the 2½ South block because the company had encountered areas of high-ash coal, decided to change the location and direction of mining, and needed the equipment for new set-up entries. In addition, UP&L stated, a newly purchased block of coal caused a change in strategy for mining reserves elsewhere, and a continuous miner was needed for that operation. UP&L provided the conceptual mine plan and stated: "As far as the dat[e] for recovering the 2½ South block of coal * * * [c]urrently, this is scheduled for 1996."

BLM responded on December 7, 1987, by issuing a notice of noncompliance. "In our analysis of this [mine plan modification] proposal, we have identified a noncompliance which must be resolved before the modification is approved," the notice read. It continued:

> UP&L is in noncompliance with the approved mine plan in that BLM was not notified when mining crews and equipment were pulled out of the area, leaving the 2½ South block unmined with no new planned sequencing. No modification to the approved mine plan was submitted until well after the fact. This is in violation of the regulations governing [sic] the Mineral Leasing Act of 1920 codified in 43 CFR 3482.1(b), 43 CFR 3482.2(2), and 43 CFR 3481.1(b), (c) which state that mine operators on Federal coal leases will submit and follow mine plans; also, operations will be conducted efficiently and in a manner that will achieve maximum economic recovery of coal. [1]

(Notice of Noncompliance at 1).

BLM explained its concern that the 2½ South block of coal would be difficult to recover in the future:

> Because UP&L did not follow the mine plan and vacated the area, we feel that the recovery of coal from the 2½ South block is questionable. With conveyor belts, power, roadways, and mining equipment in a current section in nearby 9th East E, the 2½ South block was the most logical and efficient panel to mine next. At the present time, we feel the cost to rehabilitate and reestablish access for both men and material (i.e.

[1]This notice was modified by a letter dated May 7, 1988, which replaces the first two regulations cited above with 43 CFR 3482.2(c)(2) and 43 CFR 3484.1(b) and (c), respectively, (while retaining 43 CFR 3481.1(b) and (c)) and then adds:

"The pertinent regulations that were violated are 43 CFR 3484.1(b)(1) and (4), 43 CFR 3484.1(c), and 43 CFR 3484.1(c)(7). These regulations state that underground mining operations will be conducted efficiently and in a manner so as to achieve maximum economic recovery and prevent wasting of coal. Also, the abandonment of a mining area shall require the approval of the BLM."

conveyor belts, etc.) is economically prohibitive for the limited amount of coal in the 2½ South block. Also, future mining of additional entries parallel to 2nd South and the 2½ South block may be difficult due to surrounding abutment pressures. It is our experience that coal blocks surrounded by mined out areas and left for a period of time exhibit increased pressures that may prohibit mining or substantially reduce recovery due to safety problems.

Id. at 2.

The notice concluded that the modification proposed by UP&L was "a reasonable approach to mine the 2½ South block under the present circumstances."

However, because UP&L did not follow the mine plan and there is some question as to the future recoverability of the coal, in order to satisfy this noncompliance we need insurance from UP&L that will guarantee this coal is recovered and the Federal government is compensated.

Please contact this office within 15 days to arrange a meeting to discuss how this matter can be settled.

Id. at 2.

Meetings were held on January 5 and 8, 1988. In a February 2, 1988, letter BLM summarized the preliminary mine plan modification proposals suggested at those meetings by UP&L, asked several questions about them, and requested "details and justifications" in response. "Additionally, we require a statement as to why this block of coal was not mined as scheduled," the letter stated. UP&L's March 1, 1988, reply answered BLM's questions, repeated the previously stated reasons for not mining the coal as scheduled, and concluded: "In hindsight, the delays in mining 2½ South block are going to be very beneficial from a ground control standpoint. * * * Based on our estimate at the current rate of production it is projected that this block will be mined between the year 2015 and 2018."

BLM's April 12, 1988, decision described the technical reasons for UP&L's mine plan modification proposal and approved it as "prudent * * * under present circumstances." It accepted UP&L's explanation for the removal of the continuous miner from the area but stated that "the miner could have returned at some time to mine the 2½ South block before the conveyor belt drives were removed" (Decision at 2). BLM repeated its reasons for believing that it would have been "most logical and efficient to mine [the 2½ South block] according to the original mine plan sequencing," and that it will be "more difficult or impossible" to mine the coal in 30 years, and concluded:

Considering all factors, we conclude that the recovery of the 2½ South block has been jeopardized. Because UP&L did not follow the mine plan and the feasibility of recovering the 2½ South block has been jeopardized, it is our decision that UP&L must pay royalties to the U.S. Government at the 1986 rate on the recoverable reserves in the 2½ South block.

Id. BLM calculated these reserves at 86,000 tons and explained the basis for its calculations. Payment of the royalty would exempt UP&L from paying royalty in the future if the 2½ South block is mined, BLM stated. "However, if at any time the BLM determines that the 2½

South block is unrecoverable for any reason (technical, economic, or safety), we will consider further action which would involve assessing UP&L for the full value of the coal" (Decision at 3).

BLM provided UP&L 30 days to show it had paid the royalty and "30 days from the 30 day compliance period to appeal to the Board of Land Appeals." Although UP&L's Notice of Appeal may have been filed within the 30-day compliance period (the record does not indicate when it received BLM's decision), we think it would be point less for us to return the case to BLM with directions to treat the matter as a protest. *See Robert C. LeFaivre*, 95 IBLA 26, 28 (1986).

II. Arguments of the Parties

A. *Arguments of Utah Power & Light Co.*

In its SOR, UP&L challenges BLM's view that it abandoned the 2½ South block, as permanent abandonment is defined in 43 CFR 3480.0-5(a)(29), thus violating 43 CFR 3484.1(c)(1) and (7); rather, UP&L says, removal of that block has been delayed, with the approval of BLM (SOR at 6-7). UP&L argues that it is in compliance with its mine plan, as approved in the April 1988 decision, and that BLM's assessment of royalties as a penalty for noncompliance is inconsistent with BLM's approval of UP&L's proposal to modify its mine plan to provide for mining of the 2½ South block later (SOR at 9-10, 16).

UP&L notes that BLM cites no authority for requiring payment of royalty for coal in advance of its production and points out that its leases provide for royalty payment based only upon coal that is mined or produced (SOR at 10). Under 30 U.S.C. § 207(b) (1988), 43 CFR 3483.4, and the lease terms, "advance royalties" are authorized only in lieu of continued operation of a mine, and the Deer Creek Mine is clearly in operation, UP&L states (SOR at 11).

UP&L offers several other arguments. BLM may not unilaterally amend the terms of the lease by a decision requiring payment of advance production royalties (SOR at 12-14). BLM's decision is arbitrary and capricious because there is no statutory, regulatory, or contractual basis for it (SOR at 15-16). Assessing production royalties in advance of mining and threatening to forfeit UP&L's bond and cancel its lease if they are not paid is unfair and constitutes an unconstitutional taking of its property (SOR at 17). BLM's April 1988 decision approving UP&L's proposed modification that would delay mining the 2½ South block estops BLM from assessing advance royalties (SOR at 17-19). Finally, UP&L argues that BLM's assumed 44-percent coal recovery rate in 2015 (used as the basis for the royalties) is speculative and therefore arbitrary and capricious (SOR at 20-21).

[1] UP&L also states that it understood that BLM had agreed to the modification it proposed on July 27, 1987 (calling for mining of the 2½ South block in 1996), duringthe July 8, 1987, inspection of the mine by personnel from BLM and UP&L and their subsequent meeting (SOR at

8-9). Although the August 26, 1987, Staff Report, *supra* at 4, indicates there was an agreement that such a modification would be acceptable, the modification was not effective on July 8. The regulations require that proposals for mine plan modifications must be submitted in writing by an operator or lessee, with a justification, and approved in writing by the authorized officer. 43 CFR 3482.2(c)(2). UP&L submitted this proposed modification in writing in its July 27, 1987, letter, in response to BLM's July 17, 1987, letter requesting further information "[p]rior to the approval of your minor modification." Later UP&L amended its proposed modification in its March 1, 1988, letter. The authorized officer did not approve the modification until the April 18, 1988, decision, so the modification was not effective until then.

B. *Arguments of the Bureau of Land Management*

BLM initially responded to UP&L's arguments by filing an April 12, 1989, memorandum from the Area Manager to the District Manager, BLM; later, the Regional Solicitor filed additional arguments on BLM's behalf.[2] The Area Manager's memorandum explained that its decision did not impose advance royalties: "Obviously 'advance royalties' can only be paid in lieu of continued operation"[3](Apr. 12, 1989, Memorandum at 1). Rather, says BLM:

> Our assessment of royalties for 2½ South is to protect the interests of the government for jeopardized coal reserves, and not for advance royalties with regard to the diligence laws. We believe the Bureau has discretion to assure maximum economic recovery and the prevention of wasting of coal. Though we approved UP&L's modification to the mine plan for the 2½ South area, we charged royalties for the recoverable coal of this block to assure the government's interest in the coal. * * * If, after not paying royalties on 2½ South, UP&L were to find it could not mine the section as planned in 2015, the government's charge to prevent wasting of coal and to ensure the public's interests would be for naught. Charging royalties for unmined and wasted coal is not a new precedent. UP&L's predecessors at the Deer Creek Mine were charged royalties by the Area Mining Supervisor, USGS [Geological Survey], in 1976 for coal left unmined when an approved barrier pillar of 200 feet was increased without authorization to 300 feet.

(Apr. 12, 1989, Memorandum at 2).

BLM responded to UP&L's argument that it had not abandoned the coal, stating that BLM did not mean permanent abandonment of a whole mine operation under a mine plan, as UP&L suggested by referring to the definition in 43 CFR 3480.0-5(a)(29), but rather "abandonment of a mining area" under 43 CFR 3484.1(c)(7) when UP&L

> moved the production crew and machinery that was in the [2½ South block] area to another area of the mine, pulled the conveyor belt, removed electrical power sources, and reduced the required operational ventilation amounts. * * * The actions are judged by industry practices as abandoning a section and will jeopardize any future mining of this coal.

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[2]BLM filed its Apr. 12, 1989, memorandum *ex parte*, so by order dated Aug. 20, 1990, we provided UP&L a copy in accordance with 43 CFR 4.27(b) and requested BLM to provide, within 30 days, the letter referred to in the memorandum as well as an explanation of its authority to impose royalties. The Regional Solicitor's response on behalf of BLM was not filed until Oct. 9, 1990. Nevertheless, UP&L's motion to strike the Solicitor's filing is denied. UP&L was not prejudiced by the delay in responding to our order of Aug. 20, 1990. UP&L's reply to the Solicitor's response is accordingly accepted.

[3]UP&L agrees and so do we. *See Western Slope Carbon, Inc.*, 98 IBLA 198 (1987).

Id. at 1.

To UP&L's argument that BLM had approved its proposal to mine the 2½ South block in 2015 and it was therefore not consistent to impose royalties for the coal, BLM responded:

> We approved the modification because it also included other mine plan items besides 2½ South such as the transfer raises to Wilberg Mine, etc. This does not change our opinion that the 2½ South recovery was jeopardized. * * * The Federal government needs to have some assurance of its interest. There are options other than to charge up-front royalties which could be explored, such as, increase the bond on the subject lease by the amount of royalties due. Also, a lease stipulation could be added to state that if 2½ South is never mined, royalties would be due at the end of the lease term. However, the option that was chosen gives the BLM some credibility that its interest in the public coal reserve is important.

Id. at 3.

The Regional Solicitor argues that UP&L's removal of equipment was a unilateral, unauthorized deviation from its mine plan. BLM's April 1988 approval of a modification simply "recognized the reality of the situation * * * and allowed the company to continue its formerly unauthorized activity" (Response at 1). BLM's requirement that royalties for the unmined coal be paid immediately "shift[ed] the burden of risk that this coal might never be mined from the United States Government to UP&L which had caused the problem in the first place" (Response at 2). Although there is no explicit authority for such a requirement, BLM asserts that itis a reasonable way to fulfill its responsibility under 30 U.S.C. § 209 (1988), to conserve the natural resource when a company chooses to bypass (1988), coal that may consequently not be mined. "The action of UP&L in abandoningthe 2½ South block without approval was clearly in violation of its mining plan and of the regulation at 43 CFR § 3484.2(c)(7) [sic] which states: 'The abandonment of a mining area shall require the approval of the authorized officer' " (Response at 2). Although the law relating to coal leases does not provide authority to impose fines for noncompliance with a lease, as it does for violations of oil and gas leases, BLM does have authority under 43 CFR 3486.3 to suspend a lessee's operations for violating its mine plan or the regulations, or to cancel its lease, the Regional Solicitor argues. "Or BLM could order UP&L to comply with its original mining plan if it will not pay its advance royalty," the Regional Solicitor suggests (Response at 3).

The Regional Solicitor elaborates on the reference in BLM's April 12, 1989, memorandum to a precedent for its decision. He states that in 1976 the Geological Survey (GS) Area Mining Supervisor allowed UP&L's predecessor

> to abandon a coal seam in favor of another on the agreement that the coal company would pay in advance the royalty for the coal which it was abandoning. * * * The only difference between the 1976 Peabody Coal situation and the current case is that Peabody Coal had the decency to come to the USGS and request approval. * * * However, in the

current situation UP&L unilaterally picked up its equipment and abandoned the site in violation of its mining plan and of the regulation.

(Response at 3).

The Regional Solicitor concluded:

If the Board finds that the authority of the BLM to require the advance payment of royalties for the unauthorized abandonment of the coal seam cannot be implied from BLM's authority to suspend UP&L's current operation or to seek cancellation of UP&L's lease, then it is suggested that the Board should remand the matter to BLM for it to determine whether its allowance of UP&L's unilateral and illegal action in abandoning the 2½ South Block of the Deer Creek Mine should be the subject of BLM's more Draconian powers to suspend its current operation and require UP&L to recover the 2½ South block seam, or to seek cancellation of its lease.

(Response at 3-4).

In reply, UP&L notes the Regional Solicitor "admits there is no explicit regulation or lease term authorizing BLM to require a lessee to pay production royalty in advance of mining" and argues that the "negotiated settlement" between its predecessor, Peabody Coal Co. (Peabody), and GS in 1976 isnot binding on UP&L. UP&L also repeats its argument that it has not "abandoned" the 2½ South block within the meaning of 43 CFR 3480.0-5(a)(29) or 3484.1(c)(1).

III. The Regulatory Context

BLM is responsible for inspecting coal mining operations on federally leased lands and for ensuring compliance with "all provisions of applicable laws, rules, and orders, all terms and conditions of Federal leases and licenses under MLA [Mineral Leasing Act of 1920] requirements, and approved exploration or resource recovery and protection plans." 43 CFR 3480.0-6(d)(4) and (5). It is also responsible for issuing "General Mining Orders and other orders for enforcement * * * as necessary to implement or ensure compliance with the rules of [43 CFR Part 3480]." 43 CFR 3480.0-6(d)(12).

A lessee or operator is to conduct its operations in accordance with the rules in Part 3480, the terms of its lease, its approved mine plan, and any orders of an authorized officer. It is also required to prevent wasting of coal during production and to protect recoverable reserves upon abandonment. 43 CFR 3481.1(b) and (c).

The general performance standards require a lessee or operator to conduct operations to achieve maximum economic recovery of Federal coal. 43 CFR 3484.1(b)(1). 43 CFR 3480.0-5(a)(21) defines maximum economic recovery (MER) as meaning

that, based on standard industry operating practices, all profitable portions of a leased Federal coal deposit must be mined. At the times of MER determinations, consideration will be given to: existing proven technology; commercially available and economically feasible equipment; coal quality, quantity, and marketability; safety, exploration, operating, processing, and transportation costs; and compliance with applicable laws and regulations.

The general performance standards also require a lessee or operator to conduct efficient operations to recover the recoverable coal reserves,

prevent wasting and conserve those reserves and other resources. 43 CFR 3484.1(b)(4).

The performance standards for underground mines also provide that operations are to be conducted so as to prevent wasting of coal and to conserve recoverable coal reserves and that "[n]o entry, room, or panel workings in which the pillars have not been completely mined within safe limits shall be permanently abandoned or rendered inaccessible, except with the prior written approval of the authorized officer." 43 CFR 3484.1(c)(1). An authorized officer must approve the conditions under which an underground mine, or portions of it, may be temporarily abandoned, as well as the abandonment of a mining area. 43 CFR 3484.1(c)(5) and (7). An authorized officer will also require that unmined recoverable coal reserves and other resources are adequately protected "[u]pon permanent abandonment of mining operations." 43 CFR 3484.2(b); *see* 43 CFR 3480.0-5(a)(29).

If an authorized officer determines an operator or lessee has failed to comply with the rules in 43 CFR Part 3480, the terms of its lease, the requirements of its mine plan, or an authorized officer's order, and the noncompliance does not threaten "immediate and serious damage" to the mine or its resources or affect the royalty provisions of Part 3480, the authorized officer "shall serve a notice of noncompliance" on the operator or lessee. 43 CFR 3486.3(a).[4] The notice shall specify "in what respect(s) the operator/lessee has failed to comply" and "the action that must be taken to correct such noncompliance and the time limits" for doing so. 43 CFR 3486.3(b). If the operator or lessee fails to take action in accordance with the notice, that "shall be grounds for cessation of operations upon notice by the authorized officer." 43 CFR 3486.3(a). The authorized officer may also recommend initiation of action to cancel the lease and forfeit the lease bonds. *Id.*

IV. Discussion

BLM argues that UP&L "abandoned" the area of the mine that contained the 2½ South block in violation of 43 CFR 3484.1(c)(7):

> [T]he area was abandoned when UP&L moved the production crew and machinery that was in the area to another area of the mine, pulled the conveyor belt, removed electrical power sources, and reduced the required operational ventilation amounts. All this was done without prior approval. These actions are judged by standard industry practices as abandoning a section.

(Apr. 12, 1989, Memorandum at 1; *see* Regional Solicitor's Response at 2). There are several difficulties with this argument. It is first of all not clear when BLM believes the violation occurred. The Staff Report, *supra* at 4, states that "[i]n 1985, the company removed all the continuous miners and shuttle cars from this east area in the mine and

[4] If, in the judgment of the authorized officer, the operator or lessee is conducting activities that do not comply and do threaten immediate and serious damage, he "shall order the immediate cessation of such activities without prior notice of noncompliance." 43 CFR 3486.3(c).

this left 2½ South as the only block of coal that was mineable, but left abandoned." In the April 12, 1988, decision, however, BLM acknowledged the reasons UP&L offered for removing the equipment, but said "the miner could have returned at some time to mine the 2½ South block before the conveyor belt drives were removed" (Decision at 2). This appears to indicate BLM did not believe the coal was abandoned until the conveyor belt drives were removed. However, it is not clear from the record when UP&L removed the conveyor belt drives from the 2½ South block area of the mine. The BLM inspector's quarterly inspection reports for May 1986 (the first inspection after UP&L took over the operation), September 1986, November 1986, January 1987, and April 1987 reported no "condition of noncompliance." Not until the August 1987 inspection report is there a mention of the 2½ South block and that report also states there is no condition of noncompliance, apparently because "there has been a minor modification ask[ed] for by the company to change the mining date." There is an observation in the November 1986 report that the mine had been idle during the week before the inspection "to clean and rock dust some of the belts in the mine," so perhaps the conveyor belt drives were removed during that project. But we do not know. The April 12, 1988, decision says BLM discovered that UP&L had removed the conveyor belt drives in April 1987.

Secondly, as the parties' arguments indicate, the drafting of the regulations leaves unclear what constitutes "abandonment." The definition in 43 CFR 3480.0-5(a)(29) speaks of "permanent abandonment of mining operations." This term corresponds to 43 CFR 3484.2(b) relating to the permanent abandonment of mining operations. Any entry, room, or panel workings in which the pillars have not been completely mined may not be "permanently abandoned" without prior written approval of the authorized officer according to 43 CFR 3484.1(c)(1), one of the performance standards for underground mines. Another of these performance standards, cited in BLM's revised Notice of Noncompliance, says the approval (not the prior written approval) of the authorized officer is required for "the abandonment of a mining area." 43 CFR 3484.1(c)(7). Neither "mining operations" nor "mining area" nor "abandonment" nor "abandoned" is defined, however. The lack of these definitions might be less troublesome if another underground mining performance standard did not call for an authorized officer to approve the conditions under which an underground mine, or "portions thereof, will be temporarily abandoned." 43 CFR 3484.1(c)(5). Unfortunately, the preambles to these regulations provide no guidance on these questions. *See* 47 FR 33154 (July 30, 1982); 46 FR 61424-61427 (Dec. 16, 1981); 45 FR 32715 (May 19, 1980); 41 FR 20252 (May 17, 1976); 40 FR 41122, 41123 (Sept. 5, 1975).

Third, BLM says that UP&L's actions "are judged by standard industry practices as abandoning a section." That may well be so, but

nothing is offered as proof of a standard industry practice and we cannot take official notice of such a matter.

Finally, it does not appear that UP&L intended to abandon the 2½ South block. By April 1987, BLM's inspector learned from the mine manager that the 2½ South block "was included in an economic study [by UP&L], but it seemed very doubtful the coal would be mined right then" (Staff Report, *supra* at 2). In May 1987 UP&L's chief of technical services felt that "because of economics * * * UP&L should pay the royalty for the coal and then mine the coal at their [sic] discretion" (Staff Report, *supra* at 2). UP&L did not choose that course, however, and instead requested a mine plan modification that would permit it to delay mining the 2½ South block.

For all these reasons, we do not think BLM has demonstrated a violation of 43 CFR 3484.1(c)(7).

BLM's April 12, 1988, decision states: "To reiterate, the noncompliance involves the fact that UP&L did not follow the mine plan in that all equipment was removed and the 2½ South block area was vacated without an approved mine plan modification" (Decision at 2). BLM's Notice of Noncompliance cites 43 CFR 3481.1(b) as one of the regulations violated. That regulation requires an operator to conduct its operations "in accordance with * * * the approved resource recovery and protection plan." UP&L acknowledges it did not follow its mine plan, both in its May 8, 1987, letter to BLM's Area Manager and in its SOR. In its letter UP&L states: "Your local inspector has recently voiced, rightly so, some concern over the [2½ South] block of coal. * * * The submitted mine plan indicates that we would mine the coal in this 2½ South block this year. However, our long-term commitment to the longwall mining system * * * has caused us * * * to modify this plan." In its SOR, UP&L states: "For a short duration during 1987, UP&L may have inadvertently conducted operations in a manner technically inconsistent with its 1983 mine plan" (SOR at 7). We think it clear that by May 1987 UP&L had been in violation of 43 CFR 3481.1(b) for 4 months.[5]

There is, however, no authority for BLM to impose a monetary penalty on UP&L for deviating from its mine plan, as may be done for violations of regulations by lessees on Indian lands. *Cf.* 25 CFR 211.22.

[2] Nor can we find that the authority for requiring UP&L to pay royalty now for the portion of the coal BLM calculates it may be able to mine in the future can be inferred from the fact that under the Mineral Leasing Act BLM has authority to order cessation or initiate action to cancel the lease and forfeit the bond of a lessee if the lessee does not comply with a notice of noncompliance within the time limits it specifies. *See* 43 CFR 3486.3. UP&L failed to comply with its mine

[5] Because the principal issue in this case is whether BLM may require UP&L to pay royalties for the 2½ South block now, we need not decide whether the other regulations it cited, *see* note 1 *supra*, were violated and we intimate no opinion on those issues.

plan; it did not, however, fail to take action in accordance with BLM's December 7, 1987, notice of noncompliance. That notice required UP&L to contact BLM within 15 days to discuss how the matter could be settled. It did so, and the settlement was UP&L's March 1, 1988, proposed modification of its mine plan which BLM approved in its April 1988 decision.

There is an important difference between this situation and the one involved in the October 21, 1976, letter from GS Area Mining Supervisor to Peabody concerning the Deer Creek Mine. In that case Peabody had submitted a proposal to begin extraction of pillars. Its proposal showed it had left a 300-foot pillar rather than the 200-foot pillar required by the approved mining plan. Later it could not remove the excess coal because of mine safety requirements and roof pressure. Peabody told GS it "would rather pay royalty on the coal lost than attempt to mine it" and that was the condition for the approval of Peabody's proposal to begin extracting the pillars: "if you agree to a royalty charge of $4,128 for the lost coal * * * you have our permission to begin extracting pillars in the 2nd Left section," the GS Area Mining Supervisor wrote. In this case UP&L has not conceded that the coal is lost or volunteered to pay royalty rather than mine it, although it could have done so. Without such a concession, we do not believe BLM has authority to require payment of royalty now, either as a condition of approving the proposed modification (*see* 43 CFR 3482.2(c)(2)) or afterwards in its decision approving it.

We cannot agree with the Regional Solicitor's suggestion that we should remand the entire April 1988 decision so that BLM can consider whether to require UP&L to suspend its current operations and return to the 2½ South block now or whether to cancel the lease. As indicated above, issuing a notice for the cessation of operations and initiating proceedings to cancel a lease are sanctions for failure to take action in accordance with a notice of noncompliance, not for failure to comply with a mine plan or the regulations in 43 CFR Part 3480 in the first instance, as the Regional Solicitor suggests. 43 CFR 3486.3(a). UP&L has not failed to take such action, so these sanctions are not appropriate at this stage. We think the Regional Solicitor correctly acknowledges that BLM's April 1988 decision "recognized the reality of the situation." Presumably, BLM considered before making the decision to approve UP&L's pending modification whether to require UP&L to return to mine the 2½ South block and rejected the possibility as unreasonable. BLM's decision says "under the present circumstances * * * it is prudent to delay mining of the 2½ South block * * *" (Decision at 2-3). Presumably, too, before it approved the proposed modification, BLM determined that it would not violate the regulations or the terms of the leases or interfere with MER of the coal. *See* 43 CFR 3484.2(a)(2); 3480.0-5(a)(21). If BLM does determine that it should require UP&L to mine the 2½ South block sooner than 2015, it has the authority to require a revision of the mine plan to accomplish that. 43 CFR 3482.2(b)(2). Indeed, without a revision, UP&L

would not be in compliance with its current mine plan if it did mine the 2½ South block before then.

V. Conclusion

It appears from the record that, by deciding not to mine the 2½ South block as scheduled, removing the equipment, and then requesting to postpone mining it, first to 1996 and then until 2015 or later, UP&L has reduced the chances that it can recover as much of the coal as it could have before it took those actions. We agree with BLM that UP&L therefore appropriately bears the responsibility for compensating for the loss of the public's resource, if and to the extent it is lost.

Although we cannot find authority for BLM's imposition of royalty for the coal in the 2½ South block before it has been mined, we think BLM could realize its objective of protecting the public's interest in the resource by either or both of the two alternatives mentioned in its April 12, 1989, memorandum, *i.e.*, increasing the bonds on the leases and adding a stipulation to the leases when they are next readjusted to provide that if the 2½ South block is not mined the lessee will owe royalties for the coal that could have been recovered from it. *See Coastal States Energy Co.*, 70 IBLA 386, 394 (1983). A lease bond is designed to assure payment of all obligations under a lease and that all aspects of the mining operation other than reclamation operations under a permit on a lease are conducted in conformity with the approved mining plan. 43 CFR 3400.0-5(s). A lease bond is to be conditioned upon compliance with all terms and conditions of the lease and shall be furnished in the amount determined by the authorized officer. 43 CFR 3474.2(a). The amount of a bond is not limited by statute or regulation. *United States Fuel Co.*, 109 IBLA 398, 400 (1989). BLM may increase a lease bond to fulfill the purposes set forth in these regulations. *Utah Power & Light Co.*, 104 IBLA 284, 286-87 (1988); *Ark Land Co.*, 97 IBLA 241, 245 (1987).

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the part of the April 12, 1988, decision that requires Utah Power & Light Company to pay royalty for the 2½ South block now is reversed and remanded.

WILL A. IRWIN
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

EXXON CORP.

118 IBLA 221 Decided: *March 8, 1991*

Appeal from a decision of the Director, Minerals Management Service, affirming in part and reversing in part a decision of the Chief, Royalty Valuation and Standards Division, granting in part and denying in part a petition for transportation and processing allowances. MMS 84-0066-O&G.

Reversed in part, affirmed in part, and remanded.

1. Oil and Gas Leases: Royalties: Generally

In valuing sour gas for royalty purposes, MMS erred in denying a transportation allowance for all reasonable costs incurred by a lessee in dehydrating the gas outside the gas field prior to its transportation to a processing plant where manufacture and further dehydration occur.

2. Oil and Gas Leases: Royalties: Generally

When valuation of production is challenged, appellant must not merely show that the agency's methodology is susceptible to error, but that an error did, in fact, occur. The agency's limitation of a transportation allowance to 50 percent of the value of the products transported will not be disturbed in the absence of evidence demonstrating error.

3. Oil and Gas Leases: Royalties: Processing Allowance

Where a sour gas stream is processed by a lessee to yield methane, nitrogen, CO2, sulfur, and helium and MMS limits a processing allowance to two-thirds of the value of nitrogen, CO2, and sulfur and denies any deduction against the value of methane, a residue gas, the agency decision will be reversed upon a showing that the allowance does not approximate the lessee's reasonable costs of manufacture. For onshore production occurring prior to Mar. 1, 1988, no basis exists in these circumstances to deny a deduction against the value of residue gas.

APPEARANCES: Harlan C. Martens, Esq., Steven R. York, Esq., Midland, Texas, for appellant; Peter J. Schaumberg, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

Exxon Corp. has appealed from a decision of the Director, Minerals Management Service (MMS), dated January 7, 1986, affirming in part and reversing in part a decision of the Chief, Royalty Valuation and Standards Division (RVSD). The decision of the Chief, RVSD, dated October 29, 1984, granted in part and denied in part Exxon's petition of March 23, 1984, for processing (manufacturing) and transportation allowances. The allowances at issue are critical to determine the value

of production from gas wells operated by Exxon in the Graphite, Lake Ridge, and Fogarty Creek Federal Units, Sublette County, Wyoming.[1]

The Director's decision was expressly limited to gas produced from the Madison formation of the aforementioned units within the Riley Ridge gas field. The composition of this gas stream (described by the parties as "sour gas") is: carbon dioxide (65.4 percent); methane (22 percent); nitrogen (7.5 percent); hydrogen sulfide (4.5 percent); and helium (0.6 percent).[2]

Exxon sought but did not receive any offers to purchase this raw gas stream at the wells. As a result, appellant undertook to separate marketable products from the gas stream by constructing its Shute Creek gas processing plant some 40 miles south of the field. Although this plant was not onstream when the Director issued his decision, the Director acknowledged that Exxon's "selective separation of the various components of the Riley Ridge gas stream requires a series of relatively complex manufacturing processes" not encountered in separating most natural gas streams (Director's Decision at 2).[3]

Exxon's March 23, 1984, petition requested confirmation by RVSD that certain costs incurred by appellant would be deducted from the value of finished products to determine for royalty purposes the value of the raw gas stream.[4] The processing and transportation allowances at issue correspond to various operations by which this raw gas is changed into marketable products.

Exxon's raw gas is produced from unit wells, gathered in the field, and dehydrated at a central dehydration facility located outside the units. The dried gas stream is then transported from the dehydration facility through approximately 40 miles of feed gas pipeline to the Shute Creek gas processing plant. Separation of the gas stream into its components occurs at the plant, and sales of these components are

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[1]Exxon is the operator of these three units, which are located in the Riley Ridge area of Sublette County. The three units total 39,850 acres, of which 37,930 acres are Federally owned (Director's Decision, Jan. 7, 1986, at 1). Exxon holds leases covering approximately 37,512 net acres of state and Federal lands within these units (Statement of Reasons (SOR), Mar. 20, 1986, at 1). The Riley Ridge area contains an estimated 17.5 trillion cubic feet of gas at depths exceeding 15,000 feet (Director's Decision at 1).

[2]Director's Decision at 1. *See also Exxon Corp.* v. *Lujan*, 730 F.Supp. 1535, 1536 (D. Wyo. 1990), for a similar, though not identical, breakdown of Exxon's gas stream. Exxon describes this gas as "unique" and "complex" and MMS acknowledges it to be "atypical" (SOR at 1; Answer, June 9, 1986, at 9). The parties agree that the gas stream is "not high in hydrocarbons" and "not combustible" and for this reason does not provide a source of power for dehydration operations, *infra*. Director's Decision at 3; Correspondence, Mar. 23, 1984, from P. W. Henderson, Division Operations Manager, Production Department, Exxon, to Wm. Feldmiller, Chief, RVSD, at 2. Nearly three-quarters of the gas stream is inert material that lowers the Btu value of the stream. Request for Special Exceptions, Jan. 18, 1985, at 5.

[3]"Most natural gas streams contain predominantly hydrocarbons, some water, and relatively small quantities of various contaminants," the Director explained. "Essentially, these gas streams are marketed after a few simple processing steps designed to remove the water and contaminants" (Director's Decision at 2.)

[4]Exxon used this method of valuing the gas stream because no market for this sour gas could be found. By starting with the value of finished goods and deducting therefrom certain costs incurred to produce such goods, Exxon resolved to "work back" to the value of the production at the lease. This "work back" method is also referred to as the "net back" method of valuing production at the lease. *See Ashland Oil, Inc.* v. *Phillips Petroleum Co.*, 554 F.2d 381, 387 (10th Cir. 1977), *cert. denied*, 434 U.S. 921, *rehearing denied*, 434 U.S. 977 (1977), *on remand*, 463 F.Supp. 619 (N.D. Okla. 1978), *aff'd in part and rev'd in part*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) ("It is obvious that comparable sales or current market price is the best [evidence of value], and second would come the work-back method"). *See also* the definition of "net-back method" at 30 CFR 206.151 (1989).

then made at the first potential market. Collectively, Exxon refers to these various operations as its LaBarge Project.

Methane, the most valuable component of the gas stream, is sold at the tailgate of the plant, as are nitrogen and helium. CO2 is transported by pipeline for sale at Rock Springs and Bairoil, Wyoming. Sulfur is transported 16 miles by rail to Opal, Wyoming, where it is sold.

By its March 23, 1984, petition, appellant sought confirmation of allowances for the following costs: (1) the capital and operating costs of three dehydration facilities;[5] (2) the capital and operating costs of a pipeline to carry the dried gas stream from the dehydration facilities to the Shute Creek gas processing plant; (3) the capital and operating costs of the Shute Creek gas processing plant without limitation by reference to product; and (4) the capital and operating costs of a 16-mile railroad spur to transport sulfur from the Shute Creek gas processing plant to Opal.

By decision of October 29, 1984, RVSD denied Exxon's request to deduct the cost of its dehydration facilities and the cost of transporting the LaBarge gas stream to the Shute Creek gas processing plant. Such costs were not deductible, RVSD concluded, because a lessee is responsible for operational expenses imposed by environmental considerations.[6] An allowance for processing the gas stream at Shute Creek was approved, but these deductions could be applied only to "associated products" (all products except methane) and were limited to 66-2/3 percent of the value of all "associated products." No portion of processing costs could be applied to methane, which RVSD regarded as the "principal product" of the gas stream. Lastly, RVSD approved an allowance for costs incurred in transporting CO2, sulfur, and methane (after being placed in a marketable condition) from the Shute Creek gas processing plant to the point of first sale; this allowance was, however, limited to 50 percent of the value of each product so transported and sold.

Exxon appealed RVSD's holdings to the Director, MMS, and it is the Director's decision that we review here.[7] In this January 7, 1986,

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[5]Exxon's plan for three dehydration facilities, one in each of the Graphite, Lake Ridge, and Fogarty units, was changed in 1984. In place of three facilities, a single central dehydration facility was built at a lower elevation outside the units (SOR at 40). Despite that fact, in his 1986 decision the Director continued to refer to separate field dehydration units. *See* Director's Decision at 10.

[6]RVSD here refers to the fact that BLM and the U.S. Forest Service recommended that Exxon's gas processing plant not be located near the field.

[7]After Exxon's notice of appeal had been filed and briefing completed, MMS revised its royalty valuation regulations at 30 CFR Part 206. 53 FR 1230 (Jan. 15, 1988). These regulations applied prospectively to oil and gas produced on or after Mar. 1, 1988. 53 FR at 1184, 1230, and 1237 ("[T]hese rules do not have any retroactive effect"). Pursuant to these new regulations, Exxon filed a royalty valuation proposal with MMS seeking, *inter alia*, new maximum limits for transportation costs (75 percent of product values) and processing costs (95 percent of product values) and an extraordinary processing allowance against the value of methane. Also, Exxon advised the Board that discussions were occurring between it and MMS to settle all outstanding royalty valuation issues for the LaBarge Project, including the issues on appeal in IBLA 86-626. By order of Apr. 6, 1988, this Board suspended review of IBLA 86-626 to permit settlement talks to proceed.

On Oct. 19, 1988, the Assistant Secretary, Land and Minerals Management, issued an order that adopted as final for the Department certain findings and conclusions of RVSD responding to Exxon's royalty valuation proposal. The Assistant Secretary stated that the royalty valuation determination set forth in RVSD's findings and conclusions applied to gas produced on or after Mar. 1, 1988, the effective date of the new regulations.

Continued

decision, the Director stated that the Secretary's authority to require payment of royalties is found at section 17(c) of the Mineral Leasing Act, 30 U.S.C. § 226(c) (1982). This section conditions the grant of a lease "upon the payment by a lessee of a royalty of 12½ per centum in amount or *value of the production* removed or sold from the lease."[8] (Italics added.) Under sec. 17(c), considerable discretion is vested in the Secretary to determine what is the value of production (Director's Decision at 9).

In the exercise of this discretion, the Secretary has decided that royalties must be based on the value of the production *after* it has been placed in a marketable condition, the Director stated. As support for this proposition, the Director cited *California Co.* v. *Udall*, 296 F.2d

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In the Assistant Secretary's order of Oct. 19, 1988, the following conclusions, *inter alia*, were adopted as final for the Department:

"Dehydration is not considered a function of the transportation of the gas stream. Dehydration is clearly addressed at 30 CFR 206.158 [1988] as a cost to place production in a marketable condition and, therefore, is not to be borne by the lessor. Whether this step is performed in the field or in the processing plant, it must eventually be done before any product is sold. All marketed gas streams are dehydrated to eliminate corrosion and malfunction in gas handling systems. No gas purchaser will knowingly accept corrosive products into its system, hence, dehydration is essential to marketing. The LaBarge case, despite possibly high costs resulting from unusual composition, is no exception. The MMS has established precedent and procedure regarding the dehydration of gas, and the "Romere Pass" decision (*California Company v. Udall*, 296 F.2d 384 D.C. Circuit 1961) upheld these requirements. Also, the Director's decision dated January 7, 1986 (MMS-84-0066-O&G), determined that an allowance for dehydration costs should not be allowed for this project.

"This decision on the field dehydration facility is consistent with the Director's decision in MMS-84-0066-O&G which is on appeal to the IBLA in case number 86-626. If the IBLA reverses the Director in case number 86-626 and allows Exxon to deduct the costs of the field dehydration facility as a transportation cost, or if the IBLA affirms the Director but upon judicial review thereof a court in a final, nonappealable decision determines that Exxon may deduct the costs of the field dehydration facility as a transportation cost, then this decision also shall be so modified.

* * * * * * *

"The MMS has carefully considered the applicability of the extraordinary processing allowance for the LaBarge project and has concluded that approval of such an allowance would be premature at this time. The MMS is in the process of preparing a policy which will define the conditions (feed gas composition, processes involved, costs thresholds, etc.) under which an extraordinary allowance should be granted. Until such a policy is adopted, no extraordinary processing allowances will be approved. Further, a review of information related to certain other gas processing plants located in the Wyoming Overthrust Belt has revealed that the Shute Creek Plant is neither the most expensive to operate ($/Mcf throughput) nor was it the most costly to construct ($/Mcf capacity).

"At the time that a policy on extraordinary costs is adopted, MMS will consider whether any of Exxon's requests meet the criteria, including an allowance for the costs of the field dehydration facility.

"*Summary of LaBarge Valuation Methodology*

"In summary, the value, for royalty purposes, of each individual LaBarge product should be determined as follows:

* * * * * * *

"Processing costs, excluding costs of recompression and allocated by volume, should be deducted from the product tailgate value. The allowable processing costs should be allocated to all products, royalty-bearing and non-royalty-bearing, on the basis of that product's volume percentage in the sour gas feed stream (excluding C4 [methane]). No allowance may be taken for any product which is not royalty-bearing. The processing allowances for CO2 and nitrogen are limited to 95 percent of the tailgate value. For sulfur, the processing allowance is limited to 66-2/3 percent of the tailgate value of the sulfur.

"Pre-plant transportation costs allocated by volume, excluding the costs of dehydration and subsurface water disposal, should be deducted from the plant inlet values. The allowable pre-plant transportation costs should be allocated to all products, royalty-bearing or not, on the basis of that product's volume percentage in the sour gas feed stream (including C4 [methane]). No allowance may be taken for any product which is not royalty-bearing. Under no circumstances shall the combined pre-plant and post-plant transportation allowance be more than 50 percent of any product's sales value on the basis of a selling arrangement."

Thereafter, by letter dated May 16, 1989, Exxon requested that the Board return the appeal to active status. MMS suported that request. As a result of the 1988 amendments to 30 CFR Part 206 and the Assistant Secretary's order of Oct. 19, 1988, our review of the Director's decision is limited to production commencing with first production and extending to and including Feb. 29, 1988. With respect to production occurring after Feb. 29, 1988, the sole effect of the instant decision is to require modification of the Assistant Secretary's order denying a transportation allowance for the cost of constructing and operating Exxon's central dehydration facility.

[8]Sec. 17(c) has been *amended* by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, P.L. 100-203, § 5102(b), 101 Stat. 1330-256 (1987). Language underscored above is, however, preserved intact.

384, 387 (D.C. Cir. 1961), which states: "The premise for the Secretary's decision [valuing production without an allowance for compression or dehydration] was that, since the lessee was obliged to market the product, he was obligated to put it in marketable condition; and that the 'production' was the product *in marketable condition.*" (Italics added.) As a corollary to this obligation to market the product, the Director held that the cost of placing production in a marketable condition must be borne by the lessee.

Applying *California Co.* v. *Udall* to the facts at hand, the Director denied Exxon's request for an allowance for costs of dehydrating the LaBarge gas stream at the dehydration facilities. This holding relied upon a finding, attributed to Kuntz, *The Law of Oil and Gas* § 40.5 (1967), that dehydration is part of the task of marketing the production. Such an allowance was improper, the Director concluded, irrespective of whether dehydration occurred in the field, at a processing plant or, as here, at both sites due to environmental considerations dictating the siting of the Shute Creek gas processing plant.

As noted above, RVSD denied Exxon's request for an allowance for costs incurred in transporting the LaBarge gas stream to the Shute Creek gas processing plant. In this one respect, the Director reversed RVSD and held that appellant was entitled to such a transportation allowance. This action was appropriate, the Director stated, because a lessee is entitled to an allowance based on the cost of transporting production to the nearest market. The record was clear that the nearest market for methane was at the tailgate of the gas processing plant (Director's Decision at 10).

Exxon's transportation allowance was, however, limited to "50 percent of the separate value of the leased [9] products at the nearest competitive sales point" (Director's Decision at 10). Conservation Division Manual (CDM) § 647.5.3E was cited by the Director in support of this limitation.[10]

Addressing RVSD's decision to grant Exxon a processing allowance up to 66⅔ percent of the value of "associated products," the Director characterized Exxon's appeal as a request for an allowance "based on (a) ⅔ of the value of the additional products, plus (b) ⅔ of the value of methane" (Director's Decision at 11). Such an allowance is impermissible, the Director held, because methane is the most valuable single component of the gas stream, and under the circumstances the separation of methane from the other products in the gas stream "must be regarded as part of the process of conditioning the production into a marketable product." *Id.* The costs of such conditioning must be

[9] Although helium is a product of the Shute Creek gas processing plant, its value is not considered by MMS in valuing the LaBarge gas stream. Helium is not a leasable mineral. Its production and sale here by appellant is pursuant to a separate agreement with the United States.

[10] As to RVSD's limitation of a transportation allowance for costs of transporting CO2 and sulfur to the point of first sale (Rock Springs, Bairoil, Opal), the Director noted that Exxon purported to reserve the right to appeal the application of this limitation insofar as it prevented recovery of the royalty share of transportation costs (Director's Decision at 7).

borne by the lessee, the Director concluded, and no deduction based on the cost of processing methane is, therefore, appropriate.

In support of this holding, the Director cited *United States* v. *General Petroleum Corp.*, 73 F.Supp. 225 (S.D. Cal. 1946), *aff'd sub nom. Continental Oil Co.* v. *United States*, 184 F.2d 802 (9th Cir. 1950), for the proposition that where natural gas is processed to yield products in addition to methane, a deduction from royalty value must be allowed as compensation for the cost of producing such *additional* products. The Department's consistent practice has been to apply processing costs against the value of such additional products up to a maximum of 66⅔ percent (Director's Decision at 11).

As further support, the Director looked to 43 CFR 3103.3-1(c) (1986), which states: "In determining the * * * value of gas and liquid products produced, the * * * value shall be net after the cost of manufacture. The allowance for cost of manufacture may exceed two-thirds of the * * * value of any product only with the approval of the Secretary." The Department's construction of this regulation to exclude the value of gas in calculating a processing allowance has been upheld in *United States* v. *General Petroleum Corp., supra*, the Director stated.[11]

Exxon's timely appeal of the Director's decision focuses upon three issues: the denial of a transportation allowance for costs of dehydration at the central dehydration facility; the limitation of a transportation allowance to 50 percent of the value of products transported; and the limitation of a processing allowance to 66⅔ percent of the value of lease products manufactured, excluding methane.

The gist of Exxon's argument to this Board may be expressed in a single sentence:

> The Government has ignored the basic principle that determines the questions now on appeal: the Government's equity in leased oil and gas is confined to the raw material or the value of the raw material *at the lease* and does not extend to the value added by the costs of *manufacturing* or costs of *transportation* to the point of first market. [Italics added.]

(SOR, Mar. 20, 1986, at 6).

As support for this principle, appellant calls our attention to the Department's 1926 regulations, issued 6 years after enactment of section 17(c), *supra*. Section 4(d) of these regulations addresses a lessee's royalty obligation for natural-gas gasoline, a product extracted from natural gas produced on the leasehold:

> Natural-gas gasoline * * * is a *manufactured* product. The value of this product is contingent upon the value of the raw material and the cost of its manufacture. *The Government does not wish to collect royalty on that part of the value which is derived from the cost of manufacturing, inasmuch as the Government's equity is confined to the*

[11] On Jan. 18, 1985, appellant asked the Secretary to grant special exceptions to RVSD's decision. The Director stated that a separate response by the Secretary was not anticipated, given the similarity of Exxon's request and its appeal from the RVSD decision.

value of the raw material involved. In computing royalty on natural-gas gasoline the value of the raw gasoline in the natural gas as produced is assumed to be one-third the value of the marketable natural-gas gasoline extracted from such gas, the remaining two-thirds being allowed to the lessee for the cost of manufacture. [Italics added.]

52 L.D. 1, 11 (1926).

Shell Oil Co., 52 IBLA 15, 88 I.D. 1 (1981), applied this same principle, Exxon states, in upholding a transportation allowance for pipeline costs incurred in transporting oil, produced offshore, to an onshore market. At issue in this case was the value added to offshore oil by its *transportation* onshore, appellant maintains.

Specifically, Exxon charges that the Director erred in denying an allowance for costs incurred in dehydrating the LaBarge gas stream. The central dehydration facility is an integral part of the raw gas transportation system, appellant contends, and its costs are costs incurred in transporting gas.

Exxon states that it located its Shute Creek gas processing plant approximately 40 miles from the gas field at the recommendation of BLM and the Forest Service.[12] In the field, the LaBarge gas stream is highly corrosive because of the predominance of CO2 and hydrogen sulfide therein, especially in the presence of water vapor. Ordinarily, such a raw acid gas stream is not transported long distances in its natural state, appellant notes.[13]

Having sited its plant at Shute Creek, Exxon explains, it had two options for transporting the sour LaBarge gas stream from the field to Shute Creek. It could construct a pipeline of exotic materials capable of transporting the highly corrosive LaBarge gas, or it could dehydrate the gas and then transport it through a relatively conventional pipeline. Exxon concluded that the first option was not reasonable or practicable due to the cost, scarcity of materials, and likelihood of operational problems, *e.g.*, pipeline blocking caused by formation of hydrates in cold weather. Had it selected the first option, Exxon maintains, the costs would have been deductible under the rule in *Shell Oil Co., supra.*

Appellant argues:

Because Exxon accomplished the same and only purpose–the transportation of the production of the field to the remote point of first market–at a lower cost, more safely and with decreased risk of interrupting manufacturing operations by constructing a dehydration facility and a less expensive pipeline–the MMS denied a deduction for the costs of dehydration on the grounds that dehydration is always "considered" to be for marketing purposes. This irrebuttable and procrustean rule is not based on reason, logic or the authorities cited by MMS. [14]

In support of its position that dehydration should be regarded as a transportation cost (rather than a marketing cost), Exxon notes that RVSD found that "the field dehydration system is for transportation purposes *only*."[15] (Italics added.) RVSD further found, in denying an

[12]Exxon's Request for Special Exceptions, Jan. 18, 1985, at 5.
[13]*Id.*; *see also* affidavit of Daniel R. Marlow, LaBarge Operations Manager, SOR at Exh. F.
[14]SOR at 41.
[15]SOR at 41, quoting from RVSD Findings and Conclusions, Oct. 29, 1984, at 9.

allowance for dehydration costs, that "water removal here is for pipeline safety purposes (to prevent corrosion)," Exxon states.

Appellant argues that its dehydration facility would have been unnecessary had its gas processing plant been located in the field, and to this end it offers the affidavit of Daniel R. Marlow, LaBarge Operations Manager. Referring to the Shute Creek gas processing plant as the Manufacturing Facility, Marlow states:

> If the Manufacturing Facility had been constructed in the field, the cost of the transportation required dehydration could have been eliminated. If such dehydration had been eliminated, the cost of the Manufacturing Facility would *not* have been increased and the water content requirements of all purchase contracts could have been satisfied by the manufacturing process. [16] [Italics added.]

Marlow's mention of the manufacturing process here refers to the fact that dehydration also occurs after the gas stream has reached the Shute Creek gas processing plant. Initial dehydration at the central dehydration facility is, in fact, redundant, Marlow explains:

> [T]he dehydration that occurs as an integral part of the manufacturing processes at Shute Creek * * * requires the gas to be virtually 100% dry (.01 lbs. water/mcf) before methane can be liquefied and removed, as any water would freeze at the -310°F operating temperatures and cause the shutdown of the Manufacturing Facility. Exxon's methane sales contract, by contrast, calls for a maximum of 5 lbs. water/mcf--500 times the amount necessitated by the manufacturing process. [17]

Exxon notes that RVSD held that costs associated with dehydration at the Shute Creek plant are deductible processing costs.[18] RVSD did not treat these costs as a nondeductible cost of marketing, appellant states, because it recognized that the purpose of dehydration at Shute Creek is manufacture. The purpose of the central dehydration facility--transportation--is equally significant and may not be ignored by the Director, Exxon contends.

Appellant also calls our attention to *Marathon Oil Co.* v. *United States*, 604 F.Supp. 1375 (D. Alaska 1985), *aff'd*, 807 F.2d 759 (9th Cir. 1986), *cert. denied*, 480 U.S. 940 (1987), a case validating MMS' use of the net back method to value gas produced by Marathon in Alaska, liquefied there, and shipped to Japan for sale. In that case, Exxon explains, Marathon unsuccessfully challenged an MMS order that called for Marathon to establish its "gross proceeds" by deducting *actual* costs of liquefaction and tankering from its landed sales price in Japan.

"Gross proceeds," undefined by regulation, is used at 30 CFR 206.103 (1987) in the following context:

> § 206.103 Value basis for computing royalties.

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[16]SOR at Exh. F; *see also* letter from M. W. Andrews of Exxon to Wm. Feldmiller, Aug. 29, 1984 ("Dehydration would not be required if the plant was located closer to the field").

[17]SOR at Exh. F; *see also* Andrews letter of Aug. 29, 1984, *supra* note 16 ("There is no incremental savings in the Selexol unit due to initial dehydration in the field"). Exxon also notes that partial *re*hydration of the sour gas stream is necessary in order for the initial Selexol process to function properly. RVSD Findings and Conclusions at 7, adopted by the Assistant Secretary, Land and Minerals Management, on Oct. 19, 1988.

[18]SOR at 42, quoting from RVSD Findings and Conclusions, Oct. 29, 1984, at 11.

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.]

Appellant contends that *Marathon* and 30 CFR 206.103 (1987) require MMS to determine the value of the LaBarge gas stream by using a true net back or gross proceeds method, *i.e.*, by deducting Exxon's actual costs of manufacture and transportation from the value of its finished products.

Exxon analogizes Marathon's *liquefaction*, which MMS recognized as a deductible cost of transportation, to the *dehydration* performed by appellant at its central dehydration facility. In each case, appellant contends, a cost not inherently a transportation cost is incurred for the sole purpose of transporting product to the nearest market, a market remote from the field.

Replying to Exxon's argument that the Government's equity in leased oil and gas is confined to the raw material or the value of the raw material *at the lease*, MMS states that it does not take issue with the proposition that Exxon is entitled to an allowance for manufacturing or transportation. MMS asserts, however, that it may reasonably limit such allowances, particularly so when such limitations reflect well-established principles.

It is well established by *California Co.* v. *Udall*, MMS states, that the Secretary has the authority to define "production," as that term is found in section 17(c). *California Co.* v. *Udall* upheld the Secretary's authority to define "production" as *marketable* gas and not merely raw product, MMS explains.

At issue in *California Co.* v. *Udall* was whether the Secretary properly denied a Federal operator a deduction from its contract price (12 cents/mcf) for costs of compressing gas (4.5 cents/mcf), removing excess water (0.25 cents/mcf) therefrom, and gathering (0.3 cents/mcf) in valuing production for royalty purposes. Resolving this issue in the affirmative, the U.S. Court of Appeals for the District of Columbia Circuit stated:

There is no question as to the Secretary's authority to require the payment of 12½ per cent royalty on the "value of the production." The statute so provides. The parties agree that "value" means fair market value. The heart of this part of the controversy is the meaning of "production." Does it mean the raw product as it comes from the well, no matter what its condition? Or does it mean that product readied for the market in and to which it is being sold?

* * * * * * *

The premise for the Secretary's decision in the case before us was that, since the lessee was obliged to market the product, [19] he was obligated to put it in marketable condition; and that the "production" was the product in marketable condition. Theoretically, any gas–any "production"–is "marketable." We can assume that, if the price were low enough to justify capital expenditures for conditioning equipment, someone would undertake to buy low pressure gas having a high water and hydrocarbon content. A lessee who sold unconditioned gas at such a price would, in a rhetorical sense, be fulfilling his obligation to "market" the gas, and by thus saving on overhead he might find such business profitable. There is a clear difference between "marketing" and merely selling. For the former there must be a market, an established demand for an identified product. We suppose almost anything can be sold, if the price is no consideration. In the record before us there is no evidence of a market for the gas in the condition it comes from the wells. The only market, as far as this record shows, was for this gas at certain pressure and certain minimum water and hydrocarbon content. [Footnote omitted.]

296 F.2d at 387-88.

Exxon's situation is not unique, MMS argues, because it is common for gas produced offshore to be dehydrated at or near the lease prior to pipeline transportation onshore to a processing plant. The reason for such dehydration, prevention of pipeline corrosion and transmission problems, is the same as Exxon's, MMS states; moreover, dehydration also occurs in such cases at onshore gas processing plants, as at Shute Creek. The agency uniformly treats such dehydration costs on or near the lease as costs of marketability and lease operations, MMS states, and disallows deductions therefor in determining royalty values or transportation allowances.

Responding to appellant's reliance upon *Marathon Oil Co.* v. *United States, supra*, MMS argues that Exxon's situation is clearly distinguishable from that of Marathon. Costs of liquefaction incurred by Marathon were not costs of lease operation or marketability, but were solely costs of transportation, MMS states.

[1] We find merit in Exxon's position. Case law makes clear that if there is no open market in the place where an article would ordinarily be sold, then the market value of such article in the nearest open market, *less cost of transportation to such open market*, becomes the market value of the article in question. *United States* v. *General Petroleum Corp.*, 73 F.Supp. at 263. Deduction of such cost is recognized by regulation 30 CFR 206.103 (1987), *quoted supra*, as one of the "relevant matters" that MMS must consider in valuing production. *See Conoco, Inc.*, 110 IBLA 232, 242 (1989), and cases cited therein.

No market exists for the LaBarge sour gas stream in the field, and only after transportation and manufacture does a market exist for products of the gas stream. For methane and nitrogen, that market is at the tailgate of Exxon's Shute Creek gas processing plant, whose

[19] *See* 30 CFR 206.100 (1986) and 43 CFR 3162.7-1 (1986) for a similar duty affecting Exxon.

situs was chosen by Exxon to satisfy environmental concerns and to more economically bring plant products to market.[20]

We believe it important that the Director consider the *purpose* of dehydration in determining whether an allowance is proper. In the instant case, dehydration at the central dehydration facility serves only one purpose: transportation. RVSD recognized this fact. Had the gas processing plant been closer to the field, the record shows, the central dehydration facility would not have been built. Had the central dehydration facility not been built, the cost of the Shute Creek gas processing plant would not have increased.

California Co. v. *Udall* is not contrary to appellant's position. As Exxon points out, the Court of Appeals was careful to state that no transportation or manufacturing costs were at issue there. In that case, the Federal operator had contracted to sell gas produced in its natural state from wells in the Romere Pass field, Louisiana, such gas to be suitable for pipeline transmission. The contract also specified maximum water content and liquefiable hydrocarbons and called for delivery at pipeline pressure.[21] Because some of the gas produced in its natural state contained these substances in excess of the maxima, it was necessary to remove these excesses in order to put the gas in a condition suitable for pipeline transmission. Some 30 percent of the gas required compression. The gas was conditioned by the operator and delivered to the purchaser in the field within a short distance of the wells. The gas was not transformed by a manufacturing process. 296 F.2d at 386-87.

The compression and dehydration deduction denied to the operator in *California Co.* v. *Udall* represented costs which the market, *i.e.*, the operator's contract, required to be incurred. In that case, as here, no dispute existed that a lessee was obliged by regulation to market its production. This duty was the underlying premise, the Court of Appeals found, for the Secretary's conclusion that the lessee was obligated to put its production in marketable condition. Having so concluded, the court described as reasonable the Secretary's definition of "production" as gas conditioned for market. Implicit in the court's opinion was the notion that a lessee who is obliged to put its production in marketable condition cannot look to its lessor for an allowance for conditioning costs.[22]

Exxon's dehydration of the LaBarge gas stream at its central dehydration facility was not performed to satisfy market specifications. Indeed, the record is plain that no market existed for the dried LaBarge gas stream, even at Shute Creek. Nor did dehydration at the

[20] Exxon's Request for Special Exceptions, Jan. 18, 1985, at 7 and 12.

[21] The contract price was based on a gas that would not contain in excess of 0.007 lbs. water/mcf and in excess of 0.2 gallons liquefiable hydrocarbons/mcf. This gas would be delivered to the buyer's pipeline at a pressure selected by the buyer but not to exceed 800 lbs./sq. inch. *California Co.* v. *Seaton*, 187 F.Supp. 445, 446 (D.D.C. 1960), *aff'd*, 296 F.2d 384 (D.C. Cir. 1961). By way of contrast, dehydration at Exxon's gas processing plant reduced water content to 0.01 lbs. water/mcf, and its sales contracts called for a maximum of 5 lbs. water/mcf.

California Co. did not contend that costs incurred to separate liquefiable hydrocarbons from the marketed gas were deductible.

[22] *But see* 3 Kuntz *The Law of Oil & Gas* § 40.5 (1967) at text accompanying footnote 40.

central facility remove the need for further dehydration during the manufacturing process or lessen the costs of the Shute Creek gas processing plant.

To read *California Co.* v. *Udall* as precluding a deduction of dehydration costs in all circumstances is error. In *Phillips Petroleum Co.*, 109 IBLA 4 (1989), this Board reached a similar conclusion involving a deduction of gathering and compression costs. Phillips incurred gathering and compression costs in delivering wet gas from its wells to its processing plants outside the field. Relying on *California Co.* v. *Udall*, MMS contended that such costs were incidental to marketing and, therefore, not deductible in valuing production. The Board disagreed and held that gathering and compression costs were not expenses incidental to marketing within the meaning of 30 CFR 206.106(b).[23] While acknowledging that gathering and compression costs were not deductible as a manufacturing allowance, *The Texas Co.*, 64 I.D. 76 (1957), the Board held that a deduction may be available for some of these expenses as a transportation allowance. To the extent that Phillips had incurred costs in moving wet gas from the field to its processing plants in order to extract liquid products and thereafter market production, MMS was directed to determine the amount of those expenses which are deductible as a transportation allowance.

Exxon's *purpose* in dehydrating the LaBarge gas stream at its central dehydration facility should have received greater consideration by the Director. Such considerations are not foreign to the Department, as revealed by the CDM in a different context at CDM § 647.7.3C:

> In determining allowable costs, distinction must be made between: (1) expenditures by the operator for conditioning the products for market, which is an obligation of the operator and is not an allowable cost, and (2) expenditures directly related to the extraction (manufacture) of the product or products. For example, an operator might expend 2 cents per Mcf to raise the pressure of wet gas on the lease, for the *dual purpose* of providing for the efficient *extraction* of gasoline, and for the *delivery* of the dry gas residue at a pressure sufficient to enter the purchasers' gas shipping line. In such a case, depending on actual conditions, only 1 cent per Mcf for boosting might be included in the allowable expenditures for extraction of the gasoline, the other cent being an obligation of the operator to put the residue gas in marketable condition. [Italics added.]

The Director's decision must be reversed insofar as it denied Exxon a transportation allowance for dehydration. We hold in this case that an allowance for all reasonable costs of dehydration at the central dehydration facility should have been recognized.

[2] Our decision to recognize a transportation allowance for all reasonable costs of dehydration at the central dehydration facility raises the issue whether the Director properly limited the transportation allowance that he granted based on the pipeline costs of

[23] This regulation states in part: "[N]o allowance shall be made for boosting residue gas, or other expenses incidental to marketing."

transporting the LaBarge gas stream to Shute Creek. As noted above, this allowance was limited to 50 percent of the value of leased products at the nearest competitive sales point.

The Director relied upon CDM § 647.5.3E to support this 50-percent limit. This provision states in part: "Under no circumstances should transportation costs exceed 50 percent of the product's fair market value at the nearest competitive sales point." Although this limit is set forth without qualification, RVSD informed Exxon in its October 29, 1984, decision that if Exxon believed that relief from the 50-percent ceiling was justified by convincing information, it might consider filing "an application" with the agency.

Exxon challenges this 50-percent limit and argues that its actual transportation costs in future years may well exceed 50 percent of the value of CO2, methane, and sulfur. In support of this challenge, appellant calls our attention to *Supron Energy Corp.*, 46 IBLA 181 (1980), wherein this Board stated that the CDM does not have the force of law.

Supron considered, *inter alia*, whether CDM § 647.7.3E(9) properly limited a permittee's deduction of general and administrative overhead costs to 10 percent of other operating and maintenance costs. The Board stated that although the Conservation Division Manual does not have the force of law, a decision based upon it would not be disturbed in the absence of figures clearly showing that 10 percent was an inadequate deduction.

MMS defends its 50-percent limit by reiterating that the Secretary is authorized by statutes, regulations, leases, and cases construing these authorities to establish minimum royalty values. This limitation on Exxon's transportation deduction is simply a means of establishing a minimum royalty value, MMS contends. While the Secretary may relax this policy, MMS states, Exxon has made no showing why this regularly applied policy should be waived here.

When valuation of production is challenged, an appellant must not merely show that the methodology is susceptible to error, but that an error did, in fact, occur. *Phillips Petroleum Co.*, 109 IBLA at 7. Appellant suggests that the 50-percent limitation may deny it legitimate deductions, but has assembled no data in support of its concern. In the absence of such data, we will not disturb the 50-percent limit imposed by the Director and RVSD on pipeline costs. *See Supron Energy Corp.*, 46 IBLA at 196.[24]

[3] A major part of the SOR focuses upon the Director's decision to limit Exxon's processing allowance to 66⅔ percent of the value of "such additional products," *i.e.*, nitrogen, CO2, and sulfur, and to deny any such deduction against the value of methane. The basis for

[24] In the Findings and Conclusions adopted by the Assistant Secretary, Land and Minerals Management, on Oct. 19, 1988, RVSD states at 21: "When allowed pre-plant transportation costs, properly allocated by *volume*, are combined with post-plant transportation costs, the 50 percent allowance limitation (as applied against sales value) is not met for any product. Therefore, MMS concludes that an exemption to this limit is not warranted." (Italics added.) This conclusion by RVSD responded to Exxon's royalty valuation proposal calling for, *inter alia*, allocation of pre-plant transportation costs on the basis of *value*.

Exxon's appeal of this ruling has been set forth *supra*: the Government's equity in leased gas is confined to the value of raw material, and hence the Government is owed royalty only on the reasonable value of the LaBarge gas stream at the lease. Both the Director and appellant rely on the same case for their contrary positions, *United States* v. *General Petroleum Corp., supra.*

Appellant refers to *United States* v. *General Petroleum Corp.* as the Kettleman Hills case because this controversy focused upon oil and gas produced from the Kettleman Hills field in California.[25] At issue was the Secretary's authority to establish minimum limitations upon valuations of oil and gas for royalty purposes. 73 F.Supp. at 220. Gas produced from the Kettleman Hills field was processed in an extraction plant to yield natural gasoline and dry residual gas (residue gas). At the LaBarge Project, methane is regarded as a residue gas upon extraction of nitrogen, CO2, hydrogen sulfide, and helium from Exxon's sour gas stream.

Exxon states that *United States* v. *General Petroleum Corp.* upholds section 4(d) of the 1926 regulations ("The Government does not wish to collect royalty on that part of the value which is derived from the cost of manufacturing") and provides that an allowance *must* be made for manufacturing costs in order to determine the value of gas as produced at the lease. In support, it quotes from 73 F.Supp. at 254:

> Natural-gas royalties are payable on the gas as it is produced at the well. It is the value of the gas which must be determined. Ordinarily the gas as produced contains a certain amount of "casing-head" gasoline. If the gas is processed in an extraction plant, two products result, the natural gasoline and dry residual gas. *Since part of the value of the gasoline and dry gas so manufactured is attributable to the extraction process, allowance must be made for the manufacturing costs in order to arrive at the value of the gas as originally produced.* [Italics added.]

Appellant charges that the Director's reliance upon *United States* v. *General Petroleum Corp.* to limit a manufacturing allowance to the costs of producing "such additional products" is misplaced. Nowhere does the district court use such language, Exxon states. Two products resulted from the Kettleman Hills gas because "manufacture of the liquids [natural gasoline] necessarily simultaneously manufactured the dry gas" (SOR at 27). The cost of manufacture there, two-thirds of the value of liquids, was the cost to the lessee of manufacturing *both* products, Exxon argues. "As a matter of administrative convenience and reflecting historical and business realities *100%* of the

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[25]The Senate Committee on Public Lands and Surveys noted that "Kettleman Hills * * * is regarded as one of the world's greatest oil and gas fields." S. Rep. No. 1087, 71st Cong., 2d Sess. 3 (1930). Competitive offset drilling there caused natural gas to be wasted in an amount reaching a "daily total of 400,000,000 [cubic] feet." *Id.* at 2. To avoid this waste, Congress passed the Act of July 3, 1930, ch. 584, 46 Stat. 1007, authorizing Federal lessees, who occupied 30 percent of the area of the field, to participate in a cooperative (unit) plan for rational development and operation of the field. Such a plan was formed, and lessees transferred their operating rights to a single body, the Kettleman North Dome Assn. *United States* v. *General Petroleum Corp.*, 73 F.Supp. at 231-32.

manufacturing costs were defined as two-thirds of the value of liquids."[26] *Id.* (Italics added.)

Exxon's challenge to the Director's manufacturing allowance relies also on *Marathon Oil Co.* v. *United States, supra*, which case affirmed MMS' authority to require Marathon to recalculate the value of its production. Marathon had been calculating value based on the Phillips formula, which provided that Marathon pay royalty on 36 percent of the landed price per Mmbtu of liquefied natural gas in Japan (and effectively granted Marathon an allowance equal to 64 percent of the landed price per Mmbtu for post-production costs). When the price of gas rose (thereby increasing Marathon's allowance), MMS ordered Marathon to recalculate the value of production by subtracting certain *actual* costs, instead of a fixed percentage (64 percent), from the sales price. 807 F.2d at 762.

Exxon argues that MMS should do here what it did in *Marathon*:

> [I]t replaced the inaccurate formulaic definition of liquefaction and transportation costs by a "true gross proceeds" method. The method for determining true gross proceeds was described with admirable accuracy and clarity as deducting from the contract value or gross proceeds "*all* costs and expenses incurred in processing, storing and transporting the products between the point of sale and the lease." [27] [Italics added.]

(SOR at 21). The Kettleman Hills case and 30 CFR 206.103 require this same result, appellant states.

If the Director's formula limiting a manufacturing allowance to 66⅔ percent of the value of nitrogen, CO2, and sulfur is used, Exxon predicts that only 43.5 percent of its actual manufacturing costs for 1987 will be deductible (SOR at 20).

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[26] In support, appellant offers an historical sketch of the dry gas market, noting that in 1920 dry gas produced was frequently without value due to a lack of means to transport it to market. Gas that contained hydrocarbon liquids in sufficient quantity had value to the extent of its "natural gasoline" or "casing-head gasoline" content (SOR at 26). Sec. 16 of the Department's 1920 regulations reflected this fact, Exxon states, by valuing casing-head gas at one-third of the value of marketable casing-head gasoline extracted therefrom. 47 L.D. 552, 555 (1920).

Because the dry gas manufactured was assumed to be a waste product, the cost of manufacture was defined reasonably as a percentage of the value of the *liquids* removed. This assumption was consistent with the typical gas processing agreement under which a lessee would "pay" in kind two-thirds of the liquids removed as compensation to the processor and retain one-third of the liquids and all of the dry (residue) gas (SOR at 26-27).

Sec. 4(d) of the Department's 1926 regulations, quoted *supra*, reflected an increasing potential market for manufactured residue gas, Exxon states. This regulation valued the raw gasoline in the natural gas as produced at one-third of the value of the marketable natural-gas gasoline, the remaining two-thirds being allowed to the lessee for the cost of manufacture. 52 L.D. at 11. If a market existed for the dry residual gas from the natural-gas gasoline plant, royalty would also be due on this product (SOR at 28).

From the above facts, Exxon concludes:

"In that context, of course, it is perfectly reasonable to collect royalty on 100% of the value of the residue gas because the *entire* cost of *its* manufacture had already been deducted from the value of the liquids. Any increase in the value of residue gas returned to the lessee by a gas processor increased the actual net realization of the lessee. The deduction was only *defined* as a percentage of liquids removed as the liquids were originally the most, indeed the only, valuable product of the gas stream and to reflect the manner in which the lessee typically paid for the processing. The intent and result was to deduct the entire cost of manufacturing as required by the nature of the Government's limited equitable interest in the leased gas." (SOR at 28 (italics in original)).

To like effect is Exxon's Exhibit L at 2, a letter to the Secretary, dated Jan. 29, 1947, wherein the Director, Geological Survey, states at page 2: "The 1936 regulations [calling for royalties on one-third of all casinghead or natural gasoline (or the lessee's portion if greater) and 100 percent of dry residue gas], however, are based on the premise that the *entire cost of manufacturing* will be reflected in the portion of the liquids retained by the processor" (italics added).

As to the administrative convenience of the two-thirds allowance provided by section 4(d) of the 1926 regulations, appellant refers to the Acting Secretary's net realization order of June 7, 1937, 56 I.D. 462, 464, which states in part: "The two-thirds allowance formula has been used because of the simplicity of its administration and because its basis has generally been in accordance with the facts."

[27] Language quoted by appellant in the final sentence appears in correspondence, dated Feb. 28, 1983, from the Chief, RVSD, to Marathon Oil Co. (Exh. D of Appellant's SOR).

MMS reads the Kettleman Hills case and *Marathon* as recognizing the Secretary's authority, and considerable discretion, to establish the value of production for royalty purposes.[28] Indeed, MMS points out that *Marathon* cited the Kettleman Hills case in construing 30 CFR 206.103, *supra*:

"The thrust of the regulation is that the value for royalty computation purposes set by the [MMS] Associate Director must be reasonable. The only specific requirement in the regulation is that this value be no less than 'gross proceeds.' Thus this regulation vests considerable discretion in the Associate Director to decide what the 'reasonable value' for royalty purposes shall be." [Footnote omitted.]

(Answer at 7-8, *quoting from* 604 F.Supp. at 1382). Courts have long recognized the Secretary's authority under the statutes, leases, and regulations to establish a value greater than the lessee's proceeds, MMS notes.

MMS acknowledges that Exxon's processing will enhance the value of the LaBarge gas stream and that a reasonable allowance is warranted. The key issue, MMS states, is whether the agency has established a reasonable method for computing the allowance. Exxon's processing allowance is consistent with the policy behind 30 CFR 206.106 (1987),[29] which grants an allowance for manufacturing "wet gas" not to exceed two-thirds of the value of the liquid products and provides no deduction against the value of the dry residue gas[30](Answer at 14-15). This two-thirds formula has been in the rules since 1920, MMS states, and has been upheld in several decisions, including the Kettleman Hills case.

Regardless of the historical antecedents of the two-thirds formula, MMS argues, it is too late in the day for Exxon to now argue that the agency may not limit processing allowances to an amount less than the actual costs to the lessee. MMS observes that Exxon devotes considerable attention to the proposition that determining gross proceeds involves deducting all processing costs. Exxon's reliance upon *Marathon* for the argument that value for royalty purposes equals gross proceeds is, however, misplaced, the agency states. *Marathon* upheld the proposition that value for royalty purposes cannot be less

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[28]Exxon's lease is to the same effect at sec. 2(d)(2):

"It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas, 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."

[29]This regulation states in part:

"A royalty as provided in the lease shall be paid on the value of one-third (or the lessee's portion if greater than one-third) of all casinghead or natural gasoline, butane, propane, or other liquid hydrocarbon substances extracted from the gas produced from the leasehold. The value of the remainder is an allowance for the cost of manufacture, and no royalty thereon is required. The value shall be so determined that the minimum royalty accruing to the lessor shall be the percentage established by the lease of the amount or value of all extracted hydrocarbon substances accruing to the lessee under an arrangement, by contract or otherwise, for extraction and sale that has been approved by the Associate Director."

[30]"Wet gas" is natural gas containing liquid hydrocarbons in solution, which may be removed by a reduction of temperature and pressure or by a relatively simple extraction process. "Dry gas" is natural gas which does not contain dissolved liquid hydrocarbons. 8 Williams & Meyers, *Oil & Gas Law* 1076, 283 (1987).

than gross proceeds, MMS contends. Thus, the gross proceeds measure of value is a minimum, not a maximum (Answer at 16).

MMS argues that if value were to be *at* gross proceeds, no discretion would have been allowed by 30 CFR 206.103 or recognized by *Marathon*. Limiting Exxon's processing allowance is simply an exercise of the Secretary's well-recognized authority to establish reasonable minimum values, MMS contends, even if those values are in excess of gross proceeds.

No deduction against the value of methane is proper, MMS states, because *California Co.* v. *Udall* requires Exxon to market its production and to incur the costs to make its product marketable. If processing also results in further benefits to the lessor in that additional products with greater value are also marketable (*e.g.*, CO2 and nitrogen), Exxon is entitled to an allowance for the costs of manufacturing these products, subject to limitation (Answer at 22).

No regulation specifically addresses how MMS should value a sour gas stream that, as here, yields no liquid hydrocarbons upon manufacture, but instead methane, nitrogen, CO2, sulfur, and helium. Confronted with this fact and Exxon's petition of March 23, 1984, the agency found an analogy in its well-established method of valuing wet gas. This method, which limits a manufacturing allowance to two-thirds of the value of the *liquid* products (30 CFR 206.106 (1987)), was well established because of its simplicity and because it was "generally * * * in accordance with the facts." Net realization order of June 7, 1937, *supra* note 26. When this two-thirds formula provided too generous a deduction (allowance) to a lessee, whether by reason of escalating product prices or manufacturing efficiencies, the Department curbed this deduction by requiring the lessee to deduct "actual costs of manufacture." *United States* v. *General Petroleum Corp.*, 73 F.Supp. at 255; *see also Shell Offshore Inc.*, 111 IBLA 350, 351 (1989); *Phillips Petroleum Co.*, 109 IBLA at 9; *Kerr-McGee Corp.*, 106 IBLA 72, 77 (1988). *Cf. Marathon Oil Co.* v. *United States*, 807 F.2d at 762. Thus, we understand the phrase "generally * * * in accordance with the facts" to mean that the formula granted an allowance approximating actual costs of manufacture.

The Director's analogy to the wet gas valuation regulation would be appropriate if the two-thirds formula approximated Exxon's reasonable costs of manufacture. Actual 1987 figures reveal, however, that the processing costs of CO2 and nitrogen exceeded 100 percent of their tailgate values, respectively; processing costs of sulfur approached, but did not exceed, this 66⅔ percent limit.[31] In light of Exxon's projections and actual 1987 processing costs and tailgate values, we conclude that the two-thirds formula is inadequate to approximate Exxon's actual costs of manufacture. The Director's decision requiring use of this formula is, accordingly, reversed in this respect.

[31] RVSD Findings and Conclusions at 21, adopted by the Assistant Secretary, Land and Minerals Management, on Oct. 19, 1988.

That this formula should prove inadequate is not surprising because the formula is grounded in the premise that Exxon is obliged to place the principal product of its gas stream (methane) in a marketable condition, albeit by *manufacture*, at no cost to the lessor.[32] As such, the allowance applies only to nitrogen, CO2, and sulfur and excludes methane in its calculations. We find no basis in the cited cases for this premise.

To begin, we find that 43 CFR 3103.3-1(c) (1986) is directly contrary to this premise. The terms of this regulation bear repeating: "In determining the * * * value of gas and liquid products produced, the * * * value shall be net after the cost of manufacture. The allowance for cost of manufacture may exceed two-thirds of the * * * value of any *product* only with the approval of the Secretary." [Italics added.] These terms also appear in Exxon's lease W-51423.

That a residue gas (such as methane) is a "product" of manufacture is clear. RVSD and the Director each refer to methane as a product.[33] The Kettleman Hills case is also in accord: "If the gas is processed in an extraction plant, two products result, the natural gasoline and dry residual gas."[34]

The Director relies upon *California Co.* v. *Udall* for the premise that Exxon is obliged to place methane in a marketable condition at no cost to the lessor, but we do not read this case so broadly. The Circuit Court of Appeals made clear in that case that no manufacturing allowance was at issue: "Let us here insert a cautionary parenthesis. No transportation costs are involved in this case. * * * *Neither are manufacturing costs involved here. The product was not transformed by a manufacturing process.*" 296 F.2d at 387. (Italics added.) Thus, we read *California Co.* v. *Udall* to distinguish between those operations that *condition* a product for market, for which a lessee is not entitled to an allowance,[35] and those that *transform* it. If transformation is involved, a manufacturing allowance is appropriate. *Davis Exploration*, 112 IBLA 254, 259 (1989), *appeal docketed*, No. 90-0071 (D. Wyo. Mar. 19, 1990); *see also Marathon Oil Co.* v. *United States*, 604 F.Supp. at 1386.

There is no dispute that Exxon's activities at its Shute Creek gas processing plant involve manufacture of the LaBarge gas stream. The

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[32]At page 19 of its Answer, MMS states:
"MMS does not take issue in this case with the proposition that Exxon is entitled to an allowance for manufacturing or transportation. However, MMS does maintain that it may reasonably limit the amount of such allowances. This is particularly so when limitations reflect other well-established principles. One such principle is that the lessee is obligated to make the principal product marketable at no cost to the lessor." [Footnote omitted.]

[33]RVSD Decision at 2; Director's Decision at 10.

[34]*United States* v. *General Petroleum Corp.*, 73 F.Supp. at 254. *See also* regulation 25 CFR 171.13(a), as set forth in *Supron Energy Corp.*, 46 IBLA at 186.

[35]Examples of these operations are compression, dehydration, and gathering. *California Co.* v. *Seaton*, 187 F.Supp. at 447. Compression and gathering costs may, however, be deductible as a transportation allowance, *Phillips Petroleum Co.*, 109 IBLA at 13, and compression costs may be deductible as a manufacturing allowance, CDM § 647.7.3c. Dehydration costs may be deductible as a transportation allowance, *supra*. Costs associated with the removal of excess hydrocarbons, while mentioned by the Circuit Court in *California Co.* v. *Udall*, 296 F.2d at 386, were not deducted by California Co. and were never at issue. *See* note 21, *supra*.

Director noted: "The selective separation of the various components of the Riley Ridge gas stream requires a series of relatively complex *manufacturing* processes" (Director's Decision at 2).[36] (Italics added.) We conclude, therefore, that the Director's reliance upon *California Co.* v. *Udall* in the instant case for the proposition that appellant is required to place methane in a marketable condition without the benefit of an allowance was error.

Our conclusions above do not diminish the principle, often cited by MMS, that the Secretary has considerable discretion to establish the value of production for royalty purposes. To this principle we add that when such discretion is exercised, a reasonable basis for the action taken must exist. *Phillips Petroleum Co.*, 109 IBLA at 15; *Supron Energy Corp.*, 46 IBLA at 187. Where, as here, valuation of an atypical gas stream is involved, the exercise of this discretion may call for a creative approach, rather than resort to an ill-fitting model. *See California Co.* v. *Seaton*, 187 F. Supp. at 449 n.1.

Marathon instructs that the net back method, whereby actual dollar-specific costs are deducted from sales price, satisfies the gross proceeds requirement of 30 CFR 206.103. 604 F.Supp. at 1385. It also acknowledges that gross proceeds is a *minimum* valuation. *Id.* at 1382. MMS may, accordingly, value production in excess of the amount reached by the net back method. Should it exercise its discretion to do so, *Supron Energy Corp.* requires that the agency provide a reasonable basis in the record for its action.

Finally, Exxon included in its SOR a request for a hearing, oral argument, and conference. In light of the thorough nature of the briefing, this request is denied.

To summarize our holdings: the Director's decision of January 7, 1986, is reversed in part insofar as it denied a transportation allowance for costs incurred in dehydrating the LaBarge gas stream at Exxon's central dehydration facility and insofar as it limited a manufacturing allowance to two-thirds of the value of all products except methane; the Director's decision is affirmed in part insofar as it limited (to 50 percent of product values) a transportation allowance for pipeline costs incurred in transporting the LaBarge gas stream to Shute Creek; and appellant's request for a hearing, oral argument, and conference is denied.

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 is reversed in part, affirmed in part, and the case is

[36] "There is no question in the instant case that Exxon had to process the gas in order to make the principal product, i.e., methane, marketable" (Answer at 20). "The processes utilized at the LaBarge facilities to manufacture each individual product are interrelated and one process may apply to multiple products" (RVSD Findings and Conclusions at 20, adopted by the Assistant Secretary, Land and Minerals Management, on Oct. 19, 1988).

remanded to the Director for preparation of new standards consistent with this opinion.

GAIL M. FRAZIER
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Administrative Judge

UNITED STATES *v.* WILLIE WHITE *ET AL.*

118 IBLA 266 Decided: *March 12, 1991*

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer declaring 41 lode mining claims and 21 placer mining claims null and void for lack of a discovery of a valuable mineral deposit. F-83935.

Affirmed.

1. Board of Land Appeals--Estoppel--Mining Claims: Generally

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its asserted detriment is a prerequisite to the invocation of estoppel.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success in developing a paying mine.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient 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 paying mine.

4. Mining Claims: Discovery: Geologic Inference

Where an exposure exists which shows high and relatively consistent values, geologic inference may be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed area, such that the prudent man test of discovery might be met. However, geologic inference may not be used as a substitute for the actual exposure

of the deposit within the limits of each claim at issue. Absent such exposure, there can be no discovery.

5. Mining Claims: Lode Claims

To constitute a discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place bearing gold or some other mineral deposit in such quality and quantity as would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a paying mine. Absent such an exposure, there can be no valid lode claim.

6. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the extent and grade of the mineralization disclosed constitute exploration work.

7. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Where the evidence of record, considered in its entirety, fails to establish the existence of a valuable mineral deposit, as that term is understood in the mining laws, within the limits of any of the claims at issue, those claims are properly declared null and void.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for appellants Willie White and the Sheehan Tin Grubstake; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Willie White, for himself and as agent for the Sheehan Tin Grubstake, has appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated August 31, 1987, declaring the Serpentine Nos. 1-9, Tin Mountain Nos. 1-26, and Diane Nos. 1-6 lode mining claims and the Sheehan Nos. 1-21 placer mining claims null and void for lack of a discovery of a valuable mineral deposit. The subject claims are situated on the Seward Peninsula, approximately ½ to 7 miles south and southeast of the Serpentine Hot Springs, within unsurveyed T. 5 N., Rs. 28, 29 W., Kateel River Meridian, Alaska, within the present exterior boundaries of the Bering Land Bridge National Preserve, which is administered by the National Park Service (Park Service) pursuant to section 201(2) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 410hh(2) (1988). Subject to valid existing rights, section 206 of ANILCA, 16 U.S.C. § 410hh-5 (1988), withdrew the lands at issue from location, entry, and patent under the United States mining laws.

The instant controversy was initiated on September 14, 1984, by the filing of a contest complaint by the Bureau of Land Management (BLM), on behalf of the Park Service, seeking a declaration of

invalidity with respect to the subject claims on the single ground that "there are not presently disclosed within the boundaries of the mining claims minerals in sufficient quantities and qualities to constitute a valid discovery." The contest complaint also averred, on information and belief, that the owners of the claims were: Willie White, Joe Fowler, Nathanel Hoyle, Lawrence Sheehan, Marvin Jared, Bill Ashcraft, and the Minerals Trust Corporation (MTC). Copies of the contest complaint were served on the above-named parties.

The seven named parties duly filed an answer to the contest complaint, generally denying the charge that the claims were invalid for lack of a discovery. Additionally, however, each of the named parties affirmatively averred that he was merely a beneficiary of the Sheehan Tin Grubstake (Grubstake) which held legal title to the claims. All of the parties identified Willie White as the agent for the Grubstake. All requested a hearing before an Administrative Law Judge to challenge the allegations of the complaint.

Pursuant to the complaint and answer, a 6-day hearing was eventually held in Phoenix, Arizona, in January 1986, before Administrative Law Judge Sweitzer. From the very outset of the hearing, a controversy arose over the fact that while the land embraced by the claims had been the subject of prior Departmental and statutory withdrawals,[1] the contest complaint had alleged that the claims were invalid solely because they were not, as a present matter, supported by a discovery. *See, e.g.*, Tr. 47-51, 289, 392-93, 595-96.

Counsel for contestees originally indicated that he was unwilling to stipulate to an amendment to the contest complaint which would additionally charge that the various claims were not supported by a discovery of a valuable mineral deposit as of the date of the relevant withdrawals. *See* Tr. 595-96. Subsequently, however, counsel indicated that he was uncertain whether he would object to so amending the contest complaint. *See* Tr. 1,112. Accordingly, it was agreed that, after the close of the hearing and before the filing of briefs, counsel for BLM would formally move to amend the contest complaint and counsel for contestees would thereafter have one week in which to inform Judge Sweitzer whether or not the amendment was agreeable.

Pursuant to this procedure, on February 18, 1986, counsel for BLM submitted a motion to amend the contest complaint to further charge that:

> (b) On December 2, 1980, there was not then disclosed within the boundaries of said mining claims minerals in sufficient quantities and qualities to constitute a discovery.

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[1]The land embraced by the lode claims was originally withdrawn from mineral entry on Sept. 12, 1972, by Public Land Order No. (PLO) 5250, issued pursuant to secs. 17(d)(1) and 17(d)(2)(A), of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1616(d)(1), 1616(d)(2)(A) (1988). *See* 37 FR 18730 (Sept. 15, 1972). The land embraced by the placer claims was originally withdrawn by PLO 5653 and PLO 5654, dated Nov. 16 and 17, 1978, respectively. *See* 43 FR 59756 (Dec. 21, 1978).

(c) On November 16 and 17, 1978, there was not then disclosed within the boundaries of the said mining claims minerals in sufficient quantities and qualities to constitute a discovery.

(d) On September 15, 1972, there was not then disclosed within the boundaries of the Serpentine Nos. 1 through 9, Tin Mountain Nos. 1 through 26, and Diane Nos. 1 through 6 lode mining claims minerals in sufficient quantities and qualities to constitute a discovery.

Contestees filed no objection to this motion. Accordingly, by Order of June 30, 1986, Judge Sweitzer amended the complaint in conformity with counsel's request.[2] Thus, the main issues to be decided are whether or not the instant claims are presently supported by a discovery of a valuable mineral deposit and whether they were so when the lands embraced by the claims were withdrawn from entry and appropriation under the mining laws of the United States.[3]

While there was considerable disagreement relating to the showings of value disclosed by the various mineral examinations, certain facts concerning the location of the claims are not in dispute. Prior to the location of the claims at issue, the area of the claims was the subject of a number of geologic and geophysical investigations, two of which are of particular importance with respect to the instant appeal. The first of these is Geological Survey Circular No. 565, entitled "Cassiterite in Gold Placers at Humboldt Creek Serpentine-Kougarok area, Seward Peninsula, Alaska," published in 1968 (Circular No. 565), which discussed the presence of large amounts of cassiterite (also known as tin stone) in Humboldt Creek areas which had been mined for placer gold, concluding, *inter alia*, that a presumed nearby lode source for the deposit might warrant further investigation. *See* Exh. A.

The second of these documents, Geological Survey Bulletin 1312-H, entitled "Geology, Mineral Deposits, and Geochemical and Radiometric Anomalies, Serpentine Hot Springs Area, Seward Peninsula, Alaska," published in 1970 (Bulletin 1312-H), recounted the results of surface investigations as well as an airborne magnetic and radiometric survey, which the authors concluded "have disclosed the probable source of placer gold and tin on Humboldt Creek, Serpentine-Kougarok area, Alaska." *See* Exh. B-1 at H1.

In 1969, Lawrence J. Sheehan, who was then in the process of selling his roofing business in Phoenix, obtained a copy of Circular No. 565. Sheehan had had prior experience with mining, having at one point been the owner of the Gunsight mine[4] and, in addition to performing

[2]Thereafter, however, by motion filed on Nov. 3, 1986, counsel for BLM moved to further amend the contest complaint to additionally charge that "Each of Sheehan Nos. 1 through 21 association placer mining claims embrace 160 acres and are therefore null and void for being in excess of the 40-acre limitation under Alaska State law (AS 27.10.110 and AS 27.10.140)." On Dec. 18, 1986, counsel for contestees filed a motion to amend their answer and a brief in support thereof. In this brief, contestees did not oppose amendment of the contest complaint though they challenged the legal validity and efficacy of the State acreage limitation on association placer claims. By order dated Mar. 16, 1987, Judge Sweitzer granted the second motion to amend the contest complaint and granted in part and denied in part contestees' motion to amend their answer.

[3]While, as noted in n.2, Judge Sweitzer had amended the complaint to include the charge that the placer claims were invalid because they were in excess of the 40-acre limitation provided by Alaska State law, he declined to rule on this question since he had already determined that the claims were invalid for lack of a discovery. *See* Decision at 20.

[4]*See United States* v. *Gunsight Mining Co.*, 5 IBLA 62 (1972).

the required annual assessment work thereon, had worked for 2 years in the Magma mine in Superior and 2 years in the Kennecott copper mine at Bingham Canyon in the 1940's (Tr. 522). He became interested in the prospect and, in April 1969, traveled to Alaska with his son (Tr. 526).

Once in Alaska, he contacted Alex Stettmeir, who had been a contract pilot for the geologists who had performed the field work for the Geological Survey (Survey) investigations of the area and who took Sheehan and his son to the spots where samples had been taken (Tr. 529, 653-54). Sheehan then proceeded to locate his claims over these areas, as well as other areas in which he found iron stains (Tr. 531), by driving rebars approximately 8 to 10 inches into the ground and then setting 4 by 4's on top of the rebars (Tr. 530). The notices of location were apparently all posted on the claims on June 28, 1969.[5] Sheehan testified that he took a sample at each discovery point (a total of 52 samples) and shipped them from Nome to Phoenix by air freight, but that they never arrived (Tr. 622-23).[6] Sheehan stayed approximately 35 to 40 days at Nome and on the claim site (Tr. 535).

Upon his return to Arizona, he entered into a lease with Goldstrike Mining Exploration and Development Corp. (Goldstrike), which had located various mining claims adjacent to the Serpentine and Tin Mountain claims, and then he and Goldstrike entered into an agreement with Rowan Drilling Company (Rowan) in the summer of 1970, granting Rowan the exclusive right to prospect for minerals on the claims owned by both Sheehan and Goldstrike and an 18-month option to purchase the claims under conditions therein provided. *See* Exh. O. Pursuant to this agreement, various surface activities occurred, including the drilling of at least three diamond drill holes in 1971. *See* Exh. P.[7] This agreement was subsequently terminated (Tr. 577).

Thereafter, on September 8, 1976, Sheehan and Hale C. Tognoni visited the claims and located the Sheehan Nos. 1 to 21 association placer claims in an area to the west of the Serpentine and Tin Mountain lode claims and outside the exterior boundaries of the lands withdrawn by PLO 5250. *See* Tr. 396, 629. The location notices for all of the placer claims indicated that the eight co-locators were: Sheehan, Wilber (Willie) White, Bill Ashcraft, Marvin Jared, Wayne White, Joe Fowler, MTC, and Multiple Use, Inc. *See* Exh. 8.

Approximately 1 year later, on August 25, 1977, the named locators, with the exception of Multiple Use, Inc.,[8] entered into the Sheehan Tin

[5]Thus, all of the location notices for the lode claims (except the Diane No. 1) indicate that the claims were posted on June 28, 1969. *See* Exh. 7. The location notice for the Diane No. 1 bears no date.

[6]There was subsequent testimony as to rumors that the samples had never gotten out of Nome because of resentment by both Native and non-Native Nome residents of outsiders staking claims in the area (Tr. 820-21).

[7]The results of this drilling program as well as questions relating to the actual situs of the drill holes are examined in greater detail later in this decision.

[8]What became of the interest of Multiple Use, Inc., is not apparent from the record before the Board.

Grubstake Agreement, whereby the locators, denominated as beneficiaries, transferred all of their respective interests to Willie White as agent, coupled with an interest.[9] The managing beneficiaries also agreed to lease the lands covered by the claims to MTC, as agent for the Miocene Grubstake, which in turn agreed to retain Mineral Economics Corp. (MEC) as operator to expend $100,000 to acquire any other available mineral rights which might be unitized with the existing claims and to complete a development project in 1977-78. *See* Exh. R at 3. On October 23, 1978, Willie White, as agent for the Grubstake, quitclaimed the claims to MTC, as new agent for the Grubstake (Exh. S) and on November 15, 1978, the beneficiaries formally accepted White's resignation and designated MTC as the new agent (Exh. T). On June 8, 1982, Willie White again became agent for the Grubstake and was so at the time of the filing of the contest complaint and the hearing herein. *See* Exh. X; Tr. 470.

The foregoing provides the factual basis relating to the location of the various claims and is not generally in dispute. What is in dispute are the conclusions which can properly be drawn from the various studies and examinations of the claims, particularly as they relate to the issue of a discovery as of the time of the hearing and also at the time of the various applicable withdrawals. We turn now to an examination of the testimony received at the hearing as it bears on this question.

The sole witness of the Government was Luther S. Clemmer, a retired BLM mineral examiner, presently self-employed as a consulting mining engineer who had been hired by the Park Service to perform a validity examination of the subject claims.[10] Clemmer testified that he

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[9]We note that, in his testimony, Willie White indicated that the Sheehan Tin Grubstake was formed in 1976. *See* Tr. 471-72. But, as stated in the text, the Sheehan Tin Grubstake was not actually established until Aug. 25, 1977. It is likely that White was referring to a separate agreement which preceded the location of the Sheehan Nos. 1 to 21 association placer claims. In any event, while White testified that Nathanel Hoyle was one of the original beneficiaries of the Grubstake agreement (Tr. 471), the record does not bear this out. Hoyle was neither listed as one of the original locators of the placer claims (Exh. 8) nor was he listed as one of the original beneficiaries of the Grubstake agreement (Exh. R at 5, 11). Indeed, the only documentary references to Nathanel Hoyle's interest occur in Exhibit W, where the interest of "Wayne White or his Assign (Nathaniel Hoyle)" is given as 4.75 percent, Exhibit X, where Hoyle is shown as a beneficiary on the signature page, and Exhibit N wherein a "Nate Hoyel" is listed as a beneficiary in a notice of intention to hold the mining claims, dated Dec. 1, 1983. All of these documents were prepared in 1982 and 1983. It is likely, therefore, that Hoyle ultimately succeeded to the interest of Wayne White, but was not either an original locator or an original beneficiary of the Grubstake agreement.

[10]Inasmuch as contestees neither moved for dismissal of the contest complaint after completion of the Government's case-in-chief nor challenged the existence of a prima facie case before Judge Sweitzer or this Board, we deem it appropriate to combine our review of Clemmer's direct and rebuttal testimony. We recognize, of course, that contestees do assail the proposition that they bear the ultimate burden of preponderation and also assert that no weight can be ascribed to Clemmer's conclusions as to validity because his testimony in rebuttal clearly showed he was applying an improper standard in determining whether a discovery existed. This latter question is examined in detail, *infra*.

With respect to the alleged application of an improper standard of discovery, suffice it for our present purposes to note that while, indeed, application of an erroneous discovery test would deprive the mineral examiner's ultimate conclusion as to the lack of discovery of any probative weight (*see United States* v. *Hooker*, 48 IBLA 22, 29-31 (1980)), it does not necessarily vitiate the relevance or probative value of the other testimonial and documentary evidence which he provided (*see United States* v. *Pool*, 78 IBLA 215, 219 (1984); *United States* v. *Hooker, supra*). Moreover, inasmuch as the specific statements of Clemmer upon which contestees focus were made in the course of his rebuttal testimony, they could have no effect on the existence of a prima facie case since this Board has expressly held that that issue is determined only by an examination of the testimony adduced during the Government's case-in-chief. *See United States* v. *Aiken Builders Products (On Reconsideration)*, 102 IBLA 70, 79-80 (1988) (concurring opinion); *United States* v. *Copple*, 81 IBLA 109, 120 (1984). Accordingly, we do not perceive the existence of a prima facie case to be at issue in the instant appeal. We note, in any event, that were it an issue, we would agree with Judge Sweitzer that the testimonial and documentary evidence presented on behalf of the Park Service was sufficient to establish a prima facie case of invalidity and to shift to appellants the burden of overcoming this showing by a preponderance of the evidence. *See Lara* v. *Secretary of the Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987); *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

examined the claims with Fred A. Spicker, a geologist then in the employ of the Park Service, over a 4-day period, spending approximately 26 hours on the ground (Tr. 217). While Clemmer and Spicker had originally believed that both White and Tognoni would be accompanying them on their examination, Clemmer stated he was informed at the last moment that they would be unable to participate (Tr. 20). Contestees had, however, earlier provided them with a map of the claims and reports prepared by Hale C. Tognoni and Robert T. Wilson, a geologist employed by MEC. *See* Exhs. 32 and 30.

Clemmer testified that while he and Spicker first made a helicopter reconnaissance of the Tin Mountain, Serpentine, and Diane claims, they actually began their sampling activities on the Sheehan placer claims (Tr. 205-06). He described the area of the placer claims as characterized by rounded hills, primarily covered by tundra, with some willows and small brush along the streams (Tr. 68). He noticed some granite outcropping on the Sheehan claims and that there appeared to be gravel in the stream of Reindeer Creek which crossed the Sheehan Nos. 1, 2, and 3, and Hot Springs Creek which crossed the Sheehan No. 9 (Tr. 70, 78). While he observed other streams in the area, none appeared to contain any sand or gravel (Tr. 70-71). There was no evidence of any workings on any of the placer claims (Tr. 90).

Clemmer and Spicker took a total of nine samples from the placer claims (Tr. 74). Five of the samples were taken from the stream gravels on the Sheehan Nos. 1, 2, 3, and 9 (Tr. 77-78). The remaining four samples were taken from smaller drainages and, in the words of Clemmer, "consisted primarily of granite gravel, sand and gravel, pure granite, almost" (Tr. 78).

These samples were first assayed by amalgamation by N. A. Degerstrom, Inc., to test for gold and uranium and splits from the placer samples were sent to the Union Assay Office for further assaying for tin. *See* Tr. 126; Exhs. 25, 26, and 27. No gold or tin was detected in any of the samples (Exhs. 26, 27), and only two samples from the Sheehan Nos. 10 and 11 showed any detectable presence of uranium (Exh. 25). Clemmer testified that the level of the showings for uranium (0.004% and 0.005%, respectively) were "not very significant," contending that they merely "show the presence of some radioactive mineral" (Tr. 130).

With respect to the lode claims, Clemmer testified that he and Spicker originally conducted an aerial reconnaissance of these claims looking for workings and the like, discovering bulldozer cuts and some monuments (Tr. 205). Insofar as the Diane claims were concerned, Clemmer stated that they took one sample from an outcrop of schist on the north end of the Diane No. 3, but took no other samples because "we couldn't find any veins or mineralized zones or diggings, other than -- well, no diggings or any outcrops of quartz or anything else that we thought would carry any mineralization at all" (Tr. 91).

A number of workings, consisting of bulldozer pits and cuts, were discovered on the Tin Mountain claims (Tr. 106). Clemmer testified that he and Spicker found only one outcrop of bedrock, which he described as a "quartz blowout," on the Tin Mountain No. 10 (Tr. 108). It had been trenched out approximately 75 feet in length by a bulldozer (Tr. 110-11). While they found some indication of iron stained quartz along the banks of the trench, it had apparently been cut out by the trench (Tr. 108). He took a chip sample from this trench (Tr. 109), even though he did not expect to find much in it, "but it was the best thing we could find to sample and we wanted to give the owner the benefit of the doubt in any way we could" (Tr. 282). Clemmer and Spicker found another trench on the Tin Mountain No. 21, approximately 90 feet in length, and another trench on the Tin Mountain No. 20, which, Clemmer stated, did not expose bedrock. Neither of these trenches were sampled because, according to Clemmer, nothing could be found to sample (Tr. 119-20).

Clemmer and Spicker also examined the Serpentine claims. Clemmer declared that they could find "no outcrops of mineralized bedrock or quartz or no workings, monuments, or anything else" on these claims and, therefore, took no samples from these claims (Tr. 125).

The samples taken from the Diane No. 3 and Tin Mountain No. 10 were sent to the Union Assay Office for assaying for gold, silver, lead, copper, zinc, and tin (Tr. 126-27). The Diane sample showed no gold, silver, lead, copper, zinc, or tin, while the Tin Mountain sample showed 3/10ths oz./ton silver, 0.006% copper, and no gold, lead, zinc, or tin (Exh. 27). Clemmer testified that the silver and copper returns were "insignificant" (Tr. 128).

The Government's mineral report (Exh. 28), written by Spicker and reviewed and approved by Clemmer, also discussed the import of various studies relating to the area of the claims. Specifically, this report referenced Bulletin 1312-H, as well as two reports prepared by MEC, one authored by Hale C. Tognoni (Exh. 32) and another written by Robert T. Wilson, a geologist employed by MEC (Exh. 30). The abstract of the Wilson report, dated December 4, 1978, noted that "[t]he tin mineralization associated with the Serpentine Granite Complex has important similarities to other tin-mineralized areas even though commercial lode deposits of tin have not yet been identified" (Exh. 30, Abstract at 4). In listing the similarities, the Wilson report emphasized the following:

> THE ELEMENTS ASSOCIATED WITH THE TIN ANOMALIES in the mineralized zones in the Serpentine Hot Springs area is characteristic of the lead-zinc zone developed in many tin-mineralized areas. The metal suite present in anomalous concentrations in the bedrock areas southeast of the granite complex is characteristic of the fringe or outer areas of mineralization in the district. *The implication for the Serpentine Hot Springs area is that the major tin-mineralized areas have not been exposed. It is possible, if not probable, that the principal tin mineralization lies down-dip on the mineralized structures, at depths that are near the granite complex.* [Italics in original.]

Id. The emphasized portion of the quotation was taken from a 1977 Survey Open File Report by Travis Hudson, entitled "Genesis of a Zoned Granite Stock, Seward Peninsula, Alaska." *See* Exh. 30 at 21-22.[11]

The section of the Wilson report concerning conclusions and recommendations noted, *inter alia*, that "[t]he possibility of economic tin mineralization at depth below the claim areas should be further investigated" (Exh. 30 at 27). It suggested that a likely place to locate a drill hole was at the site of the "Dike Hill" anomaly, reported by Rowan but not drilled because of logistical problems. The report concluded that "[i]f drilled, it is recommended that if mineralization or granitic basement has not been reached by approximately 2000 feet, that the drill hole should be abandoned" (Exh. 30 at 28).

The abstract from the Tognoni report, written in 1977, recounted the history of the ownership of the claims, noting that "[a]s a result of Miocene entering into the agreement with the Sheehan Grubstake, funding was provided by Miocene for preliminary geo-chemical sampling and a more comprehensive study of the geology to be undertaken by Mineral Economics Corporation" (Exh. 32, Abstract at 2). With respect to future activities, it noted:

> *M.E.C. recommended a detailed geological mapping program along with a reconnaissance exploratory drilling program for the Sheehan Tin property.* It is projected that such a program must take place during the summer months due to extreme weather conditions at this site. The cost of such a program will be in the range of $250,000.00 depending upon the greatly varying logistical costs in Alaska. The details of the project will be worked out upon further review of the already collected data by M.E.C. [Italics supplied.] *Id.*

Based on his mineral examination and his review of the foregoing documents, Clemmer testified that, in his opinion, there was not a mineral showing in sufficient quantity or quality to constitute a valid discovery on any of the claims in question (Tr. 190-91), nor was there at the dates of the respective withdrawals (Tr. 193-95). Clemmer stated that the basis for his conclusion with respect to a lack of a discovery as of the earlier dates was that "there is no evidence on the ground now that anything has ever been done other than a few bulldozer cuts, so there couldn't have been any more mineral showing at that time than there is today" (Tr. 195).

On cross-examination, Clemmer admitted that he and Spicker did not test the claims for the presence of beryllium (Tr. 236), nor did they pan in any of the tributaries of Humboldt Creek (Tr. 237). Amplifying on the basis for his conclusion that there was no discovery, Clemmer

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[11]The quoted language was also replicated, verbatim, in an annual assessment statement filed with BLM on behalf of the claims in October 1979. *See* Exh. 29. The statement continued:

"Mineral Economics Corporation does not represent that it has outlined any ore reserves in the Sheehan Tin Grubstake's Project; however, we are of the opinion that the area represents a bona fide and truly viable mineral target of potentially major significance and that there is sufficient evidence on the surface for a prudent man to spend his time and money with a reasonable expectation of developing a paying mine." *Id.* at 3.

stated that "there wasn't anything to study. I mean, no ore reserves, no value, grade, for any reserves so we could not do an economic analysis[,] * * * there was no mineral showings that would even indicate any reserves" (Tr. 246-47).

Clemmer further testified that he had reviewed Bulletin 1312-H and examined the plates and tables which were included in the Bulletin (Tr. 248). Clemmer stated that he and Spicker had not sampled from the sample points indicated in plate 1 because they were unable to locate the sample points on the ground from the map, though he also admitted that they were not actually trying to sample the points shown on the plate. Rather, "[w]e were attempting to locate mineral outcrops, veins, whatever we could find that would indicate mineral" (Tr. 252).

A disagreement developed between counsel for contestees and the witness over whether or not bedrock was exposed in the area of the lode claims. The following colloquy ensued:

Q. [By Mr. Tognoni] Now, evidently you walked over that same ground and saw no bedrock?

A. Only in a place or two.

Q. So isn't it true, then, that what you're interpreting as bedrock is different than what these persons making the map said?

A. No, I don't think so. This bedrock that they've indicated is under the – whatever is there, the rubble or the talus, or whatever. It doesn't mean it's exposed.

Q. Where does it say that?

A. It doesn't have to say that.

Q. That's your interpretation[,] then?

A. That's my interpretation for many years.

* * * * * * *

Q. So whatever the person was calling bedrock in this map, you decided wasn't bedrock, so you didn't sample it. That's basically it?

A. That's absolutely correct, and an examination on the ground shows it's not bedrock. This whole area they show as granite. You don't see that in many places.

(Tr. 253-54).

Counsel for contestees also explored Clemmer's understanding of the requirements for a discovery of a valuable mineral deposit. Thus, Clemmer did not deny that the drilling by Rowan in the area was prudent. Rather, he considered such activities part of the exploration stage rather than the development stage. He expanded on his rationale in the following colloquy:

Q. BY MR. TOGNONI: I think we probably got the thought probably across, but you're saying that when Rowan Mining put their money into this drilling program, that they weren't prudent?

A. No. I believe I said just the opposite. They may be prudent to explore, if I remember correctly my answer.

Q. But not improvement, not to develop?

A. Well, their drilling evidently didn't show enough to encourage them to go further.

Q. Well, isn't the reasonable expectation that you're talking about of developing a paying mine is what they're doing, and the prudent man has to have the reasonable expectation of developing a paying mine? Why else would he put money into it? Why else would Rowan put into it?

A. He may have had an expectation when he started, but after three holes he left for some reason.

Q. Yes, but what he and his people did was examine the same things that you saw on the surface and decided that they would put money into it, and that was their reasonable expectation. So though saying he had the same expectation, you're saying was imprudent on his part to drill those holes?

A. Well, again, I don't think I said he was imprudent to drill the holes, but I think he probably decided he was imprudent to go further, so he didn't go any further.

Q. Or his money ran out?

A. Well, that could be. I would have no way of knowing that.

(Tr. 269-71).

Clemmer expressed his personal view that he did not deem the property to presently constitute a prudent exploration venture, though he admitted that some people might disagree (Tr. 274). He argued that even though such individuals might consider it prudent to further explore the property, this would not mean that they had perfected a discovery of a valuable mineral deposit (Tr. 278). While at one point he indicated it was his view that a paying mine must ultimately result if a discovery exists, he clarified this, noting that "[t]he mine doesn't have to be developed, but there has to be something there that indicates that he has a discovery, something of value" (Tr. 280).

The elements which affected Clemmer's determination of whether a discovery existed were also explored in his rebuttal testimony. He again differentiated between exploration and discovery, arguing that "[t]he mere presence of iron-stained rock and so forth does not, to me at least, indicate any sort of discovery. It's merely pointing to a prospect that might be developed later into something more valuable -- or valuable" (Tr. 988). While Clemmer stated that he did not think that proven ore as defined by Survey[12] was required as a prerequisite for discovery, he did declare that "[t]o me, if you have driven drifts into an ore body, you have drill holes where you can give those holes weight, then you can identify proven ore" (Tr. 990). Clemmer also reiterated that he had found bedrock, which he defined as "solid, hard outcrop of rock of one kind or another, fractured certainly, or faulted, but still together" (Tr. 1001), in only one of the bulldozer cuts, and in an outcrop on the Diane claims (Tr. 1001-02).

On cross-examination, the questions of reserves and discovery were revisited:

Q. [By Mr. Tognoni] Well, are you saying that the Tin Mountain has to have proven reserves?

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[12]In his testimony, Clemmer referenced the requirement that a deposit be sampled on three sides in order to be considered "proven" reserves (Tr. 990). In actuality, however, under Survey Bulletin 1450-A, "Principles of the Mineral Resource Classification System of the U.S. Bureau of Mines and the U.S. Geological Survey," such reserves would be considered to be "probable" reserves, and properly classified as "indicated" reserves under the Survey classification system. *See* Survey Bulletin 1450-A at A3 n.1.

"Indicated" reserves is therein defined as "reserves or resources for which tonnage and grade are computed partly from specific measurements, samples, or production data and partly from projection for a reasonable distance on geologic evidence. The sites available for inspection, measurement, and sampling are too widely or otherwise inappropriately spaced to permit the mineral bodies to be outlined completely or the grade established throughout." *Id.*

A. To determine the value of a property, you have got to have proven reserves.
Q. To have a discovery of it?
A. Well, I can't – I think I've defined discovery. In my opinion, you have got to have something of value, something you can find on the ground, something you can sample, something you can hang your hat on; and it generally would involve some ore reserves.
Q. It generally would?
A. Yes.
Q. But when you say "generally," is there a case that it does not have to?
A. No, not and have a valid mining claim.

(Tr. 1064-65).

Counsel for contestees also queried Clemmer extensively with respect to his familiarity with the Board's decision in *In re Pacific Coast Molybdenum*, 75 IBLA 16, 90 I.D. 352 (1983), insofar as it concerned the proper application of the present marketability test. Clemmer admitted that he was unfamiliar with the decision (Tr. 1079). In response to a hypothetical situation propounded by counsel, Clemmer testified that where uranium claims with established reserves were valid at a $40-a-pound price for uranium, and the price was now $8 a pound, he would consider the claims lacking in present marketability if it cost $20 a pound to mine and market the ore (Tr. 1081).

Counsel for the Park Service explored this question further in his redirect examination:

Q. [By Mr. Mothershead] Now, there's much testimony generated on the fact that you could have a discovery today, but because of changed market conditions, you could wind up without any discovery at all as a result of the market change at some time in the future. I believe you testified to that.
A. Yes.
Q. But in that event, that no way detracts from the fact, does it, that you still have the quantity of ore in the ground which could be mined at a future date for a profit if there's a favorable change in the marketing conditions; is that not true?
A. If economic conditions become favorable, they could mine again, yes, that's true. I think that's happened in a number of cases.
Q. Now, with respect to the Tin Mountain claims, would it be possible that your finding of a nondiscovery could change to discovery if you had considerably more data that would indicate to you that there's a sufficient quantity of ore of good value that a mine could be profitably operated?
A. Yes, if we were at that point in time when that could be shown.
Q. Now, that – could some of that data be possibly the results of core drilling over a wide area?
A. Yes.
Q. Trenching?
A. To some extent.
Q. Or a shaft?
A. Yes.
Q. But that point has not yet been reached, has it, on the Tin Mountain claims?
A. That's correct.

(Tr. 1098-99).

In a final colloquy with counsel for contestees concerning his perception of the relationship of the prudent man rule to the question of present marketability, Clemmer noted that "the reasonably prudent man to me has to have an expectation of making money, or he's not

going to invest his money in a losing proposition, not very long" (Tr. 1106).

The evidence on behalf of the contestees was presented through a number of witnesses. Thus, Lawrence J. Sheehan testified as to the original location of the lode claims in 1969 and the location of the placer claims in 1976, as set forth above. Willie White, managing agent of the Sheehan Tin Grubstake, discussed the formation of the Grubstake, and also related various efforts he had made in attempting to interest third-parties in purchasing the property, beginning in 1982. White testified that he contracted with Gordon Waters, who employed satellite imaging techniques (generally known as Landsat) to search for mineral deposits. Based on these techniques, Waters apparently delineated various mineral deposits on the claims on a number of maps which he sent to White. *See* Exh. N. Since Waters did not testify, however, it was unclear exactly what the maps purported to display and whether the areas colored-in on the maps were indications of existing deposits or indicative of areas in which future exploration might be warranted. White did testify that Waters told him that the property was worth $65,000,000 (Tr. 518).[13]

White also stated that Waters thereafter contacted a party from Midland, Texas, who was interested in spending $200,000 to drill the perimeters of the property and prove it up and would, if successful, purchase the property for $10,000,000, but that these negotiations were abandoned when the party contacted BLM officials (Tr. 492). White also contended that subsequent attempts to interest third-parties were frustrated by actions of BLM (Tr. 492-96). White stated that he personally valued the property at $25,000,000 (Tr. 501).

Brian Tognoni, the mineral land manager for MEC, also testified on behalf of contestees, both with respect to sampling of the placer and lode claims in September 1977 as well as the subsequent arrangements entered into by both MTC and the Miocene Grubstake to develop the claims.[14] Concerning the sampling of the claims in 1977, Brian Tognoni testified that the entire sampling process took 6 or 7 days (Tr. 458). Three different sets of samples were taken. One, from the placer claims, consisted of 36 samples which were generally taken from the corners of those claims (Tr. 380; Exh. I).

Two sets of samples were taken from the Tin Mountain lode claims. The first of these consisted of both soil and rock chip samples taken on a square grid encompassing parts of the Tin Mountain Nos. 20, 21, and 22 claims. A total of 121 samples were taken on this grid, each sample

[13]White had earlier testified that Waters charged $65,000 for his work, a charge which was to be paid upon the sale of the property (Tr. 490). It is unclear from the record whether this charge was a function of the expressed valuation of the property (viz., $65,000,000).

[14]Pursuant to an agreement executed on July 18, 1978, the Miocene Grubstake obtained a 25-percent interest in the Sheehan Tin Grubstake in exchange for $25,000 in expenditures already made and to be made in the future. *See* Exh. U. This interest, however, was ultimately transferred back from Miocene to the beneficiaries of the Sheehan Tin Grubstake (Tr. 756).

100 feet apart. *See* Exh. I. An additional 101 samples were taken along a 10,000-foot line commencing outside the claim boundaries and continuing through the Tin Mountain claims, intersecting and crossing parts of the Tin Mountain Nos. 1 through 11, and 14. *See* Exh. J. Each of these sample points were also 100 feet apart (Tr. 382). Tognoni testified that most of these latter samples were soil samples taken with an auger driven down to the point of resistance, in most instances that being permafrost located one or two feet beneath the surface (Tr. 401, 405).

Insofar as the square grid was concerned, Tognoni testified that approximately half of those samples were rock chip samples, taken from "outcrops of rock, in-place rock" (Tr. 453). *See* Exh. L. The various samples were subsequently assayed (Exh. H), and, with respect to the square grid sampling, the results were transcribed onto a series of graphic depictions (Exh. M). The results of this sampling program will be more fully explored below.

While Brian Tognoni testified as to the actual taking of the samples, he did not purport to interpret the results. This was done in the course of the testimony of C. L. (Pete) Sainsbury, contestee's main witness. Sainsbury, holder of a doctorate in geology, was, at the time of the hearing, head of his own corporation, but had, prior to 1972, been employed by Survey in Alaska where he spent 14 years in the geologic mapping of the Seward Peninsula (Exh. E). He was the principal author of numerous works dealing with the geology of the Seward Peninsula, including both Circular No. 565 and Bulletin 1312-H. Additionally, during the period from 1966 to 1972, he was the Survey commodity specialist for tin (Tr. 329). He was, as Judge Sweitzer found, "a recognized expert in tin and the geology of the Serpentine Hot Springs area" (Decision at 9 n.5).

Sainsbury testified extensively as to his activities on the Seward peninsula during his Government employment. Describing the general geology of the peninsula, he noted that the Lost River Mine, which had closed in 1954, was on "a very well defined metallogenic tin deposit which comes across from the Chukchi Peninsula in Siberia and enters the Seward Peninsula at the western tip. Cape Mountain continues easterly across the Seward Peninsula encompassing the Lost River tin deposits and eastward to the Serpentine area and possibly beyond, probably beyond" (Tr. 318). He also noted that, in the past, the only substantial production of tin from placer deposits in the United States had occurred at Potato Mountain, approximately 70 miles west of the claims in question, though he placed the claims within the north central part of the tin province he was defining (Tr. 322).

In discussing the origin of Circular No. 565, he noted that, in 1967, one of his assistants was doing a stream sediment survey in the area and brought back a large can of cassiterite nuggets obtained from the tailings found along Humboldt Creek. Subsequent visits resulted in additional samples and further field work leading to the writing of the circular. While the primary thrust of the circular was to suggest that

the marginal gold deposits located in Humboldt Creek might be economic to develop if the cassiterite could be recovered and sold (*See* Exh. A at 6), the circular also suggested that various faults which were noted crossing Humboldt Creek above the placer cuts "might be a source of the cassiterite" (Exh. A at 4). At the hearing, Sainsbury stated that subsequent studies which he had anticipated in had served to strengthen his view that the cassiterite was derived from the western tributaries of Humboldt Creek, which traverse the area of the lode claims involved herein (Tr. 331-32).

Sainsbury then described the studies which ultimately led to the publication of Bulletin 1312-H. Initially, he attempted to differentiate what he referred to as "the classical term 'bedrock' " from what he would apply to the tundra area of the Seward peninsula:

> Your Honor, in this part of the world we are dealing with a permafrost area. The ground is perennially frozen from just a few inches down. Even in the summer it may only thaw as much as two or three feet. Very often less than that. Because of the underlying frost and the very frigid climate, there's intense frost breaking of the rocks.
>
> In terms of the classical term "bedrock," as would be applied in Southeastern Alaska, we have outcrops, many outcrops of such in that area. But mostly what we have is the bedrock has been broken by frost, slightly loosened so it sits as pieces from a small size to a very large size. But essentially, absolutely in place above where it was frost wedged.
>
> In much exploration in this part of the world, in order to get totally undisturbed rock, you may have to go down as much as 15 or 20 or 25 feet to find what you would call classical bedrock that has not been broken at all by the frost.
>
> In terms of arctic mapping, we all call this frost broken rock that's essentially in place bedrock.

(Tr. 349-50). Sainsbury noted that, in his experience, "if we have outlined a fault zone, an altered fault zone on the surface, it is always found by trenching that takes the upper few feet of the rock off" (Tr. 351). Thus, while Clemmer had stated that bedrock was observable only on two of the claims (the Tin Mountain No. 10 and the Diane No. 3), Sainsbury asserted that in excess of 80 to 85 percent of the area covered by the lode claims was located on "bedrock" (Tr. 350). *See also* Tr. 719.

Sainsbury testified that, in conducting their sampling of the area, he and his associates first attempted a stream sediment survey as an initial exploration technique, which disclosed low levels of tin, lead, and zinc (Tr. 353). In order to obtain more dependable information, they then proceeded to panned concentrate studies. These concentrates were then assayed for anomalous levels of those metals normally associated with tin deposits.[15] The results of these stream sediment and panned concentrate assays were reported in Table 4 and depicted in Figures 2A and 2B of Bulletin 1412-H. Sainsbury noted that six of

[15]Anomalous, in this context, means higher than the general background levels which might normally be expected. *See* Exh. B-1 at H3; Tr. 354. Sainsbury subsequently stated that anything two times background levels would be considered anomalous (Tr. 809). Sainsbury also noted that the suite of minerals normally associated with tin deposits were silver, mercury, arsenic, manganese, cobalt, copper, molybdenum, nickel, lead, antimony, tin, tungsten, and zinc (Tr. 360).

these samples were taken from tributaries of Humboldt Creek which crossed a number of the Tin Mountain claims, though the concentrations discovered were in lesser amounts than that seen further down Humboldt Creek (Tr. 363).[16]

Sainsbury further testified that, in addition to the stream sediment and panned concentrate samples from tributaries of Humboldt Creek, they also took bedrock and panned concentrate samples from the area west of the tributaries of Humboldt Creek as well as stream sediment samples from Hot Springs Creek, Reindeer Creek, and Schlitz Creek. The assayed values for the bedrock and panned concentrate samples were reported at Table 2, and the values for the stream sediments were reported at Table 3. The sample sites, with indications of the relative degree of anomalous results, were depicted on Plate 1.

In discussing the reason why certain areas were sampled, Sainsbury noted that, owing to the very short field season in Alaska, the samples were, in fact, taken by three different individuals, working together but not in conjunction with each other (Tr. 727). In discussing the selection of sampling sites, the following colloquy occurred between the witness and contestees' counsel, which amplified Sainsbury's earlier assertions with respect to the presence of bedrock in the area:

> Q. And how would you choose a spot to sample?
>
> A. Generally, every spot that was sampled was chosen because it had signs of what we geologists call hydrothermal alteration or brecciation, or clay alteration, or quartz, little bits of vein quartz always in a well traceable, easily traceable, linear zone.
>
> Q. Now, Mr. Clemmer seems to be calling that rubble there that is not in place in his, and you seem to be calling it bedrock, and in place. Could you explain the difference?
>
> A. I think we could enlarge upon this in considerable detail. I think when the term bedrock was used, as used in the mining laws of 1870, there were essentially no people who had any experience in the arctic whatsoever, in geology, in geologists.
>
> Therefore, that definition of bedrock would have to have been put together – would most likely have been put together by people who had no experience in the arctic, or in permafrost areas.
>
> In reports by the Bureau of Mines, and by many U.S. Geological Survey geologists, we will call bedrock, material which we can ascertain with no difficulty. It correctly expresses what is just under the surface, or outcropping at the surface without being broken up at all.

(Tr. 727-28).

Sainsbury also reviewed the results obtained by contestees' sampling program. Reviewing the results of the soil samples from the grid survey, he noted that a number of the assays showed anomalous results of metals. In particular, Sainsbury noted that one sample assayed at 900 parts per million (ppm) for beryllium and another at 580 ppm. He noted that in the past, stream sediment samples which

[16] Of the six samples which Sainsbury referenced, one (No. 41) showed no anomalous metals at all, another (No. 42) showed only molybdenum at a concentration 3 times greater than background, and two (Nos. 38 and 40) showed both molybdenum and zinc with zinc twice normal background and molybdenum 2 times and 1.4 times above background ranges, respectively. The final two samples (Nos. 37 and 39), each showed the presence of three metals in anomalous amounts. Sample No. 37 showed the presence of anomalous levels of gold, molybdenum, and zinc at levels 7, 2, and 3.3 times background ranges, respectively. Sample No. 39 showed anomalous levels of molybdenum, lead, and zinc at ranges 2, 2, and 3 times normal background. Not one of the samples taken from the area of the lode claims showed the presence of anomalous levels of tin.

showed 200 to 220 ppm beryllium "led us to the discovery of the Cape Creek ore body, which has several million tons of very high grade fluorite beryllium rock which was drilled – subsequently drilled by the U.S. Bureau of Mines" (Tr. 743).[17]

When asked whether the results obtained by his sampling program of the bedrock areas had established a discovery, Sainsbury responded:

A. That's right. We have actually shown bedrock concentrations of an amount that would – I won't use the term prudent man, but I'll say any exploration geologist would become immediately excited by that amount of mineral and stake it.

Q. And say he's made a discovery?

A. He's made a discovery, that's correct.

Q. In fact, as to this particular area, you claim that you had discovered a valuable mineral deposit?

JUDGE SWEITZER: That sure is leading, Mr. Tognoni. There hasn't been any objection to it, but...

THE WITNESS: I'll stick with our conclusions as expressed in the report, that the values found here would lead, should lead, to exploration, trenching, and probably drilling of some of these zones.

(Tr. 367). Later, when asked whether, considering all of the information which had been developed, he thought that a prudent man would be justified in spending his time and money on the placer and lode claims with a reasonable likelihood of success in developing a paying mine, Sainsbury responded:

A. In my opinion, the information available to date does suggest that a paying mine can be developed on the Sheehan lode tin claims.

Q. [By Mr. Tognoni] Is there a likelihood?

A. I think there's a strong likelihood.

Q. Not just a reasonable likelihood?

A. Well, at least reasonable, and to me, as an exploration geologist, it's a strong likelihood.

Q. But you think those same – not just you as a geologist, but I'm putting you in that position of that prudent man that you have known out there who makes that decision, not you as an expert. Do you think a prudent man with the information here would be actually justified in putting his time and money with a reasonable likelihood of success that a paying mine can be developed?

A. I think several classes of those prudent men would believe that they have a reasonable chance of developing a paying mine on the Serpentine lode claims and the Sheehan Tin lode claims.

(Tr. 799-800).

With respect to the placer claims, Sainsbury noted that:

[T]here are some anomalous metals reported in some of these holes. Silver, even in two parts per million, is always anomalous. Beryllium is generally higher than we would expect to find in areas that had no particular source for beryllium. Arsenic is noticeable. Copper values, except for possibly 50, I would not consider anomalous. Some of the lead values may be anomalous, 25 parts per million. One sample of tin at eight parts per million could possibly be of importance.

[17]In reference to sample 3402 which had assayed at 900 ppm beryllium, Sainsbury subsequently admitted that "I couldn't tell you if it's of commercial value, but it's very close to the amount of beryllium that would be contained in pegmatites that are mined for beryllium" (Tr. 808).

(Tr. 793). He testified that beryllium readings of 10 ppm or higher indicated "a source area somewhere shedding beryllium into that drainage" (Tr. 794). He concluded that "the modest amount of work down there does indicate the presence of minerals or metals which would warrant interest by a prudent man to continue development" (Tr. 822).

Sainsbury's views on the question of whether or not a discovery existed on the lode claims were further amplified on cross-examination:

> Q. [By Mr. Mothershead] So then you would conclude, based on this sentence, that because you made the findings on the surface you have, there's a much greater expectation, then, of possibly finding a major ore body under those claims – in those claims?
>
> A. Yes, I would.
>
> * * * * * * *
>
> Q. [By Mr. Mothershead] And how do we determine for sure whether or not we have a significant ore body that is not disclosed on the surface, other than just surface indicators?
>
> A. Structure, geophysical methods, physical openings into the material, development of the surface information into the information required to completely evaluate the deposit.
>
> Q. And if we do have good readings, what is the ultimate verification of those good readings?
>
> A. By subsurface hole:
>
> Q. By iron core drillin[illegible], is that what we call it?
>
> A. Diamond drilling –
>
> Q. Diamond drilling, sorry.
>
> A. – or by physical openings of substantial size, shafts et cetera.
>
> Q. At what point can we determine that we would indeed have commercial lodes in our claim based upon the favorable surface readings?
>
> A. Sometimes with an initial hole; sometimes with one or two pits even. But normally it requires substantial amounts of development work before you can outline an economic deposit.

(Tr. 870-72). Ultimately, Sainsbury expressly agreed with the statement that "the discovery precedes the time when you know you have a good prospect" arguing that "I could really define a discovery there, would be the first time a piece of silver-rich galena was picked up on the ground that we thought we could see there, there you have immediately made a discovery" (Tr. 901).[18]

In his decision, Judge Sweitzer reviewed the evidence adduced at the hearing and concluded that contestees had failed to establish that a discovery existed within the limits of any of the claims. Before examining the question of discovery, however, Judge Sweitzer disposed of a number of subsidiary legal arguments which contestees had advanced in their pleadings. Thus, Judge Sweitzer rejected contestees' contentions that the mere location of a mining claim establishes a vested property right, that the Government was collaterally estopped to challenge the validity of the claims based on statements appearing in Circular No. 565 and Bulletin 1312-H, and that the Government

[18] Indeed, Sainsbury declared that "[i]f someone wants to buy a worthless piece of ground or a major ore deposit, that makes it a valuable piece of property" (Tr. 938).

bore the ultimate burden of proving a lack of discovery on each of the claims (Decision at 7-13).

Judge Sweitzer then turned to the critical question of discovery. He first recounted the testimony of the Government's mineral examiner, Clemmer, as well as the conclusion of the Wilson report (Exh. 30) that "the major tin-mineralized areas have not been exposed. It is possible, if not probable, that the principal tin mineralization lies down-dip on the mineralized structures, at depths that are near the granite complex."[19] He noted further that the Wilson report expressly concluded that "commercial lode deposits of tin have not yet been identified" (Decision at 16, quoting Exh. 30 at 27). Judge Sweitzer concluded, based on Clemmer's testimony and the Government's documentary submissions, that the Government had made a prima facie case of invalidity and that the burden then devolved upon the claimants to overcome this showing by a preponderance of the evidence (Decision at 16).

Judge Sweitzer next proceeded to review the evidence presented on behalf of the contestees, set forth *supra*. He noted that Sheehan had located the claims based primarily on a third-party's recollection of where Sainsbury had sampled and that, while Sheehan had taken samples from the lode claims when he located them, all of these samples were lost before they could be assayed. With respect to the Rowan drilling program, while recognizing that one drill hole (Hole V-6-1) had showed significant mineralization, he also pointed out that "there is no credible evidence to establish on which particular claim(s) such hole(s) may have been drilled" (Decision at 19). He rejected the use of the samples taken by MEC on the ground that, since they were taken after the land had been closed to mineral entry, they could not be used to prove the validity of the subject claims since "[n]o exposure uncovered subsequent to withdrawal can breathe life into a claim that was not already valid at the time of the withdrawal" (Decision at 19). Judge Sweitzer expressly held that "the exposure of mineralization assertedly on the Tin Mountain Nos. 9, 10, 17, 18, 20, 21, and 23, the Serpentine No. 7, and the Diane No. 2 lode mining claims reported in Geological Survey Bulletin 1312-H is insufficient to constitute a discovery" (Decision at 20).

This last conclusion was the result of an analysis of Sainsbury's evidence which Judge Sweitzer had conducted in the course of rejecting contestees' assertion that the Government was estopped from challenging the validity of the claims. After citing various statements by Sainsbury relating to the need for further exploration, Judge Sweitzer concluded that:

[19] Judge Sweitzer also referenced a copy of an annual affidavit of assessment work for the claims which had been filed in 1979 in the Fairbanks District Office, BLM, pursuant to sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1988). *See* Exh. 29. This document repeated, verbatim, the language set forth in the text.

Although the findings reported in Bulletin 1312-H (Exh. B-1) may provide physical evidence of mineralization on several claims sufficient to warrant the further expenditure of time and money in efforts to determine whether or not the extent of mineralization might be sufficient to justify developing a profitable mining operation, these exposures in and of themselves do not show the extent of any mineral deposit that may exist on the claims and therefore do not constitute a discovery. *Barton* v. *Morton*, 498 F.2d 288 (9th Cir. 1974); *United States* v. *Wood*, 51 IBLA 301, 87 I.D. 628 (1980).

(Decision at 12). Based on the foregoing determinations, Judge Sweitzer concluded that contestees had failed to establish, by a preponderance of the evidence, the existence of a discovery on any of the claims at issue and, therefore, the claims were properly determined to be null and void.

On appeal, claimants basically reiterate the arguments which they made before Judge Sweitzer. For reasons which we will set forth, we hereby affirm Judge Sweitzer on all essential points.

Before the Board, claimants again argue that because their mining claims constitute a property interest the effect of the Government contest herein has been to effectuate a taking of their property without compensation in violation of the Fifth Amendment. *See* Statement of Reasons (SOR) at 9-21. While it is, indeed, true that courts have long recognized that a valid mining claim is "property in the fullest sense of the word" (*Forbes* v. *Gracey*, 94 U.S. 762, 767 (1876)), the mere location of a mining claim on Federal land, absent a discovery, vests no rights in the locator as against the United States.[20] *See Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). While we examine the questions relating to the existence of a discovery below, suffice it for our present purposes to note that, unless appellants can establish that the claims are supported by discovery, there can be no unconstitutional taking of their possessory interests.[21]

Appellants also repeat their assertion that the Government is collaterally estopped from asserting that the claims are invalid. As noted above, this argument is based on their assertion that Circular No. 565 and Bulletin 1312-H effectively established that sufficient mineralization existed to constitute a discovery and that the Government is estopped from challenging the conclusions contained in these documents (Reply at 8-9). This argument is, we believe, flawed in a number of aspects.[22]

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[20]It is, of course, true that the location of a mining claim, unsupported by a discovery, may, nevertheless, afford a claimant protection under the doctrine of *pedis possessio* against subsequent intrusions of others while he remains in continuous, exclusive occupancy and diligently attempts to make a discovery (*see generally Union Oil Co. of California* v. *Smith*, 249 U.S. 337 (1919)). This doctrine, however, does not apply as against the United States. *See, e.g., Cameron* v. *United States*, 252 U.S. 450, 456 (1920); *United States* v. *Williamson*, 45 IBLA 264, 277-78, 87 I.D. 34, 41-42 (1980); *R. Gail Tibbetts*, 43 IBLA 210, 218-19, 86 I.D. 538, 542-43 (1979).

[21]Even assuming that appellants' claims were supported by discovery, they would not possess either equitable or legal title to the lands in question, however. The Federal courts have consistently held that these titles pass to mineral claimants only upon the payment of the purchase price established by Congress for the land. *See Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450 (1896); *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U.S. 428, 430 (1892); *Freese* v. *United States*, 639 F.2d 754, 758 (Ct. Cl. 1981); *United States* v. *Rizzinelli*, 182 F. 675, 682-83 (D. Idaho 1910).

[22]Moreover, insofar as Circular No. 565 is concerned, this contention is actually contradicted by appellants' SOR, wherein they aver "[c]ontrary to language in the Decision herein, the placer discovery on which Sainsbury reported in his 'Circular 565' is *not* the discovery substantiating Appellants' claims" (SOR at 13 (italics added)).

[1] First of all, as we have noted on numerous occasions, the Board has well-established rules governing consideration of estoppel questions. The following discussion taken from our decision in *Ptarmigan, Inc.*, 91 IBLA 113, 117 (1986), *aff'd, Ptarmigan, Inc.* v. *United States*, No. A88-467 Civil (D. Alaska, filed Mar. 30, 1990), *appeal filed*, No. 90-35369 (9th Cir. Apr. 29, 1990), synthesizes the Board's approach:

> First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970):
>
> Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.
>
> *Id.* at 96 (quoting *Hampton* v. *Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960)). *See State of Alaska*, 46 IBLA 12, 21 (1980); *Henry E. Reeves*, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. *Harold E. Woods*, 61 IBLA 359, 361 (1982); *State of Alaska, supra.* Third, estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. *United States* v. *Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978); *D. F. Colson*, 63 IBLA 121 (1982); *Arpee Jones*, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. *See Edward L. Ellis*, 42 IBLA 66 (1979).

It is, moreover, axiomatic that the existence of a crucial misstatement of a material fact upon which an individual relied to his or her asserted detriment is a prerequisite to the invocation of estoppel, since it is precisely such detrimental reliance which justifies estoppel in the first instance. And it is on this point that appellants' position is most critically lacking.

We note that nothing in either Circular No. 565 or Bulletin 1312-H supports appellants' implicit assertion that a valuable mineral deposit exists on each and every mining claim which they have located.[23] Any claim of reliance with respect to Bulletin 1312-H is impossible, insofar as the original location of the lode claims is concerned, since it was published in 1970 and the lode claims were located on June 28, 1969. And, while Sheehan did testify that it was his reading of Circular No. 565 which led to his decision to travel to Alaska to locate the claims, the fact of the matter is that this Circular recounted field examinations of areas which are *not* within the limits of any of the claims. *See* Tr. 782.

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[23] In this regard, we would point out that Sainsbury's testimony as to the conclusions which he drew from his examinations of the area is totally irrelevant to the question of estoppel. Sheehan testified that he had not met Sainsbury until the hearing (Tr. 658-59). Thus, any claim of reliance with respect to the location of the lode claims must be limited to the documents themselves and not to Sainsbury's personal views of the conclusions reached which are not reflected in those documents.

Thus, the circular notes that several high-angle faults similar to those which controlled the gold deposits of the Kougarok River crossed Humboldt Creek "above the placer cuts from which the cassiterite was recovered," but expressly declared that "[t]hese faults were plotted from aerial photographs; they were not examined on the ground" (Exh. A at 4). The circular's conclusion that these faults "might be a source of the cassiterite" would scarcely give Sheehan a rational basis upon which to conclude the Government was assuring him that his claims were supported by a discovery. Nor does the subsequent statement that "[a] random grab sample of bulk concentrate * * * was found to contain slightly more than 60 percent tin, and thus meets the requirements for a high-grade saleable tin concentrate" (Exh. A at 5), provide any sustenance to such a conclusion, since this sample was not taken from any of appellants' claims.

Thus, we think it clear that, as a matter of fact, no estoppel could arise with respect to Sheehan's actions in locating the lode claims, nor can any estoppel be premised on anything in Circular No. 565, either at the time of location of the claims or thereafter. There remains only the possible assertion that subsequent actions of appellants were taken in reliance on Bulletin 1312-H. Not only is this difficult to credit for the elementary reason that one would suppose that, having located their own claims, appellants based their subsequent actions on *their* assessment of the validity of their claims, but the transcendent reality is that a reading of Bulletin 1312-H simply does not support appellants' broad assertion that officials of the United States agreed that there was a discovery on each and every or, indeed, on any of their claims.

We noted above that Judge Sweitzer rejected this contention, holding, *inter alia*, that while Bulletin 1312-H, as well as Circular No. 565, might provide evidence of the existence of mineralization within the area of the claims, they were clearly inadequate to establish the extent of any mineral deposit which might exist within the limits of any claim and therefore could not, in and of themselves, establish the existence of a discovery. In this regard, we think Judge Sweitzer's analysis was clearly correct.

Thus, the abstract of the report does not aver that a discovery had been made or that an ore body had been delineated. Rather, it notes that "[g]eologic mapping, analyses of samples of bedrock, and geochemical studies have disclosed the probable source of placer gold and tin on Humboldt Creek, Serpentine-Kougarok area, Alaska, and have shown mineralized bedrock in several areas on the east side of the granite stock at Serpentine Hot Springs" (Exh. B-1 at H1). While the abstract does report that "two mineralized and altered fault zones were sampled in detail," the bulletin never referred to these areas as constituting a discovery or even as embracing an ore body.[24]

[24] As the Board has recognized in the past, geologists and others involved in the mining industry will often use the term "ore" to refer to a mineralized deposit which can be marketed at a profit. *See United States* v. *Whittaker*, 95 IBLA 271, 282 n.8 (1987). Thus, while the failure of the bulletin to utilize the term "discovery" is, perhaps,

Continued

Moreover, there is, as this Board explained in *United States* v. *Feezor*, 74 IBLA 56, 90 I.D. 262 (1983), a substantial difference between "a mineral deposit" and "a valuable mineral deposit." Thus, the Board noted:

> As modern adjudications have developed, the latter phrase has come to mean a mineral deposit of sufficient quantity and quality so as to justify a prudent man in expending both labor and money in developing a paying mine. Where the term "mineral deposit" is used, it merely means, in the context of a lode claim, that a mineralized area in a vein or lode has been disclosed. It does not necessarily mean that a *valuable* mineral deposit has been exposed.

Id. at 75, 90 I.D. at 272-73.

A reading of Bulletin 1312-H leads ineluctably to the conclusion that the terms "mineralized bedrock" and "mineralized and altered fault zones" and "mineralized areas" which were employed therein refer to the disclosure of a mineral deposit and do not support the assertion that a *valuable* mineral deposit had been discovered. Indeed, this point is clearly made in the textual discussion of the two mineralized fault zones where, having noted that certain samples "were collected over a width of 200 feet and a length of 1,000 feet along the flat saddle, where frost action has completely shattered bedrock to create a veneer of surface rubble," the bulletin then admits that "nothing can be stated as to the width of *possible* veins that exist within the altered zone beneath the frost-shattered rock" (Exh. B-1 at H8 (italics added)). Having expressly eschewed the ability to predict the width of any *possible* veins lying beneath the surface, the bulletin could not also have been simultaneously asserting that a discovery, within the meaning of the mining laws of the United States, had been shown to exist based on its sampling of the surface since there would be no theoretical basis upon which to predicate any estimates of the quantity of mineralization.

In any event, even had officials of the Government unequivocally declared in these publications that a valuable mineral deposit was shown to exist throughout the area covered by appellants' claims, the United States would not be estopped from challenging appellants' assertion that the claims were valid and, upon a showing that the claims were not, in fact, supported by a discovery, obtaining a declaration that the claims were null and void. As the Supreme Court noted long ago, speaking through Justice Van Devanter,

> [T]he execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

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understandable given the absence of any mining claims as of the time of the field investigation (Tr. 785), the similar failure to use the term "ore" or to otherwise assert that a mineral *deposit* capable of exploitation had been disclosed is not so easily explained.

Cameron v. *United States*, 252 U.S. 450, 459-60 (1920). Continuing, the Court noted that:

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind.

Id. While cautioning that the Department's power to strike down claims could not be exercised arbitrarily, the Court expressly declared that "but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void." *Id.*

The continuing authority of the Department to inquire into the validity of claims so long as legal title remains in the Department has been repeatedly reaffirmed by the courts. *See, e.g., Schade* v. *Andrus*, 638 F.2d 122, 124-25 (9th Cir. 1981); *Ideal Basic Industries, Inc.* v. *Morton*, 542 F.2d 1364, 1367 (9th Cir. 1976). Invocation of estoppel in situations in which the record establishes that a claim is not supported by a discovery of a valuable mineral deposit would inevitably lead to the issuance of patents for public land where the requirements of the law have not been met. It would ultimately result in the granting of a right not authorized by law to the detriment of the rights of the public which the Department is charged to protect. Estoppel, in such circumstances, simply cannot lie.

The central question, of course, remains whether the evidence establishes that a discovery exists on each of the claims. Appellants argue that the claims clearly meet the "prudent man test" as delineated by Federal Court decisions, criticizing reliance in the decision on the "marketability test." Subsidiary thereto, appellants contend, relying on two decisions issued in the early 1900's (*Charlton* v. *Kelly*, 156 F. 433 (9th Cir. 1907); *Lange* v. *Robinson*, 148 F. 799 (9th Cir. 1906)), that "for the purposes of the mining laws the term 'exploration' is synonymous with 'development' " (SOR at 10). Appellants also assert that, in any event, the evidence adduced at the hearing establishes that the marketability test has been met, contending, *inter alia*, that the mineral examination and evidence presented by the Government were of no probative effect, and specifically assailing the testimony of Clemmer as to the absence of a discovery. Our review of the evidence adduced at the hearing, however, convinces us that the evidence, considered in its totality, fails to establish the existence of even a mineral deposit within the limits of the majority of the claims and clearly fails to establish the existence of a *valuable* mineral deposit within any of the claims.

[2] Initially, it is useful to briefly describe the "present marketability" test as defined by recent Departmental adjudications. As we noted in *In re Pacific Coast Molybdenum, supra*:

"Present marketability" has never encompassed the examination of either cost or price factors as of a specific, finite moment of time, without reference to other economic factors. Rather, the question of whether something is "presently marketable at a profit" simply means that a mining claimant must show that, as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine may be developed.

Id. at 29, 90 I.D. at 360. *Accord United States* v. *Shiny Rock Mining Corp.*, 112 IBLA 326 (1990); *United States* v. *Whittaker*, 95 IBLA 271 (1987). Admittedly, Clemmer's discussion of the concept of present marketability arguably exhibited a misunderstanding of the application of the present marketability test in recent adjudications (*see* Tr. 1078-85), and, to the extent that issues relating to present marketability were involved in the instant case, the Board would necessarily be forced to discount his conclusions as to the claims' validity. *See United States* v. *Pool*, 78 IBLA 215, 219 (1984); *United States* v. *Hooker*, 48 IBLA 22, 29-31 (1980). But, as we view the record established at the hearing, the "present marketability" component of the discovery test is not really involved in the instant case. Rather, quite apart from any questions as to whether appellants have met the present marketability test, the record fails to establish that they have met the prudent man test in its most unvarnished form.

Application of the present marketability test presupposes the established existence of a mineral deposit and is utilized as an aid in determining whether it is a valuable mineral deposit such that a reasonable prospect exists for its successful exploitation. In other words, questions as to the marketability of a mineral deposit necessarily assume the existence of the mineral deposit. The present record, however, discloses little evidence that a mineral deposit has been exposed on any of the claims at issue, and none, at all, that a valuable mineral deposit has been so exposed.

In examining the question of whether and to what extent appellants have shown the existence of a valuable mineral deposit within the limits of their claims, we will first review the testimony of Sainsbury, upon which appellants place particular reliance. In the excerpts of his testimony set forth above, Sainsbury clearly asserted that, in his opinion, the Diane, Serpentine, and Tin Mountain claims were supported by a discovery of a valuable mineral deposit. *See, e.g.*, Tr. 367, 799-800. Yet, at the same time, Sainsbury also admitted that it was not possible to determine the quantity of the deposit without diamond drilling (Tr. 898). The law, however, is quite clear that without some indication that mineral values exist in sufficient quantity to warrant an effort to extract them, it is impossible to meet the prudent man test of discovery.

[3] As long ago as its decision in *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905), the Supreme Court recognized this requirement. In *Chrisman*, the Court quoted with approval Justice Field's declaration in his dissenting opinion in *Iron Silver Mining Co.* v. *Mike & Starr*

Gold & Silver Mining Co., 143 U.S. 394, 412 (1892) that: "[T]he mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." To the same effect are more recent Federal and Departmental decisions. *See, e.g., Thomas* v. *Morton*, 408 F.Supp. 1361, 1371-72 (D. Ariz. 1976), *aff'd*, 552 F.2d 871 (9th Cir. 1977); *Converse* v. *Udall*, 399 F.2d 616, 620-21 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *United States* v. *Weekley*, 86 IBLA 1, 6 (1985); *United States* v. *Larsen*, 9 IBLA 247, 262 (1973), *aff'd*, *Larsen* v. *Morton*, No. 73-119 TUC-JAW (D. Ariz. Oct. 24, 1974).

Moreover, Sainsbury's conclusions were premised on the results of his own sampling and that undertaken by appellants in 1977. While there is no gainsaying Sainsbury's expertise as an exploration geologist nor his personal knowledge of the area of the claims, we do not believe that his sampling provides a sufficient basis on which to conclude that a discovery, within the meaning of the mining law, exists within the limits of any of the claims.

Initially, we would point out that the geochemical investigations undertaken by Sainsbury were simply not designed to make a discovery but rather were intended to establish whether sufficient mineralization might exist to warrant further exploration. Indeed, this is the general aim of geochemical methods of exploration. Thus, it has been noted that:

> Through systematic collection and analysis of appropriate samples, geochemical "anomalies" (either of the actual element being sought, or of an "indicator" element known to be commonly associated with the element being sought) can be detected. *Such geochemical anomalies when integrated with geological and other information, frequently are a great aid in the selection of target areas.* [Italics supplied.]

SME Mining Engineering Handbook (1973) at 5-8. Sainsbury testified as much when he stated that "[o]ur purpose was first to locate the source of the tin, and then to establish that there was metalization along these altered zones. At that point the U.S. government is supposed to stop and private industry is supposed to take over" (Tr. 366).

Admittedly, Sainsbury presented this testimony immediately prior to his assertion that "any exploration geologist would become immediately excited by that amount of mineral, and stake it * * *[and say] he's made a discovery" (Tr. 367). But, as we noted above, Sainsbury made these assertions that a discovery existed while at the same time admitting that it would be impossible to make any estimate as to the quantity of mineralization without further exploration (Tr. 898). Regardless of what an exploration geologist might conclude, however, a discovery *within the meaning of the mining laws* cannot be said to exist absent some evidence of the extent of mineralization.

[4] Moreover, there is another intrinsic problem with Sainsbury's testimony as it relates to the requirements of a discovery. As this Board has noted on numerous occasions, while recourse to geologic inference to establish the quantity and quality of a mineral deposit is

permitted, geologic inference cannot be used to establish the existence of a mineral deposit. *See, e.g., United States* v. *Feezor, supra; United States* v. *Larsen, supra.* Thus, this Board stated in *Larsen*:

> While geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit. That is, where ore has been found, the opinions of experts, based upon knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, deductions from established facts–in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery–may properly be considered in determining whether ore of the quality found, or of any mineable quality, exists in sufficient quantity to justify a prudent man in the expenditure of his means with a reasonable anticipation of developing a valuable mine.

Id. at 262.

[5] We set forth above Sainsbury's extensive comments relating to the nature of the permafrost environment. Sainsbury clearly was of the opinion that the "rubble" to which Clemmer referred was actually "rock in place" and constituted "bedrock." This is a critical point since the *sine qua non* of a discovery is the *exposure* of a mineral deposit and, to the extent that the rocks and specimens[25] which he sampled are considered to be detrital deposits, they cannot be considered supportive of a lode claim since a placer discovery (even assuming it exists) will not support a lode location. *Cole* v. *Ralph*, 252 U.S. 286, 295 (1920); *United States* v. *Haskins*, 59 IBLA 1, 88 I.D. 925 (1981), *aff'd, Haskins* v. *Clark*, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984).

Under 30 U.S.C. § 23 (1988), lode locations may be made "upon veins or lodes of quartz or other rock in place." Thus, absent the exposure of such "veins or lodes of quartz or other rock in place," there can be no valid lode claim. Yet, it is clear from the testimony presented on behalf of appellants that they are not contending that the entire surface covering their lode claims consists of a vein or lode. On the contrary, the evidence is that such veins or lodes as may exist will be found at some depth beneath the surface. *See, e.g.*, Exh. 29; Exh. 30 at 27-28; Exh. B-1 at H8; Tr. 351, 870, 898. Rather, appellants' contention is that the surface rubble or "frost broken rock" is "essentially in place" (Tr. 350).

The question of what constitutes rock "in place" has received a not inconsiderable amount of judicial attention. Thus, in *Stevens* v. *Williams*, Fed. Cas. No. 13,414, *cited in Lindley on Mines* § 301 (3d ed. 1914), Judge Hallett stated that "[a]s to the meaning of these words 'in place,' they seem to indicate the body of the country which has not been affected by the action of the elements; which may remain in its original state and condition as distinguished from the superficial mass

[25] Of the 23 samples taken from the 11 sample sites arguably within the limits of the claims, 7 were chip samples, 7 were panned concentrates, 7 were grab samples, and 2 were selected hand specimens. In point of fact, the highest silver assays (5,000 ppm) were obtained from the selected hand specimens taken from float. *See* Exh. B-1, Table 2, Samples AKd-249F, AH-75A.

which may lie above it." Similarly, in *Meydenbauer* v. *Stevens*, 78 F. 787 (D. Alaska 1897), Judge Delaney charged the jury:

> By the phrase "in place" congress evidently intended to make a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of quartz or rock simply lying or resting upon the earth's surface without any walls, and also pieces or bowlders detached from the earth's crust, commonly called "float," and usually found in the mountain gulches and along the beds of streams in a mineral country.

Id. at 790.

It is unnecessary for us to decide if broken rock held in place by permafrost constitutes rock "in place" within the meaning of 30 U.S.C. § 23 (1988). The testimony adduced at the hearing was to the effect that the permafrost began a foot or two beneath the surface (Tr. 401, 405, 728-29) whereas the source deposit would normally be located below the permafrost line. Appellants' basic theory is that the frost riven rock is held "in place" by the permafrost, yet even Sainsbury admitted that this was not completely true since "[t]he surface, the few surface inches, may be moving slightly" (Tr. 728), and also acknowledged that, in the summer, the surface would thaw "two or three feet" (Tr. 349). But, in point of fact, the samples were taken from this surface. Thus, Sheehan described the sampling sites to which he had been taken by Stettmeir:

> Q. [By Mr. Mothershead] And once you went to these sites how were they – how did they appear on the ground?
> A. Well, the ground was – they were in areas where the ground was broken, and they were –
> Q. Broken, how do you mean broken; cleared?
> A. What did you say?
> Q. Cleared of rubble, or –
> A. Oh, no. Where it looked like somebody had dug in a little bit.
> Q. So it was merely kind of a digging in of the surface there that was indicated?
> A. No, it wasn't dug down deep, it was if somebody had moved the rock around. It wasn't a pit.

(Tr. 653). Nothing in either Bulletin 1312-H or Sainsbury's testimony is to the contrary. Thus, regardless of whether or not it could be argued that broken rock entrapped in permafrost constitutes rock "in place," Sainsbury's sampling could not be said to have exposed such a deposit since the sampling of the surface rubble did not penetrate into the permafrost.

We wish to make it crystal clear that the foregoing is not meant to deprecate in any way Sainsbury's sampling program or the geological (as opposed to legal) extrapolations which he made from the results. The simple fact of the matter, however, is that Sainsbury's purpose was *not* to make a discovery of a valuable mineral deposit as defined by the mining laws, but rather to determine the "probable source of placer gold and tin on Humboldt Creek" (Exh. B-1 at H1). Having shown the existence of mineralization along two altered zones in the area, his role ceased, leaving it to private industry to take over (Tr. 366). We find ourselves in total agreement with Judge Sweitzer that, as a result of Sainsbury's endeavors, an area worthy of further

exploration was clearly delineated. We cannot agree with appellants that Sainsbury's endeavors were sufficient to establish a legal discovery on any of the claims, much less the ones from which he did not even take a sample.[26]

[6] We recognize, of course, that appellants assert that "for the purposes of the mining laws the term 'exploration' is synonymous with 'development,' " and further contend that the various Board precedents which have rejected this assertion "fly directly in the face of Court admonishments" to that effect (SOR at 10). But, save for the two turn-of-the-century cases cited in support thereof, courts have uniformly rejected appellants' attempt to equate evidence which would justify further exploration with evidence sufficient to support a discovery.

The mining industry, itself, has no difficulty in distinguishing between prospecting, exploration, and development. Thus, Peele defines prospecting as "the search for minerals," exploration as "the work of exploring a mineral deposit when found * * * undertaken to gain knowledge of the size, shape, position, characteristics, and value of the deposit," and "development" as "the driving of openings to and in a proved deposit, for mining and handling the product economically." Peele, *Mining Engineers' Handbook* 10-03 (3d ed. 1941). Nor have courts exhibited any inability to differentiate between the concept of exploration and development. Indeed, in *Converse* v. *Udall, supra*, the Court of Appeals for the Ninth Circuit not only discussed the basis for the differentiation, it examined the very court cases urged by appellants as compelling a different result:

> Converse attacks the Secretary for drawing a distinction between "exploration," "discovery," and "development." But the authorities we have cited show that there is a difference between "exploration" and "discovery." (See, e.g., Cole v. Ralph, supra, 252 U.S. at 294, 296, 307, 40 S.Ct. 321.) If the latter word were taken literally, then the finding of *any* mineral would be a "discovery." Webster, 2d Ed., defines "discover" as "to make known the identity of, * * * by laying open to view, as a thing hidden or covered, to expose; to disclose; to bring to light." But, as we have seen, that alone is not enough. On the other hand, Webster defines "explore" as "to seek for or after, to strive to attain by search." This is exactly what a prospector does, both before he finds the first "indications * * * of the existence of lodes or veins" (United States v. Iron Silver Mining Co., supra, 128 U.S. at 683, 9 S.Ct. at 199) and thereafter until he finds enough mineralization to meet the legal test of discovery. It is true that some of the cited cases

[26]It is even unclear which claims are located over sampling spots. Plate 1 of Exhibit B-1 is drawn on too small a scale to correlate sample sites with individual claims. The same is true of Exhibit B-2, which is an enlargement of Plate 1 with the outer perimeter of the claim groups depicted thereon. Admittedly, Exhibit J purports to locate Sainsbury's sampling sites on specific claims, but the record fails to establish the basis for these locations. Brian Tognoni testified that Exhibit J was prepared in September 1977, based on the topography shown in Plate 1 (Tr. 440). The problem, however, is that Plate 1 is drawn on a scale of 1" to a mile. Some of the circles used to delineate sample sites and which vary in size based on the sum of anomalous metals are one-eighth inch (*i.e.*, 660 feet) in diameter. The actual sampling point could be 330 feet in any direction from the center of the circle. Since each lode claim is limited by statute to a maximum width of 600 feet, it is obvious that exact placement of the sampling sites within specific claim boundaries based on topography alone is not possible. This is made graphically clear on Exhibit J where the distance between Survey sample sites 58 and 60 is shown to be approximately 800 feet and the distance between sample sites 56 and 59 is approximately 1,580 feet, yet the text of Exhibit B-1 states that this group of samples was "collected over a width of 200 feet and a length of 1,000 feet" (Exh. B-1 at H8).

say that "development" and "exploration" mean the same thing (Charlton v. Kelly, supra, 156 F. at 436), or speak of "exploration" after discovery (Lange v. Robinson, supra, 148 F. at 804). But in each of these cases, the court was talking about further work to be done after a sufficient discovery had been made, work which could be called "exploration" or "further exploration," or could also be called "development." They do not support the attack here made upon the distinction between work which must necessarily be done before a discovery, and the discovery itself, which is what the Secretary talks about when he distinguishes between "exploration" and "discovery." [Italics in original.]

Id. at 620-21. *Accord Barton* v. *Morton*, 498 F.2d 288, 290-91 (9th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974); *Multiple Use, Inc.* v. *Morton*, 353 F.Supp. 184, 193 (D. Ariz. 1972), *aff'd*, 504 F.2d 448 (9th Cir. 1974); *see also United States* v. *New Mexico Mines, Inc.*, 3 IBLA 101 (1971). There is, in short, no basis for appellants' assertion that exploration and development mean the same thing in mining law.

We thus conclude that, while Sainsbury's studies and testimony might well engender an interest in further exploration of the area, they are insufficient, in themselves, to support a determination that any of the lode claims, much less all of the lode claims, were supported by a discovery as of the date of the withdrawal (September 12, 1972), the date of the hearing, or the present time. The question then is whether appellants submitted any other probative evidence supporting their assertion of a discovery on each of the lode claims.

[7] We note that the samples which Sheehan took were lost in transit and never assayed. Moreover, his own investigation was limited primarily to the sites identified by Stettmeir as the areas in which Sainsbury had taken samples. Thus, nothing in his testimony advanced appellants' assertions of a discovery on each of the claims.

Much controversy has centered around the drilling of Hole V-6-1 by Rowan Drilling in July 1971. This hole was one of three by Rowan pursuant to an agreement between appellants and holders of claims adjacent to the Serpentine and Tin Mountain lode claims. Hole V-6-1 was drilled to a depth of 140 feet and, at a depth of 122 feet, encountered a vein approximately 3 inches wide which included "a ½ inch wide piece of highly mineralized vein material [which] contained 1.10% tin" (Exh. P at 2). Judge Sweitzer noted that "[a]though some evidence suggest[s] that some of the core holes drilled by Rowan Drilling Company may have been drilled on the subject lode claims (Tr. 554), there is no credible evidence to establish on which particular claim(s) such hole(s) may have been drilled" (Decision at 19). Accordingly, Judge Sweitzer held that the core hole values could not be utilized to support a discovery on any of the claims.

The problem in determining where this hole was drilled is occasioned by the fact that no precise location is provided for this hole in Exhibit P. Exhibit P consists of part of an affidavit of assessment work performed for the 1971 assessment year[27] and a written report

[27] That the first page of Exhibit P is part of the annual assessment statement filed for 1971 can be seen by comparing it to that filing which is contained in Exhibit N.

presumably prepared by Rowan after the drilling. In discussing the character of the work performed, the assessment work affidavit noted "a diamond drilled core hole, near bulldozer trench cut in August 1970, was drilled to total depth of 140 feet and cores assayed" (Exh. P). The written report noted that "Hole V-6-1 was collared 630 feet N 30° W from the claim marker at the NE corner of North Spur lode #1 * * * slightly north of the exposure from which tin bearing samples were taken in 1970."

Appellants contend that this hole was drilled within the limits of the Serpentine and Tin Mountain claim based primarily on Sheehan's conclusion that, since all of the bulldozer trenches were contained within the limits of his claims, it must have been located within his claim (Tr. 576).[28] There are a number of problems with this theory.

First of all, there is simply no evidence in the record that all of the trenches were located within the subject claim group. While Clemmer did identify three bulldozer cuts located on the Tin Mountain Nos. 10, 20, and 21 claims, his testimony was, by its very nature, limited to the claims at issue and he never asserted that these were the only bulldozer cuts in the general area.

Moreover, simple reliance on the assertion that the hole was drilled near a bulldozer cut ignores the fact that the drill site was expressly located 630 feet north, 30 degrees west of the NE corner of the North Spur #1. In point of fact, the North Spur #1 is *not* among the claims listed in the affidavit of assessment work as claims for which assessment work had been performed. The most logical conclusion is that this claim was owned by unknown third parties and was located outside the periphery of the claim block being explored. If this is, in fact, the case, the drill hole could not have been located on one of appellants' claims since the Goldstrike claims completely surround the Tin Mountain and Serpentine claims on the south and west. *See* Exh. B-2. We think it clear that the evidence of Exhibit P, considered in its entirety, requires placement of Hole V-6-1 outside of appellants' claims.[29]

In any event, while appellants' attempt to place drill Hole V-6-1 within the limits of their claims (without attempting to identify which claim it might have been located in), they also seek to ignore the conclusions which Rowan drew from its drilling program. Thus, the report concluded:

> The geophysical and geochemical anomalies at both the Vein #3 lower bench site and the Vein #6 site have been tested by drilling, and the causes of the anomalies

[28]Sheehan admitted, however, that he had not made any of the cuts to which the document referred since he was not on the claims in 1970 (Tr. 576).

[29]Another practical difficulty with appellants' argument is that the three cuts to which Clemmer testified were all located on the Tin Mountain claims, which are directly north of the Serpentine claims. A location of the drill hole based on any of these three cuts would require that the North Spur #1 be located over either the Serpentine No. 6 or the Tin Mountain Nos. 7 or 8. There was, however, absolutely no evidence of any claim conflicts in the area nor is it likely that Rowan would use a conflicting claim as a reference point in derogation to a claim which it had under lease.

adequately explained. *No commercial levels of mineralization were encountered in the holes.* At Dike Hill, the strong geochemical anomaly has been supported by geophysics although this zone was not tested by drilling. [Italics supplied.]

(Exh. P at 3).

Sainsbury's conclusion as to the possible marketability of the cassiterite deposit intersected by Hole V-6-1 (Tr. 961-62) was made totally on speculation as to the possible length and depth of the vein for which no support appears in the record.[30] Moreover, Sainsbury admitted that he could not specifically identify the location of any of the drill holes (Tr. 964). And Sainsbury's estimate of value ignores the fact that Rowan, which was in the best position to evaluate the data which it developed, subsequently abandoned its option to purchase the claims. Thus, even if we could actually locate Hole V-6-1 within a specific claim, it would not be sufficient by itself to establish that a reasonably prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine with respect to the claim upon which the drill hole was located. There is no possible way that this hole can be deemed to validate all of the 35 claims in the Tin Mountain and Serpentine groups.

There remains the samples taken by Brian Tognoni in 1976. At the outset, we note that the grid samples were taken primarily from Tin Mountain Nos. 21 and 22, with a slight overlap into No. 20. The 10,000-foot line sample crossed parts of the Tin Mountain Nos. 1 through 11, and 14. *See* Exh. J. It would follow, therefore, that nothing disclosed in Tognoni's samples could serve to constitute the exposure of a mineral deposit, much less a valuable mineral deposit, which is the *sine qua non* of discovery on any of the other claims. Accordingly, the Diane Nos. 1 to 6, the Serpentine Nos. 1 to 9, and the Tin Mountain Nos. 12, 13, 15 to 19, and 23 to 26 claims must be deemed null and void since they fail to show an exposure of a valuable mineral deposit within the meaning of the mining laws.

Of the 66 sampling sites located within the Tin Mountain claims (E-35 to E-100), not a single one reported anything other than "nil" for tin, and only 15 showed any silver, the highest (E-72 and E-83) assaying at 4 ppm. *See* Exh. H. Given the fact that the background value for silver was 1 ppm (*see* Exh. B-1, Table 2), only 6 of the 66 samples registered above background levels for silver. Furthermore, only four samples registered even twice the established background values for any other of the minerals tested, all of them showing lead at levels two to three times greater than background.[31]

No background levels had been established for beryllium. Of the 66 samples, 15 showed 5 ppm, 45 showed 10 ppm, and 6 showed 15 ppm.

[30] Moreover, Clemmer pointed out that Sainsbury's cost computations were based on in-place value and that actual mining would require a 36-inch mining width to extract the deposit which would significantly dilute total returns (Tr. 1005-09).

[31] These four samples were E-63, E-71, E-72, and E-74, which showed assay values of 180 ppm, 150 ppm, 190 ppm, and 150 ppm, respectively (background levels being 70 ppm).

Sainsbury, as noted above, testified that beryllium readings of 10 ppm or higher indicated "a source area somewhere shedding beryllium into that drainage." Even assuming that this testimony, which was given with reference to the placer claims, would be equally applicable to the beryllium showings disclosed on the lode claims, the readings disclosed could scarcely constitute evidence that the source area happened to be under any of the claims or that the source area, itself, contained beryllium in sufficient quantity and quality to justify a prudent man in expending time and effort with the reasonable expectation of developing a paying mine. This is evidence which, while it may have some value as a spur to exploration, clearly fails to establish that a discovery of a valuable mineral deposit has been made. Accordingly, we must affirm Judge Sweitzer's conclusion that the Tin Mountain Nos. 1 to 11, and 14 claims are null and void.

There remains to be analyzed the results of the grid survey conducted primarily on the Tin Mountain Nos. 21 and 22, with approximately four sample sites located within the Tin Mountain No. 20. As noted above, Brian Tognoni testified that a total of 121 samples were taken in a square grid pattern at intervals of 100 feet. Approximately half of these samples, generally the northern samples (*see* Exh. L),[32] were rock chip samples taken from "outcrops of rock, in-place rock" (Tr. 453), while the other half were soil samples taken by an auger driven downward to the point of resistance, usually the permafrost layer one or two feet below the surface (Tr. 401). Sainsbury, in his review of the assay returns, underlined those results which he thought favorable because of the number of anomalous readings. *See* Exh. H (underlined). Sainsbury was clearly of the view that the results were generally supportive of his own sampling, even though there was no overlap in the areas sampled. Our review, however, fails to disclose any basis upon which it could be concluded that a discovery of a valuable mineral deposit was disclosed by Brian Tognoni's sampling.

Of the 121 samples, 65 were soil samples and 56 were rock chip samples. An analysis of the results discloses that, notwithstanding Sainsbury's conclusions, nothing in the reported values lends support to the assertion that appellants' sampling program exposed a valuable mineral deposit of rock in place. In fact, quite the contrary result is disclosed.

We note that Bulletin 1312-H provided the following background values for the minerals tested (with the exception of beryllium): silver - 1 ppm; arsenic - 150 ppm; copper - 100 ppm; lead - 70 ppm; antimony - 150 ppm: tin - 15 ppm; and zinc - 150 ppm. Not only is the average value of the samples below the *background* value for every mineral

[32]There is, however, one mistake on Exhibit L. A comparison of Exhibit L with Exhibit I indicates that the Sample No. 3438 was a rock chip sample. Actually, this sample was a soil sample. Sample No. 3439, immediately to the east, was a rock chip sample. *See* Exh. H. All computations appearing in the text of this decision have been made in light of this correction.

except silver and lead,[33] the average value of the rock chip samples is below the average value of the soil samples for every single mineral, and in most cases, substantially so.[34]

As we discussed above, the soil samples, taken from areas immediately above the permafrost did not sample rock in place, and thus, even if the values disclosed were substantially higher, the sampling could not have exposed mineralization which would have supported a lode discovery. And, an examination of the assay reports in greater detail with respect to the 56 rock chip samples clearly establishes that appellants did not expose an in place mineralization sufficient to meet the prudent man test.

The assay results disclose that not a single assay reveals any values above the background levels for copper, antimony or zinc, only one sample showed higher than background levels for lead, only two samples for arsenic, three for silver, and nine for tin. Only one rock chip sample showed even three minerals above background levels and that sample showed a total anomaly of only 1.67.[35] The highest total anomaly reading for a rock chip sample was 5.6 based on a reading of 100 ppm for tin.[36] Only one rock chip sample other than the two above even showed an anomaly above 1.[37] Based on these showings, there is simply no basis upon which to predicate a determination that appellants' sampling had exposed a valuable mineral deposit.

We are well aware of the fact that averaging of assay returns is subject to the criticism that it distorts the purpose of geochemical sampling which is to identify anomalies as a guide for targeting areas for further exploration. But that is the precise point. It is insufficient for purposes of establishing a discovery under the mining laws to merely show that the evidence is such that further investigation is warranted with the hope that such actions will uncover the source of the anomalies. Rather, the source itself must be identified. Once that is accomplished, geologic inference may be used to show that sufficient quantity and quality exists to support a reasonable expectation of success in developing a paying mine. That this was not done herein is highlighted by the fact that the rock chip samples consistently assayed for lower values than the soil samples. The source of the enrichment of the soil samples and whether such deposit would be amenable to successful mining operations is no more ascertainable now than it was before the grid samples were taken.[38] We must conclude, therefore,

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[33]The average values were: silver - 1.21 ppm; arsenic - 60.74 ppm; copper - 44.63 ppm; lead - 97.35 ppm; antimony - .34 ppm; tin - 10.45 ppm; and zinc - 53.93 ppm.

[34]The comparisons are as follows: Silver: soil samples - 1.95 ppm, rock chip samples - 0.34 ppm. Arsenic: soil samples - 68.58 ppm, rock chip samples - 51.64 ppm. Copper: soil samples - 56 ppm, rock chip samples - 31.07 ppm. Lead: soil samples - 167.15 ppm, rock chip samples -16.34 ppm. Antimony: soil samples - 0.42 ppm, rock chip samples - 0.26 ppm. Tin: soil samples - 12.3 ppm, rock chip samples - 8.30 ppm. Zinc: soil samples - 81.5 ppm, rock chip samples - 21.9 ppm.

[35]This was sample No. 3119. The procedure for ascertaining the total anomaly is set out in Exhibit B-1 at H3-H4.

[36]This was sample No. 3485.

[37]This was sample No. 3477 which had a total anomaly of 3 based on a silver assay of 4 ppm.

[38]The difference between anomalous geochemical analyses and discovery of the mineral deposit was clearly expressed by Sainsbury with reference to the two high beryllium soil samples (Nos. 3402 and 3406). Commenting favorably on the high showings, Sainsbury compared it to showings in the drainage below the Lost River Mine of 200 to 220 ppm in stream sediments. These showings, he testified, "led us to the discovery of the Cape Creek ore body" (Tr.

Continued

that Judge Sweitzer was correct when he held that appellants had failed to establish that these claims were supported by a discovery. His decision with respect to the Tin Mountain Nos. 20, 21, and 22 must be affirmed.

The final issue to be decided is the validity of the Sheehan Nos. 1-21 placer mining claims. Judge Sweitzer gave short shrift to these claims, noting that "only sample No. 3334 shows any tin values (Exh. H) and no evidence has attributed this sample to any particular claim" (Decision at 20). In fact, the only evidence supportive of these claims was the tepid endorsement rendered by Sainsbury at the hearing when he noted "the modest amount of work down there does indicate the presence of minerals or metals which would warrant interest by a prudent man to continue development" (Tr. 822). Given our analysis of Sainsbury's basis for his assertion that the lode claims, for which far more exploratory data existed, were supported by a discovery, it is impossible to place any reliance on his similar conclusion with respect to the placer claims.

Indeed, while we agree that the geochemical and structural analyses of the area of the lode claims might well lead a prudent man to continue exploration in the hope of ultimately making a discovery, the minimal showings contained in the assay reports of the placer samples could scarcely be said to engender the same hope.[39] Nor was the original location of these claims impelled by any assumed "discovery." Sheehan was quite candid in providing that the reason why the placer claims were located in the area in which they are found. In response to a question from contestees' attorney as to why the placer claims had been located so far in distance from the lodes, Sheehan responded, "Because everything else in between those were closed to mineral entry" (Tr. 629). We think the evidence is overwhelming that these placer claims are not now and were not either at the time of the hearing or on the date of the applicable withdrawal (November 1978) supported by a discovery of a valuable mineral deposit. Judge Sweitzer's decision declaring these claims null and void must also be affirmed.[40]

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743). The problem in the instant case is that while a beryllium deposit *might* underlie one or more of appellants' claims, they never "discovered" it. And, even if they had, the discovery could only have occurred in 1976, at a point in time in which the land had long since been withdrawn from mineral entry, and their belated "discovery" would not breathe life into the claim. *See, e.g., United States* v. *Lara*, 67 IBLA 48, 57 (1982), *(On Reconsideration)*, 80 IBLA 215 (1984), *aff'd*, 642 F.Supp. 458, 461 (D. Or. 1986), *aff'd as modified*, 820 F.2d 1535, 1542 (9th Cir. 1987).

[39]Indeed, even the single assay which reported the presence of tin failed to indicate that it was present above the background levels determined by Sainsbury in Bulletin 1312-H for the area of the lode claims. Indeed, with the exception of one other sample (No. 3317) which assayed 2 ppm for silver, and two samples (Nos. 3335 and 3336) which showed zinc at 390 ppm and 250 ppm, respectively, no other samples showed above these background levels for *any* of the minerals tested. While these assays did consistently show low levels of beryllium, not only are these returns subject to the analysis set forth *supra* at note 37, but we would also point out that there is absolutely no evidence that the ultimate source of the enrichment would be a deposit in *placer* formation. *See Cole* v. *Ralph, supra.*

[40]In view of our conclusion as to the lack of discovery of a valuable mineral deposit on any of the placer claims, we do not reach the question as to the applicability of the 40-acre limitation, provided by Alaska State law, to the claims at issue. *See* notes 2 and 3, *supra.*

In summary, we find that there is no basis in law or in fact for estopping the Government from inquiring into the validity of the subject mining claims. We further find that while the evidence relating to the Diane, Tin Mountain, and Serpentine lode claims might entice a prudent man to continue exploration in the hope of exposing a valuable mineral deposit, the evidence establishes that such a deposit has not yet, in fact, been exposed on any of the claims. Accordingly, these claims are properly deemed null and void. Insofar as the Sheehan placer claims are concerned, it is arguable whether sufficient indications of mineralization exist to even justify further exploration. The record is absolutely clear that these claims are not supported by a discovery of a valuable mineral deposit and they are properly declared null and void. In light of the foregoing determinations, there has been no unconstitutional taking of property in violation of the Fifth Amendment since, absent the existence of a discovery, a mining claimant has no property rights as against 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 in its entirety.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

FIRST AMERICAN TITLE INSURANCE CO. *v.* BUREAU OF LAND MANAGEMENT, FORT MOJAVE INDIAN TRIBE (INTERVENOR)

9 OHA 17 Decided: *March 26, 1991*

Review of a decision and order of the Interior Board of Land Appeals requiring corrective survey of public lands. Group No. 367.

Decision and order of Board vacated; case remanded.

1. Accretion--Surveys of Public Lands: Generally

In apportioning accreted lands between two adjoining riparian sections, BLM properly uses the perpendicular survey method where it is not feasible to use the proportionate shoreline survey method because no zero accretion point or end point of a perpendicular line drawn to the new bank of the river created by accretion may be used to allocate proportionate parts of that bank to the sections.

2. Accretion--Surveys of Public Lands: Generally

In utilizing the perpendicular survey method to apportion accreted lands between two adjoining riparian sections, BLM must select a perpendicular line drawn to the new bank of the river created by accretion which equitably apportions that bank between the

sections, consistent, whenever practicable, with awarding to each section the land in front of it.

APPEARANCES: Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Richard A. Friedlander, Esq., and James T. Braselton, Esq., Phoenix, Arizona, for the First American Title Insurance Co.; Jeanne S. Whiteing, Esq., Boulder, Colorado, for the Fort Mojave Indian Tribe.

OPINION BY DIRECTOR MIDDLETON

OFFICE OF HEARINGS AND APPEALS

This case constitutes a review by the Director, Office of Hearings and Appeals (OHA), acting under instructions dated March 21, 1990, from the Secretary of the Interior, of a July 7, 1989, decision of the Interior Board of Land Appeals (Board) in *First American Title Insurance Co.* v. *Bureau of Land Management*, 110 IBLA 25 (1989), and a subsequent December 27, 1989, order by the Board denying separate motions by the Bureau of Land Management (BLM) and the Fort Mojave Indian Tribe (Tribe) for reconsideration of that decision.

The present dispute concerns where BLM should properly locate the surveyed line dividing lands which have accreted to secs. 10 and 15, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, along the bank of the Colorado River, since those sections were originally surveyed by the General Land Office (GLO) in 1905.

The following facts are not disputed. The land in Ts. 17 and 18 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, was originally surveyed in 1905 by John J. Fisher, a GLO deputy surveyor. Those surveys, which established the meander corners of the east bank of the Colorado River as it existed at the time of the survey, concluded with approval of the surveys and acceptance of the survey plats on June 29, 1906. For purposes of this decision, that meander line runs successively generally southeast through secs. 21, 28, 27, 34, and 33, T. 18 N., R. 22 W., and secs. 4, 9, 10, 15, 22, 23, and 24, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, thus rendering all of these sections originally riparian to the river.

The record indicates that, based upon the 1905 surveys, all of the land in fractional sec. 15 was patented by the United States to the Santa Fe Pacific Railroad Co. (Santa Fe) in 1910. By deed dated November 19, 1910, Santa Fe conveyed the land to the Cotton Land Co. (Cotton Land).

Subsequent thereto, with one major exception relevant herein, the Colorado River began its westward movement as a result of the accretion of land to the east bank of the river as it flowed through the two townships. The case of *Cotton Land Co.* v. *United States*, 75 F.Supp. 232 (Ct.Cl. 1948), indicates that the building of Parker Dam

on the river south of the subject area and the consequent formation of Lake Havasu on October 16, 1938, especially caused the deposition of sand and, presumably also, ultimately the accretion of land to the east bank of the river upstream from the lake, including the bank of the river as it flowed past secs. 10 and 15.[1] According to that case, the "deposition of sand began early in 1939 and has progressed upstream [from the lake] since that time." *Id.* at 233.

On October 19, 1959, Cotton Land quitclaimed various accretions to its land, including the accretion to sec. 15, to River Farms, Inc. (River Farms). The upland area had apparently been deeded to River Farms in 1958. *See River Farms, Inc.* v. *Fountain*, 520 P.2d 1181, 1183 (Ariz. Ct. App. 1974). Throughout this time period, title to the land in fractional sec. 10 has remained, and continues to remain, in the United States, in trust for the Tribe.

In 1961, BLM undertook to establish the location of various section lines across land which had accreted to the east bank of the Colorado River along its course in the subject townships, including the line between secs. 10 and 15. These accretion land surveys were conducted by Norville Shearer, a BLM project engineer, from 1961 to 1962. In accordance with special surveying instructions approved December 29, 1961, Shearer surveyed the accretion lines using what is described in *Public Lands Surveying - A Casebook* (1975) (Casebook), prepared by BLM's Cadastral Training Staff, at page D1-2, as the proportionate shoreline survey method.

By surveying the accretion lines using that method, Shearer sought to apportion the accreted land so that the sections originally riparian to the river retained the same proportionate access to the river as before the accretion by affording them the same proportionate frontage along the new bank of the river as along the original bank of the river. The accretion lines are also known as partition lines where they extend across and thereby apportion the accreted land.

In order to apportion land which had accreted to secs. 27, 28, 33, and 34, T. 18 N., R. 22 W., and secs. 4, 9, 10, and 15, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, Shearer, based on the proportionate frontage of these sections along the original bank of the Colorado River, determined the proportionate frontage along the new bank of the river[2] between a northern zero accretion point in sec.

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[1] According to the court, the upstream deposition of sand in the Colorado River caused by construction of the Parker Dam and formation of Lake Havasu "reached Needles [, California,] in 1939, and has since reached a point 22 miles above Topock [, Arizona]." *Cotton Land Co.* v. *United States, supra* at 233. The stretch of the river involved in the present case is encompassed by the 22-mile section north of Topock.

[2] All references herein to the "new bank" of the Colorado River are actually to the bank of the river as it existed immediately prior to the rechannelization of the river by the Bureau of Reclamation in the 1950's. This rechannelization established the bank of the river as it actually exists today, slightly further to the west of the location of the bank prior to such activity. As explained in a June 26, 1968, memorandum from the Acting Regional Solicitor, Los Angeles Region, to the Deputy Solicitor, at page 2: "Reclamation's channelization work consisted of a narrowing of the river channel and an avulsive movement of the channel still further to the west and caused a strip of land of varying width to become exposed between the left pre-channelization bank and the left post-channelization bank." This case, however, concerns only the proper location of the line between secs. 10 and 15 *across the accreted land* from the original bank of the river to what is referred to in the record as the pre-channelized or old left bank of the river or what is now referred to as the "new bank" of the river, as it was established by accretion. It should be remembered that, in either case, that bank is not the current east bank of the river.

21, T. 18 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, and a southern zero accretion point on the southern boundary of sec. 15, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona.[3] *See* Tr. 47, 302, 303, 382-83. Intervening accretion lines were drawn from the points on the old bank of the river where the section lines had originally intersected that bank to the appropriate points on the new bank of the river determined by proportioning that bank. The result was the extension of various intermediate section lines across the accreted land, including the line between secs. 10 and 15. The line between secs. 10 and 15 established by Shearer, which will henceforth be referred to as the Shearer line, bears S. 49°43' W.

Although monuments were set at either end of the accretion line between secs. 10 and 15, the Shearer survey plat was never formally accepted by BLM in order to await the conclusion of litigation which eventually culminated in the circuit court's February 4, 1966, decision in *Sherrill* v. *McShan*, 356 F.2d 607 (9th Cir. 1966). That litigation raised and ultimately determined a vital question regarding Shearer's northern zero accretion point, concluding that it was located in an area formed not as a result of accretion but due to an avulsive change in the course of the river. Nevertheless, relying on the accretion line between secs. 10 and 15 as surveyed by Shearer, between 1974 and 1976, various individuals purchased and First American insured title to land bounded by Shearer's accretion line.[4]

In 1982, BLM resumed its efforts to establish the location of section lines across accreted land in T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, including the line between secs. 10 and 15. The survey was conducted by Paul L. Reeves, a BLM cadastral

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[3]Shearer explained in an Apr. 6, 1962, memorandum to the record, at page 5:

"*Having satisfied myself that all considered changes in the river's position, within the area of interest, had occurred through normal processes of erosion and accretion, and not through avulsive changes*, a plan of division of the accreted lands which had attached to the left bank of the river subsequent to the original surveys in Arizona was devised. This plan was based upon a ratable division of the left bank of the Colorado River, as it existed at the time of rechannelization, in direct proportion to the record meander lines for each section as originally surveyed." (Italics added).

In its Sept. 28, 1987, response to the Board's Aug. 27, 1987, order to show cause, at page 1, BLM specifically explained that Shearer selected the northern zero accretion point at the point "where the 1905 meander line crossed the left bank [of the river] as it was at the time of channelization" and the southern zero accretion point "at a point normal to the river at the meander corner between secs. 15 and 22, T. 17 N., R. 22 W. [, Gila and Salt River Meridian, Mohave County, Arizona]." With respect to the latter point, BLM further explained: "Shearer chose a normal at this southerly point because the 1905 meander line and the last natural channel were fairly close (8½ chains distance) at this point, they were reasonably parallel, and there was not another zero accretion point for a long distance southerly from there." *Id.*

[4]The record indicates that the following individuals purchased accreted land within a triangular area bounded on the northwest and southeast, respectively, by the Shearer line and the line ultimately adopted by BLM as the accretion line between secs. 10 and 15: Milo W. and Martha E. Nelson, Earl C. and Irene London, and Leon Abrams. These individuals acquired the land pursuant to sale agreements executed between December 1974 and January 1976 with the Rio Colorado Development Co. (Rio Colorado), which in turn had acquired the land from River Farms pursuant to a Dec. 23, 1974, sale agreement. All of the agreements refer to the Shearer line, specifically described as a line running S. 49°43" W. In the case of the River Farms/Rio Colorado agreement, the land description reads: "Thence S 49°43' 0" W, along the division of accretion line established by the U.S. Bureau of Land Management Surveys in the early 1960's." Title insurance policies were issued by First American in connection with the resulting transfers from Rio Colorado to the above- named individuals between June 1975 and July 1976.

surveyor, pursuant to supplemental special instructions approved August 5, 1982. These instructions provided, at page 3, that:

> The unapproved 1960-62 surveys will be verified and accepted whenever possible. This survey was made soon after the channelization of the Colorado River when the banks of the abandoned channel were still distinguishable and is considered the best available information for identifying the accretion lands. * * * There are private surveys of record in this area, one of which is the Bermuda Plantation subdivision. This particular survey was performed prior to the 1960-62 surveys and if conditions on the ground are found to be acceptable, said subdivision will be incorporated into the field notes.

Furthermore, in conjunction with these surveying activities, BLM sought the guidance of the Solicitor regarding whether the Shearer survey might be approved in light of the circuit court's opinion in *Sherrill*.[5] The Associate Solicitor, Division of Indian Affairs, in a July 7, 1982, memorandum to the Director, BLM, noted that the northern zero accretion point relied upon by Shearer had been determined by the court to be found within an area created in the period 1912-1935 by the avulsive movement of the Colorado River westward from a channel running to the east around what was known as Goat Island, which channel was formerly situated in secs. 27, 28, 33, and 34, T. 18 N., R. 22 W., and secs. 3 and 4, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona.

The Associate Solicitor then posited a number of approaches which BLM could adopt in the exercise of its surveying authority. He suggested that BLM could, "for the limited purpose of achieving equitable accretion apportionment" in the case of the area south of the avulsed area involved in *Sherrill*, "reproduce" the Shearer survey, relying on a zero accretion point "in section 28 north of the area litigated in *Sherrill* v. *McShan*" concluding that to do so "need not be construed as an unwillingness to be bound by the decision in *Sherrill* v. *McShan*" (BLM Exh. 66 at 7). However, he further noted that adopting the Shearer accretion lines, rather than the accretion lines adopted in a 1961 survey of the "Bermuda Plantations," between secs. 10 and 15, and secs. 15 and 22 would deprive the Tribe of a "considerable amount of land" as an accretion to sec. 10 and "would cause three lots in Bermuda Plantations to be considered as situated on accretion to Indian section 22." *Id.* at 6.

He also suggested that BLM could adopt a zero accretion point "south of the area litigated in *Sherrill* v. *McShan*," specifically in sec. 4. *Id.* However, he noted that not only would this have the same result as adopting the Shearer accretion lines between secs. 10 and 15 and between secs. 15 and 22, but

> the partition lines for sections 4 and 10 would be about 100 yards different than under the Shearer survey and the ownership of the accretion to section 9 as declared in *River*

[5] Such guidance was apparently sought because of BLM's concern that the court's determination in *Sherrill* that the northern zero accretion point was in an avulsed area might undercut the validity of the Shearer survey. This concern was shared by Shearer. Indeed, the Acting Regional Solicitor, Los Angeles Region, in a June 26, 1968, memorandum to the Deputy Solicitor, reports, at page 6: "In effect, Mr. Shearer stated the decision cast doubt on the validity of the survey and only a new engineering study could determine if any part of the survey could still be used or relied upon."

Farms would be altered as that case validated the Shearer partition lines partitioning the accretion between sections 4 and 9 and sections 9 and 10.

Id.

In deciding upon which survey method to use, the Associate Solicitor generally stated that BLM should consider the following factors:

> Properly considered [is] the effect of applying the generally accepted proportionate method; the effect of utilizing the alternate method of extending each partition line normal (i.e. at a 90 degree right angle) to the bank line; whether a more equitable result is obtained by employing a combination of these methods; and agreements of the affected parties. This last factor would seem to encompass the need to recognize prior court decisions and other indicia of commonly accepted ownership patterns. [6]

In surveying the lines between secs. 10 and 15 and between secs. 15 and 22 across the accreted land, Reeves did not adopt the Shearer lines but, rather, used lines which had been surveyed by Nelson E. Myer, a private land surveyor, in 1961. Those lines had been surveyed at the request of River Farms as part of its subdivision and planned development of the area known as the "Bermuda Plantations" along the Colorado River in sec. 15. The lines are denoted on a survey plat prepared by Myer as the "Westerly" and "Easterly" lines of "Sec. 15 Accretion Lands" (BLM Exh. 19). Reeves explained in the approved field notes (BLM Exh. 4a), at page 3, that he relied on the Myer survey because "[t]his subdivision, known as Bermuda Plantation, has been developed and the boundary lines appear to be locally accepted."

According to Reeves, Myer had employed what is described in the Casebook, at page D1-2, as the perpendicular survey method. Using that method, Myer had drawn lines from the termination of the section lines on the original bank of the Colorado River nearly perpendicular to the new bank of the river. The line between secs. 10 and 15 established by Myer, which will henceforth be referred to as the Myer line, bears S. 31°09' W.

Adoption of the Myer line had the effect of placing a triangular piece of land, which the Shearer survey had regarded as part of sec. 15 and, thus, privately owned, in sec. 10 and, thus, within the Fort Mojave Indian Reservation. The Reeves survey, including its location of the sec. 10/15 accretion line, was approved by BLM and the survey plats were accepted on September 16, 1982.

By letters dated July 19 and November 30, 1984, First American objected to BLM's acceptance of the Myer, rather than the Shearer, line, asserting that it would upset long-established land titles. By letter dated December 20, 1984, the Deputy Director, BLM, responded to First American's objections, refusing to alter the Reeves survey. First American raised additional objections by letter dated January 10,

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[6]This "last factor" is an apparent reference to the earlier statement in the Associate Solicitor's July 1982 memorandum, at page 2, that: "Although the Shearer survey was never approved, the Shearer accretion partition lines have been relied on in some instances for the sale and purchase of property and for Mohave County, Arizona tax rolls, and have been recognized in a state court proceeding *River Farms* v. *Fountain*, 21 Ariz. App. 504, 520 P.2d 1181 (1979)." (Footnote omitted.)

1985. The Acting Director, BLM, responded by letter dated February 19, 1985, concluding that the Deputy Director's December 1984 letter constituted BLM's "final administrative action" and "dismiss[ed] [First American's] claim that [BLM] erred in its survey procedure." First American thereafter filed an appeal with the Board.

In a December 16, 1987, decision in *First American Title Insurance Co.*, 100 IBLA 270 (1987), the Board treated First American's appeal as an appeal from the Acting Director's February 1985 decision denying First American's protest of the Reeves survey to the extent that it had rejected the Shearer line and accepted the Myer line for purposes of apportioning the accreted land between secs. 10 and 15. Initially, the Board noted that an accepted survey will not be overturned unless a preponderance of the evidence establishes that the survey is either fraudulent or grossly erroneous and further stated, relying on *Peter Paul Groth,* 99 IBLA 104 (1987), that a failure by BLM to provide proper justification for deviating from a primary survey method constitutes gross error. *First American Title Insurance Co., supra* at 278.

After a careful review of the record developed up to that point in time, including the reasons offered by BLM for rejecting the Shearer line in favor of the Myer line, the Board noted that the "usual" or "recommended" approach for surveying accreted lands is, in accordance with the *Manual of Instructions for the Survey of the Public Lands of the United States* (1973) (Survey Manual), the proportionate shoreline survey method. Next, the Board concluded that, although the Shearer survey was apparently discredited, the record still contained "unresolved questions of fact" concerning whether BLM had adequate justification for departing from that method in accepting the Myer line, especially where it was the usual method and BLM had relied upon it in surveying the accretion lines between secs. 4 and 9 and between secs. 9 and 10. *First American Title Insurance Co., supra* at 281. The Board, therefore, set aside the Acting Director's February 1985 decision and referred the case to the Hearings Division, OHA, for assignment to an Administrative Law Judge "to conduct a hearing on the question of whether BLM's departure from the proportionate method of surveying accreted lands is supported by adequate justification." *Id.* In the event that the judge determined that there was no such justification, the Board instructed him to "remand the case to BLM for action consistent with his decision." *Id.*

The case was assigned to Administrative Law Judge John R. Rampton, Jr., who held a hearing between June 28 and 30, 1988, in Phoenix, Arizona, at which were represented BLM, First American, and the Tribe, which was permitted to intervene in the proceeding. On December 19, 1988, Judge Rampton issued his decision. In that decision, Judge Rampton outlined the nature of the Board's decision referring the case for a hearing, stating that it

placed upon BLM and the intervenor, Fort Mojave Tribe, the burden of justifying with adequate reasons why Shearer's survey done by the "usual" or "recommended" [method] could not be accepted. In my view, implicit in the Board's order are the instructions that, if at all possible, Shearer's method of apportionment should be acceptable and that deviation without "proper justification" constitutes gross error.

(Decision at 8).

Judge Rampton noted that BLM had supported rejection of the Shearer line, even though it had been determined by the proportionate shoreline survey method, on the basis that the line had resulted from improper application of that method where the location of the line was based on a northern zero accretion point which was located in land which had formed by avulsion rather than accretion, as determined in *Sherrill* v. *McShan*. He ruled, however, that BLM did not have adequate justification for rejecting the Shearer line, concluding that there was "no legal bar" to reliance on that point, especially where the Associate Solicitor in his July 1982 memorandum had stated that BLM could recognize the avulsion to have occurred " 'while apportioning the unaffected accretions south of that area in the most equitable manner' " and where BLM had relied on that point in establishing the accretion lines between secs. 4 and 9 and between secs. 9 and 10. *Id.* at 16.

Moreover, Judge Rampton concluded that rejection of the Shearer line could not be adequately justified where it impaired the bona fide rights of private owners of the disputed land who had relied on that line, as it was denoted by monuments on the ground, in purchasing the land and constructing improvements, even though the Shearer survey had never been approved by BLM. *Id.* at 19.

Accordingly, Judge Rampton concluded that the Reeves survey "must be rescinded" and remanded the case to BLM for revision of the survey "to reallocate the accretion lands between secs. 10 and 15 in accordance with the line established in 1962 by Mr. Shearer." *Id.* Both BLM and the Tribe appealed to the Board from Judge Rampton's December 1988 decision.

In its July 7, 1989, decision, the Board affirmed Judge Rampton's December 1988 decision as modified, concluding that, while BLM was fully justified in not relying on the Shearer survey, BLM had not adequately justified departing entirely from use of the proportionate shoreline survey method. The Board held that, by accepting the accretion lines between secs. 9 and 10 and between secs. 15 and 22, which BLM had already approved and were unchallenged, there was no reason why BLM could not apportion the intervening accreted land solely between secs. 10 and 15 using a "modified application" of the proportionate shoreline survey method (Order, dated Dec. 27, 1989, at 2). Thus, the Board remanded the case to BLM with instructions to prepare a corrected survey which would survey the accretion line between secs. 10 and 15 in that fashion.

BLM and the Tribe moved for reconsideration of the Board's July 1989 decision. In its December 1989 order, the Board denied these motions as untimely filed. However, the Board clarified its July 1989 decision, specifying that the northern and southern lines which should be used to control the apportionment of accreted lands between secs. 10 and 15 were the sec. 9/10 accretion line surveyed by Shearer in 1962 and the sec. 15/22 accretion line surveyed by Myer in 1961.

In his March 1990 memorandum, the Secretary, acting pursuant to 43 CFR 4.5, instructed the Director, OHA, to review the Board's July 1989 decision and December 1989 order in *First American Title Insurance Co.* v. *BLM, supra.*[7] This decision constitutes that review.

In order to facilitate this review, the Director, by order dated April 19, 1990, notified all of the parties that they would have an opportunity to file briefs in the above- captioned matter and, accordingly, established an initial briefing schedule. By order dated July 25, 1990, as modified July 30, 1990, the Director expanded this schedule to permit the filing of reply briefs. The briefing schedule has now concluded. To date, briefs, initial and reply, have been filed by all of the parties, viz., BLM, First American, and the Tribe.[8]

Throughout the course of review of this case by the Director, the matter at issue has been the subject of certain judicial proceedings. In particular, First American instituted an action in the District Court for the District of Arizona, captioned *First American Title Insurance Co.* v. *Bureau of Land Management*, No. 89-1911-PHX-CAM, which seeks an injunction requiring BLM to survey the lands at issue in accordance with the Board's July 1989 decision and December 1989 order. Also, the Tribe initiated an action in that same court, captioned *Fort Mojave Indian Tribe* v. *Lujan*, No. 90-0280-PCT-EHC, which, in challenging the Board's July 1989 decision and December 1989 order, seeks an injunction preventing BLM from surveying the lands at issue in accordance with that decision and order.

The Director has been advised by the Tribe that the above-mentioned judicial proceedings have been "stayed pending the outcome of the review by the OHA Director" (Tribe's Brief at 8). Thus, in reviewing and deciding the instant case, the Director has proceeded on the assumption that any action by him is not precluded by the pendency of these cases or any judicial ruling.

BLM and the Tribe initially contend that the Board improperly placed the burden of proof on BLM, requiring it to adequately justify its failure to use the proportionate shoreline survey method. Instead,

[7]The Secretary also directed that the Board's July 1989 decision and December 1989 order "are to be suspended" pending the completion of the Director's review. Accordingly, completion of the corrected survey ordered by the Board, which BLM had originally intended to finish by Feb. 26, 1990, but which had then been suspended by the Director, BLM, has likewise been stayed pending review and disposition of this matter.

[8]First American has requested oral argument before the Director, which request is opposed by BLM and the Tribe. The request is hereby denied. The arguments offered by First American in favor of oral argument are not persuasive. The briefing schedule, as extended to permit reply briefs by the parties, has afforded all of the parties an opportunity not only to address their concerns to the Director, but also to respond to each other. Further, in view of the extensive briefing which has already taken place throughout the lengthy history of this case, before the Director, as well as before the Administrative Law Judge and the Board, there is now simply no need to delay resolution of the case further in order to permit additional elucidation of the matters at issue.

BLM and the Tribe argue that the Board, consistent with its well-established standard, should have required First American to prove by a preponderance of the evidence that BLM's survey of the sec. 10/15 accretion line was either fraudulent or grossly erroneous.

It is beyond cavil that the Board has long held that one challenging a BLM survey following its approval bears the ultimate burden of establishing by a preponderance of the evidence that the survey was either fraudulent or grossly erroneous. The Board did not deviate from that standard. Plainly, in initially referring the case for a hearing and subsequent deliberations, the Board regarded the question of whether BLM had adequately justified departure from the proportionate shoreline survey method as a *question of fact* to be resolved on the basis of the record, rather than a shifting of the burden of proof to BLM. That burden always rested on First American.

Indeed, the Board finally concluded that First American had effectively borne its burden to the extent that the preponderance of the evidence demonstrated that BLM had departed from the method preferred by the Survey Manual for surveying accretion lines, *i.e.*, the proportionate shoreline survey method, without adequate justification and, thus, had committed gross error. Regardless of its merit, BLM and the Tribe seemingly ignore here the conclusion of the Board that, under the Survey Manual, the proportionate shoreline survey method is the preferred method for surveying accretion lines in the absence of adequate justification otherwise and, thus, where a party challenging an accretion lands survey is able to demonstrate that BLM has failed to justify not using this method, it will have shown gross error by a preponderance of the evidence.

Furthermore, in deciding *First American* in this manner, the Board was also following its prior decision in *Groth*. In that case, the Board had likewise concluded that the party challenging an approved BLM survey, which had not employed the survey method preferred by the Survey Manual of two-point control, had established gross error where the preponderance of the evidence demonstrated that BLM had not adequately justified failure to use this method.

Thus, it is clear that the Board did not improperly shift the burden of proof to BLM, but, rather, concluded that First American had met that burden based on BLM's failure to adequately justify not using the preferred survey method.

So said, it is clear, as discussed below, that the Board was incorrect in concluding that the proportionate shoreline survey method is the method preferred by the Survey Manual for surveying accretion lines. Furthermore, as also discussed below, it must be concluded that the perpendicular survey method is equally applicable in such cases and that the choice between these two methods is ultimately dependent on which results in the most equitable apportionment of accreted land between adjoining sections.

At the outset, BLM broadly states that it is not required to justify favoring the proportionate shoreline survey method over another method where the Survey Manual does not "require" that it justify departing from that particular methodology, but, rather, provides it with the "flexibility * * * to choose among several established methodologies" (BLM Brief at 8).[9]

Every BLM decision must be judged on appeal to the Board by whether it is reasonable and not arbitrary and capricious. Where the Board is unable to discern any reason for the decision, that decision must necessarily be set aside. Thus, where BLM decides to adopt one survey method rather than another of equal applicability, that decision must, likewise, be justified or risk being set aside.[10]

In concluding that the proportionate shoreline survey method is the preferred method for surveying accretion lines, the Board relied on the Survey Manual and the Casebook. *See First American Title Insurance Co.* v. *BLM, supra* at 28; *First American Title Insurance Co., supra* at 275, 281. However, nowhere in either the Manual or the Casebook does BLM state that this survey method is preferred. At best, section 7-66 of the Survey Manual, at page 172, states that this method is "usually" employed and the Casebook further states, at page D1-2, that this method is "recommended" by the Survey Manual.[11]

In addition, section 7-66 of the Survey Manual essentially states that lands accreted to the bank of a river are to apportioned in the same manner as the beds of nonnavigable bodies of water. It states that apportionment in both cases is designed to allocate to each riparian owner "the area lying *in front of* his basic holdings" (Survey Manual at 171 (italics in original)).

Further, immediately prior to the part of the Survey Manual dealing with the apportionment of accreted lands (sections 7-62 through 7-67) is the part which concerns the apportionment of the beds of nonnavigable bodies of water (sections 7-57 through 7-61). The preface to the latter

[9] In this regard, BLM contends that, in the same way that the Board cannot "treat as insignificant or * * * declare * * * invalid" a duly promulgated regulation of the Department, citing *American Gilsonite*, 111 IBLA 1 (1989), and other cases, the Board cannot treat as insignificant or declare invalid a provision of the Survey Manual and, thus, must abide by its dictates. The Board has long held that manual provisions, like those found in the Survey Manual, are not on par with Departmental regulations. They are simply not promulgated pursuant to the Department's rulemaking authority or in accordance with the formal strictures of the Administrative Procedure Act, 5 U.S.C. § 553 (1988). Thus, manual provisions, unlike regulations, are properly deemed not binding on the Board, *see Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986), and, as such, can be declared invalid by the Board. So far as treating the Survey Manual as insignificant, while the Board is not bound to follow it, BLM is required to abide by manual provisions so long as they are extant and do not conflict with any statute or regulation and, thus, the Board, to this extent, has properly endeavored to ensure that BLM so complies with the Survey Manual. *See Peter Paul Groth, supra; Domenico A. Tussio*, 37 IBLA 132 (1978).

[10] It is clear, however, that the Board at worst merely required BLM to "explain" its departure from use of the proportionate shoreline survey method. *See First American Title Insurance Co.* v. *BLM, supra* at 28. That is not too onerous a burden. Nor can it be viewed as improperly limiting the considerable discretion afforded to BLM surveyors. Such surveyors should and do have the ability to apply methods other than the proportionate shoreline survey method. They need only explain their reason for doing so. It would appear that BLM would have the Board approve any departure from application of the proportionate shoreline survey method, regardless of whether the record contains any justification for doing so. This hardly comports with the reasoned decisionmaking which the public has a right to expect of BLM.

[11] The Casebook is clearly wrong in stating that the Survey Manual "recommend[s]" the proportionate shoreline survey method when all the manual does is state, as a matter of fact, that this method is most often employed in the surveying of accreted lands. Thus, where, as BLM reports, "in terms of the 'priority' of authorities, it is the *Manual* and not the *Casebook* which directly governs the field operations of the [BLM] Cadastral Survey," no weight will be attributed to this statement in the Casebook (BLM Brief at 25 (italics in original)).

part (section 7-57) states: "Some variation is necessary in adapting the methods to particular cases. Care must be taken to award each basic holding on the shore the part of the bed *in front of* it. If one method fails to do this, another method, or a combination of methods, must be used." *Id.* at 168 (italics in original). Furthermore, selection of the proper method, states the Survey Manual, is to be based on what achieves "equitable results." *Id.* at 169.

The Survey Manual then sets forth first in section 7- 58 what is essentially the proportionate shoreline survey method and then sets forth in section 7-59 an "alternate method," which is essentially the perpendicular survey method.[12] *Id.* Finally, the Survey Manual, in figures 76(a) and 76(b), on pages 169 and 170, illustrates the use of both methods in the case of apportioning the bed of a particular nonnavigable river, noting that the results obtained with use of the proportionate shoreline survey method are "not as satisfactory" as those obtained with use of the perpendicular survey method, apparently from the standpoint of what constitutes the most equitable apportionment consistent with awarding to the basic holdings along the shore the lands in front of them. *Id.* at 169.

What is clear from the Survey Manual is that, in apportioning accreted lands, just as much in apportioning the beds of nonnavigable rivers, the proportionate shoreline survey method is not necessarily preferred over the perpendicular survey method, but that either method, or even a combination of these methods, may be employed depending on what results in the most equitable apportionment consistent, whenever practicable, with awarding to the basic holdings along the original shore the accreted lands in front of them. So stated, the Survey Manual, thus, embodies the principal case law on the subject of the division of accretions.[13] *See generally* 78 Am. Jur. 2d Waters § 422 (1975) at 870- 71; 93 C.J.S. Waters § 76 (1956) at 751; III American Law of Property § 15.31 (1952) at 865-67. Accordingly, while use of the proportionate shoreline survey method may be more "usual," it must give way where the results would not be the most

[12]Citing cases from the 1800's, BLM and the Tribe establish that the perpendicular survey method has been equally recognized as a valid method for apportioning accreted land at least as long as the proportionate shoreline survey method. *See* BLM Brief at 29 and Tribe Brief at 12 n.4, citing *Tappan* v. *Boston Water-Power Co.*, 31 N.E. 703, 705 (Mass. 1892) (tidal flats in river); *Welles* v. *Bailey*, 10 A. 565, 567 (Conn. 1887) (accretions to river bank); *Knight* v. *Wilder*, 56 Mass. 199, 209 (Mass. 1848) (bed of nonnavigable river); *see also Wineman* v. *Shannon Brothers Lumber Co.*, 368 F.Supp. 652, 657-58 (N.D. Miss. 1973); *Cunningham* v. *Prevow*, 192 S.W.2d 338, 350 (Tenn. Ct. App. 1945); *Turk* v. *Wilson's Heirs*, 98 S.W.2d 4, 14 (Ky. 1936).

[13]It is said in 65 C.J.S. Navigable Waters § 84 (1966), at page 263, distilling relevant case law, that:

"In apportioning accretions, a principal object to be attained is retention, as far as feasible, of the former means of access to the water, and accretions should also be so apportioned as to do justice to each adjoining owner, giving each a fair portion in view of the contour and location of their respective tracts before the accretions were formed. Ordinarily, accretions must be immediately in front of the land to which they are attached so that the owner cannot follow them up or down the stream." (Footnotes omitted.)

Thus, the rules of apportionment, by generally recognizing the importance of access to a river by riparian owners, seek to preserve existing access, as much as possible, and to allocate fair shares of any increases or decreases in that access. *See United States* v. *1,629.6 Acres of Land*, 335 F.Supp. 255, 268-71 (D. Del. 1971), *aff'd in part, rev'd in part*, 503 F.2 764 (3d Cir. 1974); *Hathaway* v. *City of Milwaukee*, 111 N.W. 570, 571- 72 (Wis. 1907); *Groner* v. *Foster*, 27 S.E. 493, 494 (Va. 1897); *Crandall* v. *Allen*, 24 S.W. 172, 174 (Mo. 1893).

equitable and/or, whenever practicable, not award to each basic holding the accreted land in front of it.[14]

Whether to use the proportionate shoreline or the perpendicular survey method will clearly depend upon the circumstances.[15] As the Supreme Court stated in *Johnston* v. *Jones, supra* at 223 (quoting from *Deerfield* v. *Arms,* 34 Mass. 41, 46 (Mass. 1835)), application of the proportionate shoreline survey method " 'may require modification * * * under particular circumstances.' " *See also* J. Grimes, *A Treatise on the Law of Surveying and Boundaries* § 575 (4th ed. 1976) at 818 ("Each case must be decided on its own merits and the court must consider all of the circumstances and then allocate the rights equitably among all of the owners").

Taking the two extremes, in the case of a river whose relatively straight configuration has not appreciably changed due to a shift in the river's course caused by the process of accretion, suitable apportionment would seem to be best achieved simply by use of the perpendicular survey method. *See* J.M. Gould, *Law of Waters* § 163 (3rd ed. 1900) at 323; *see also State* v. *6.0 Acres of Land,* 139 A.2d 75, 77 (N.H. 1958). In the case of a constantly winding river which has retained that character following its movement, however, such apportionment might best be achieved by use of the proportionate shoreline survey method or a combination of the two methods. *See* J.M. Gould, *Law of Waters* § 163 (3rd ed. 1900) at 323; *see also Swanson* v. *Dalton,* 131 N.W.2d 704, 708 (Neb. 1964); *State* v. *6.0 Acres of Land, supra* at 77.

[1] It is proper to start first with the original Shearer survey of the accretion line between secs. 10 and 15, which First American had argued should be adopted by BLM. The Board, however, was correct in

[14] First American has submitted the opinion of Lane J. Bouman, a registered land surveyor and former longtime employee with BLM's Cadastral Survey Division, who suggests that, because section 7-66 of the Survey Manual "does not *expressly* allow for the apportionment of accreted lands by any method other than the proportionate [shoreline survey] method," use of the perpendicular survey method is always "improper" (Affidavit of Lane J. Bouman, dated June 26, 1990, at 6 (italics added)). Section 7-66 of the Survey Manual, however, only states that the proportionate shoreline survey method is the method "usually" employed and does not expressly preclude the use of any other valid method. Clearly, some method is permissible in the unusual situation. Moreover, in view of the fact that the purpose of apportioning the beds of nonnavigable bodies of water and lands accreted to the banks of rivers is the same, *i.e.*, to apportion the land "in front of" the basic holdings, the logical conclusion is that the same survey methods may be used in either case. In a July 26, 1990, affidavit submitted by BLM, Keith R. Williams, Assistant Chief, Division of Cadastral Survey, BLM, states, at page 3, that, "in some cases, the method of running normals to * * * the present bank (perpendicular lines to the bank) is the most appropriate method to uphold the overriding 'in front of' requirement." Further, Stephen G. Kopach, Deputy State Director for Cadastral Survey, Eastern States Office, BLM, reports, in a July 26, 1990, affidavit at page 6, that the perpendicular survey method is, in practice, the "second most frequently used methodology in the survey of accret[ed lands]." Finally, the Casebook states, at page D1-2, that the proportionate shoreline survey method is "used by the Federal Government, *wherever possible,*" which means not necessarily in all cases, and that the perpendicular survey method is the "second preference." (Italics added.)

Bouman's opinion that use of the perpendicular survey method is never appropriate is further undermined by that of Donald B. Davidson, a trained civil engineer with extensive surveying experience, who testified on behalf of First American that use of that method is acceptable and that there may be situations where use of the proportionate shoreline survey method is not appropriate. *See* Tr. 351, 352; *see also* Letter to BLM from Davidson, dated Mar. 20, 1985, at 3.

[15] In his July 1990 affidavit, Kopach states that the proportionate shoreline survey method is not appropriate in all circumstances. He gives as an example where the method should not be employed the situation "where there exists an irregular shoreline which mathematically results in an inequitable partitioning of the accret[ed lands]." *Id.* at 5. In so saying, he apparently alludes to the situation where deep indentations or sharp projections along the original bank of a river will exaggerate a riparian owner's original frontage and, thus, cause an excessive allocation to him of the new bank of the river under the proportionate shoreline survey method. *See Johnston* v. *Jones,* 66 U.S. 217, 223 (1862); *see also Bass* v. *Farrell,* 370 S.W.2d 54, 58 (Ark. 1963); *Swarzwald* v. *Cooley,* 31 P.2d 381, 383 (Cal. 1934).

concluding that the survey did not comport with the Survey Manual to the extent that it relied on a northern zero accretion point which simply does not represent the northernmost extension of an accretion to the original 1905 bank of the Colorado River, or, indeed, is located at all on accreted land. Rather, the evidence establishes that the point is located entirely in an area that had, subsequent to 1905, been eroded from the east bank of the river and then returned to that bank through an avulsive movement of the river. *See First American Title Insurance Co.* v. *BLM, supra* at 28-29. Accordingly, this point cannot be used as a basis for apportioning accreted land south of the point.

The question then naturally arises whether BLM could not rely on a proper northern zero accretion point to apportion the relevant accreted land. The Board, in its original December 1987 decision sending the case for a hearing, questioned whether such a point could not be found south of the discredited point. *see First American Title Insurance Co., supra* at 277.

BLM and the Tribe contend that there is no zero accretion point in this stretch of the river, *i.e.*, a point along the original 1905 meander line where the accretion stopped, as evidenced by the location where the new bank of the river still intersected that line at some time prior to the river's rechannelization. The record reveals that, whether by avulsion or accretion, the entire left bank in this stretch of the river shifted to the west. Consequently, it is impossible to identify a zero accretion point from which to apportion accreted land south of that point.[16]

Nevertheless, rather than use zero accretion points to define the northern and southernmost extensions of the identified accreted area in this stretch of the river, BLM might draw perpendicular lines near these locations and then simply apportion the intervening accreted land. Thus, BLM could conceivably draw perpendicular lines as the accretion lines between secs. 4 and 9 to the north and between secs. 15 and 22 to the south, and then apportion the intervening accreted land between secs. 9, 10, and 15. This is clearly sanctioned by section 7-58 of the Survey Manual in describing the analogous use of the proportionate shoreline survey method to apportion the beds of nonnavigable rivers: "Normal lines are extended to the median line, above and below the area to be apportioned, at points where the river's course is straight, or nearly so. The intermediate distance along the median line is then prorated according to the frontage" (Survey Manual at 168-69).

[16]In the case of the land immediately north of the east-west centerline of sec. 4, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mohave County, Arizona, encompassing what had formally been Goat Island and the surrounding area, that land had not accreted to the left bank of the river as it existed at the time of the 1905 survey, but, rather, had returned to that bank through the avulsive movement of the river to the west, well past the position of the original 1905 meander line. In the case of the land immediately south of the east-west centerline of sec. 4, while this land had accreted to the left bank of the river, it is impossible to determine where the accretion stopped because the entire bank of the river in this stretch of the river, north and south of the east-west centerline of sec. 4, has shifted to the west and it is impossible to determine what movement was caused by either avulsion or accretion.

However, while this solution might have been the most equitable apportionment of the accreted land along this stretch of the river at the time BLM initially undertook to survey this land in 1962, it clearly is not acceptable given present circumstances. The reason for this is simply that it would undoubtedly require changing the location of the accretion lines between secs. 4 and 9 and between secs. 9 and 10.

Put simply, it is not possible to now return to the situation as it existed at the time BLM began its survey of the accreted land. BLM has already surveyed the sec. 4/9 and sec. 9/10 accretion lines under an approved survey and this part of the survey has not been challenged by any party. Accordingly, the location of these lines has already been determined with administrative finality. The matter is essentially res judicata and will not be disturbed in the absence of fraud or gross irregularity, especially where to do so would disrupt what the United States and local parties have, since 1982, regarded as the accretion lines. *See Melvin Helit* v. *Gold Fields Mining Corp.*, 113 IBLA 299, 308-09, 97 I.D. 109, 114 (1990), and cases cited therein; *United States* v. *Shearman*, 73 I.D. 386, 434-35 (1966). No fraud or gross irregularity can be found. Accordingly, the location of these lines will remain as established by the 1982 BLM survey.

In an attempt to resolve what is admittedly a difficult situation, the Board devised a third solution, viz., apportioning the accreted land solely between secs. 10 and 15. However, this method is nowhere permitted under the Survey Manual and, thus, will not be considered a proper solution.

The primary defect in the method required by the Board is that it does not provide for apportionment of an accretion to the original 1905 bank of the Colorado River between either zero accretion points, *i.e.*, the furthest extensions of the accretion, or perpendicular lines drawn to the new bank of the river. That was admitted by the Board. *See First American Title Insurance Co.* v. *BLM, supra* at 34 n.8. Nevertheless, the Board provided that BLM should use the sec. 9/10 accretion line originally surveyed by Shearer, which had finally been approved by BLM because it had been implicitly accepted by the state court in *River Farms, Inc.* v. *Fountain, supra*, and was subsequently relied upon by local residents for many years.[17] *See First American Title Insurance Co.* v. *BLM, supra* at 33. There is simply no sanction, however, in the Survey Manual for, in proportioning the new bank of a river between certain lines, use of a line to define the northernmost extent of that bank where that line was based on a prior erroneous apportionment of accreted lands, even though it has been approved by BLM for whatever reason.[18]

[17] As First American correctly points out, the sec. 9/10 accretion line was not expressly approved by the state court in *River Farms*. Rather, the parties to that adverse possession suit stipulated that the line surveyed by Shearer would be the "southern limit of their dispute" (First American Brief at 27 n.14).

[18] First American, however, contends that, in the absence of express language in the Survey Manual which precludes BLM from using an approved accretion line, rather than a perpendicular line or zero accretion point, to apportion accreted lands to the south, such use is permissible. First American views the Survey Manual from the wrong standpoint. The fact that the Survey Manual does not expressly permit use of an approved accretion line militates against its use.

Furthermore, the Board's solution, as BLM and the Tribe correctly point out, virtually carries the principal error of the Shearer survey further to the south. This is its greatest danger. By providing for apportionment of the accreted land attached to secs. 10 and 15 between the sec. 9/10 accretion line, which was the line originally established by Shearer relying on the discredited northern zero accretion point, and the sec. 15/22 accretion line, which is the Myer line drawn in almost the same position as the original Shearer line, the Board ensures that Shearer's northern zero accretion point will also virtually control that apportionment. *See* BLM Brief at 17 n.7. This cannot be permitted because it does not result in the true equitable apportionment of *only the accreted lands* between all of the sections south of that point, including secs. 10 and 15.[19]

The conclusion that necessarily flows from the above analysis is that it is simply not possible to use the proportionate shoreline survey method to apportion accreted land in this stretch of the Colorado River because there are either no northern zero accretion points or it is not now possible to rely on a northern perpendicular line dividing accreted land between secs. 4 and 9. Moreover, there is no support for use of the Board's so-called "modified" approach. Accordingly, it naturally follows that BLM, in these circumstances, could properly turn to use of the "alternate method," *i.e.*, the perpendicular survey method.

[2] At the time of the 1982 BLM survey, BLM could have apportioned the accreted land between secs. 10 and 15 using a perpendicular line drawn by its cadastral surveyors to the new bank of the river. However, BLM chose instead to rely on the line already surveyed by Myer. There is arguably nothing wrong with this approach where it seems to fully comport with the Department's decision in *Algoma Lumber Co.* v. *Kruger*, 50 L.D. 402 (1923).

As the Board correctly pointed out in *First American Title Insurance Co.* v. *BLM, supra* at 31, the case of *Algoma* stands for the proposition that, where the Government has failed to survey a line separating private and public land, a subsequent private survey of that line should be accepted by the Government where the survey is "within the allowable limit of error" permissible in the case of Government surveys. *See also Burton E. Edwards*, 78 IBLA 62 (1983), and *Mr. & Mrs. John Koopmans*, 70 IBLA 75 (1983) (acceptance of private surveys).

BLM clearly failed to finish surveying the accretion line between secs. 10 and 15 for many years following its initial survey efforts in 1962. During that time period, the only survey of that line which was

[19] First American properly notes that BLM's acceptance of Shearer's sec. 9/10 accretion line is inconsistent with its nonacceptance of Shearer's sec. 10/15 accretion line, stating that "[i]f the zero accretion point were so 'discredited' as to affect Mr. Shearer's entire survey, the Section 9/10 partition line should not have been adopted" (First American Brief at 26-27). However, while adoption of the sec. 9/10 accretion line results in a false apportionment of the accreted lands between those sections, which apportionment is not " 'cured' " by BLM's acceptance, this does not justify likewise falsely apportioning accreted lands between secs. 10 and 15 using that same line. *Id.* at 26.

extant was the Myer survey, completed in 1961. Over the years, various private parties undoubtedly relied on that survey because it delineated the boundaries of the private subdivision known as "Bermuda Plantations" along the bank of the river in sec. 15 and valuable improvements have presumably been placed in reliance on that survey. However, the overriding question is whether the Myer survey was prepared within the allowable limit of error under the Survey Manual.

The Board concluded in *First American Title Insurance Co.* v. *BLM, supra* at 37, that it was improper for BLM to accept the Myer line as a basis for apportioning accreted land between secs. 10 and 15 where Myer had had "no adequate justification for departing from the proportionate shoreline survey method" and, thus, had not executed his survey within the allowable limit of error, within the meaning of *Algoma*. In so holding, the Board primarily relied on the fact that "there is no evidence that Myer could not have relied on a [northern] zero accretion point south of [the avulsed Goat Island] area." *Id.* However, there is simply no demonstrated northern zero accretion point in this stretch of the Colorado River which Myer could have relied upon.

Nevertheless, it is true that, rather than relying on a northern zero accretion point, to the extent that his survey predates the Shearer survey, Myer could, as suggested above, have simply drawn a perpendicular line as the accretion line between secs. 4 and 9 and then, also using the perpendicular line which he in fact drew as the accretion line between secs. 15 and 22, apportioned the intervening accreted land between secs. 9, 10, and 15. The Board noted that Myer had, at the time he conducted his survey, the freedom to apportion the accreted land in that fashion because there were no other established survey lines along that stretch of the river. *See First American Title Insurance Co.* v. *BLM, supra* at 36-37.

However, the question is not whether BLM should have, in surveying the sec. 10/15 accretion line in 1982, regarded the Myer survey of that line as within the allowable limit of error at the time it was conducted because to do so would ignore circumstances which have intervened since that time. Rather, the question is whether the Myer survey was, in 1982, within the allowable limit of error given extant circumstances. The reality is that the sec. 4/9 and sec. 9/10 accretion lines had, in 1982, been recognized by a state court and relied upon by private landowners. Given this, Myer could not, if he himself were performing his survey in 1982, have disrupted those lines in order to apportion the accreted land between secs. 9, 10, and 15, using the proportionate shoreline survey method. He would, necessarily, have had to resort to the perpendicular survey method.

Moreover, the perpendicular survey method is, as noted above, an equally valid survey method and there is no evidence that use of that method will not result in the most equitable apportionment of the

accreted lands between secs. 10 and 15, consistent, where practicable, with awarding to these sections the lands in front of them.

However, as discussed below, the Myer survey cannot be considered to have been within the allowable limit of error in 1982, in terms of delineating the proper apportionment of accreted lands between secs. 10 and 15 pursuant to the perpendicular survey method. Accordingly, BLM's adoption of the Myer line as the sec. 10/15 accretion line is inconsistent with *Algoma*.

It is important to remember the salient facts of *Algoma*. At issue was the location of a section line separating public and private land. Following conveyance of the land immediately north of that line to the Algoma Lumber Co. (Algoma), the company, in 1911, had the line privately surveyed. That survey established the section line at S. 89°39' W. "About that time," Algoma placed buildings "of considerable value" within a few feet north of the line. *Algoma Lumber Co., supra* at 403.

In 1921, the Government surveyed the section line, establishing it at S. 89°57' W. Algoma protested acceptance of that line, arguing that "the line last run on course S. 89°39' W. is within the allowable departure from cardinal direction recognized in public surveys, and should be adopted." *Id.* at 404. The First Assistant Secretary concluded that the privately surveyed line should be accepted where it was "within the allowable limit of error." *Id.* That is, "[i]f the line had been actually run by the Government resulting in the same degree of error it would not have been disturbed even in the absence of a private claim based thereon." *Id.* Furthermore, he concluded that there were other reasons for recognizing this line:

> The Government is now concerned with the establishment of a line by an official survey to mark the division between the private land and the public land. In doing this, if it can protect valuable improvements innocently placed, under circumstances such as here disclosed, and still keep within the allowable departure from cardinal course, that object should be accomplished. Certainly there is no adverse claim which can be recognized as affording an obstacle to the Government in according this just measure. There appears to be less than one acre of land between the disputed lines.
>
> *Id.*

The primary lesson of *Algoma* is that, in order to be acceptable to the Government, a private survey must be "within the allowable limit of error" for Government surveys. Put another way, the survey must not have deviated from Government surveying standards to the point that the Government would not have been able to accept the survey if it had in fact been performed by the Government.

There is no question that the Myer survey used a perpendicular line to delineate the sec. 10/15 accretion line and, thus, technically comported with the perpendicular survey method. However, the overriding principle which guides the surveying of accreted lands, whether under relevant State case law or the Survey Manual, is that

of equitable apportionment. *See Causey* v. *Gray*, 243 A.2d 575, 583 (Md. 1968); *Conkey* v. *Knudsen*, 8 N.W.2d 538, 542 (Neb. 1943); *Watson* v. *Horne*, 13 A. 789, 790 (N.H. 1888). As BLM states in its brief, at pages 39-40: "[T]he key objective in the division of accretion [is] equity. * * * Equity is best judged by determining whether each basic holding on the shore is awarded an equitable share of accretion lands in front of the parcel." Thus this is the principal goal with application of the perpendicular survey method.[20]

At the time of the 1982 BLM survey, given acceptance of the accretion lines to the north and south of the sec. 10/15 accretion line, all that remained was to apportion the new bank of the Colorado River between secs. 10 and 15 in an equitable fashion. However, that did not occur. Rather, as First American has established, as a result of BLM's acceptance of the Myer line, sec. 10 received a 70-percent increase in its frontage along the new bank of river, while sec. 15 suffered a 9-percent decrease.[21] This fact is unrebutted by BLM or the Tribe. Indeed, it can be largely confirmed by simple measurement, taken from the accepted survey plat (BLM Exh. 4), of the length of the old and new banks of the river bordered by secs. 10 and 15, as determined, respectively, by GLO in 1905 and BLM in 1982.

Where the Myer survey, as adopted by Reeves, results in a 70-percent increase in sec. 10's frontage along the new bank of Colorado River when compared to its frontage along the original bank of the river, while sec. 15 suffers a 9-percent decrease in its frontage, the survey clearly does not reserve to these sections the same proportionate access to the river as along the original bank of the river, consistent with the principle of equitable apportionment under the Survey Manual. *See Swarzwald* v. *Cooley, supra* at 384.

BLM argues only that the percentage difference in the apportionment of the new bank, when compared to the old bank, of the river as between secs. 10 and 15 does not require abandonment of the perpendicular survey method in favor of the proportionate shoreline survey method, especially where use of the latter method is inappropriate: "Merely because there is a percentage difference

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[20] *Welles* v. *Bailey, supra* at 567 (quoting from J.M. Gould, *Law of Waters* § 162 (1st ed. 1883)), cited by BLM and the Tribe, instructs that the perpendicular survey method is to be employed so that " 'every proprietor * * * [receives] frontage of the *same* width on the new shore as on the old shore.' " (Italics added.) Thus, where there has been no change in the overall frontage along the new shore, *Welles* requires that the perpendicular survey method be used so as to apportion that shore according to the existing frontage of each lot so that each riparian owner gets the same share. However, where the overall frontage along the new shore has increased or decreased, each riparian owner would, under the principle of equitable apportionment, be entitled to his proportionate share of the new bank. Thus, *Knight* v. *Wilder, supra* at 209-10, also cited by BLM and the Tribe, states that

"[t]he object is to give to each riparian proprietor an equal share of the bed of the river, *in proportion to* his line on the margin of the stream, together with that portion of the bed of the stream, which lies opposite, in front of, or adjacent to, his upland; and this * * * will be effected by the straight lines, at right angles, which will in general be the shortest and most direct lines, to the thread of the stream." (Italics added.)

See also Tappan v. *Boston Water-Power Co., supra* at 705.

[21] First American principally relies on a June 26, 1990, affidavit of Lane J. Bouman, which states, at page 8:

"I * * * compar[ed] the amount of shoreline which each of the Subject Sections contained pursuant to the original 1905 survey with the amount of shoreline allocated to each of the Subject Sections in the 1982 BLM Survey. My comparison revealed that the 1982 BLM Survey increased (by approximately 70%) the amount of shoreline allocated to the Tribe's Section 10 while simultaneously decreasing (by approximately 9%) the amount of shoreline allocated to the privately-owned Section 15."

between the allocation arrived at using the normal method over that available under the proportionate method does not make the normal method inapplicable. This is especially the case where, as here, the proportionate method was not methodologically appropriate" (BLM Reply Brief at 14-15).

BLM, however, does not challenge either the inequity of the apportionment or the fact that, while the percentage difference does not require abandonment of the perpendicular survey method in favor of the proportionate shoreline survey method, it argues in favor of selection of *another* perpendicular line. Indeed, a number of perpendicular lines, including the one selected by Myer, can be drawn from the old to the new bank of the Colorado River in order to divide the accreted lands between secs. 10 and 15. *See* First American Exh. 84.

Also, Davidson testified that the Myer line allocated accreted land to sec. 10 "really not directly in front of Section 10, it's more in front of Section 15" (Tr. 316). A review of the approved survey plat (BLM Exh. 4) indicates on its face that sec. 15 is not accorded some portion of the land "in front of" that section, contrary to section 7-66 of the Survey Manual. This is because, under the Myer survey, some of the accreted land southeast of a line drawn perpendicular to the old bank of the river from the terminus on that bank of the original sec. 10/15 line is not allocated to sec. 15, but to sec. 10. *See Fraser's Million Dollar Pier Co.* v. *Ocean Park Pier Co.*, 197 P. 328, 331 (Cal. 1921); *see also Steinem* v. *Romney*, 194 A.2d 774, 777-78 (Md. 1963); *Crandall* v. *Allen, supra* at 174; *Mulvy* v. *Norton*, 3 N.E. 581, 586 (N.Y. 1885).

The present case is also far different from the situation in *Algoma* in its secondary aspects. In addition to the primary fact that the privately surveyed line in *Algoma* was within the allowable limit of error, adoption of that line was seen as the fair and just solution where, in accepting that line, the Government was also able to protect valuable improvements placed in reliance on that survey and there was "no adverse claim." That is not the situation here.

In the present case, no valuable improvements are protected by adoption of the Myer line versus some of the other perpendicular lines which could be drawn. At least two other perpendicular lines could arguably be drawn to the north, thus not affecting any of the improvements likely placed in sec. 15 in reliance on the Myer survey. *See* First American Exh. 84. Also, there are private parties, *i.e.*, First American and its policyholders, whose claim to land in sec. 15 is adversely affected by adoption of the Myer line versus some of the other perpendicular lines. Finally, whereas, in *Algoma*, the Government and privately surveyed lines differed by less than 1 degree and involved less than 1 acre of land, in the present case, the difference between the Myer line and any one of the other perpendicular lines which could be drawn to the north is a matter of

several degrees and would likely involve many acres of land. *See* First American Exh. 84. Thus, which of these perpendicular lines is adopted as the sec. 10/15 accretion line is of no small import.

Given all this, the necessary conclusion is that the Myer survey of the sec. 10/15 accretion line was not executed within the allowable limit of error and, thus, cannot be adopted under *Algoma*. The Myer line fails to comport with the Survey Manual both because it fails to allocate to secs. 10 and 15 the accreted lands in front of those sections and, most importantly, because it also fails to equitably apportion the new bank of the river between them. *See Wineman* v. *Shannon Brothers Lumber Co., Inc., supra* at 659 ("equitable division of the accretions"); *Tappan* v. *Boston Water-Power Co., supra* at 705; *Knight* v. *Wilder, supra* at 209-10. Moreover, where the ultimate aim of the holding in *Algoma* is the achievement of "fairness," reliance on the Myer line plainly does not achieve a fair result. *Algoma Lumber Co.* v. *Kruger, supra* at 404.

Thus, it can fairly be said that had BLM, in surveying the sec. 10/15 accretion line in 1982, itself selected the Myer line from among the possible perpendicular lines, this selection would now be viewed as inconsistent with the prime directives of the Survey Manual and the survey would not be considered properly approved. Where BLM should not accept a line if surveyed by BLM, it similarly is not bound to accept the same line merely because it has been surveyed by a private surveyor.

Rather, the proper line between the accreted lands in secs. 10 and 15 is a line drawn perpendicular to the new bank of the river where the result is the most equitable apportionment of that bank between secs. 10 and 15 that can be achieved given present circumstances, so long as the sections are awarded the accreted lands in front of them as far as practicable.[22] It is with that end in mind that the case will be remanded to BLM for a corrective survey.

Accordingly, the July 1989 decision and December 1989 order of the Board must be vacated and the case remanded to BLM in order that it may prepare a corrective survey of the sec. 10/15 accretion line by surveying a line perpendicular to the new bank of the Colorado River which results in the most equitable apportionment of that bank between secs. 10 and 15 consistent, if practicable, with awarding the land in front of the sections.

Pursuant to the authority delegated to the Director, OHA, by the Secretary of the Interior, 43 CFR 4.5, the Board's July 1989 decision and December 1989 order in *First American Title Insurance Co.* v.

[22] Arguably, the improvements placed by First American's policyholders immediately north of the Myer line in reliance on the Shearer survey should militate in favor of selection of the perpendicular line which can be drawn furthest to the north. However, such improvements were placed in reliance on an unapproved BLM survey and, thus, as properly decided by the Board in *First American Title Insurance Co.* v. *BLM, supra* at 31-34, have no bearing on where the sec. 10/15 accretion line should be placed.

BLM, supra, are vacated and the case is remanded to BLM for further action consistent herewith.

ROGER E. MIDDLETON
Director

UNITED STATES *v.* ELMER H. SWANSON

119 IBLA 53 Decided: *March 29, 1991*

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring the Livingston tunnel site, IMC 27881, invalid. ID-23098.

Affirmed as modified.

1. Mining Claims: Tunnel Sites

Pursuant to 30 U.S.C. § 27 (1988), failure to prosecute work on a tunnel for 6 months shall be considered an abandonment of the right to all undiscovered veins on the line of such tunnel.

2. Mining Claims: Tunnel Sites

The language of 30 U.S.C. § 27 (1988), clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute the tunnel for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes.

3. Mining Claims: Tunnel Sites

The right to utilize a tunnel site for development of a mine is essentially a right-of-way and can be abandoned. Abandonment of a right-of-way can be predicated upon a showing that the means of enjoyment of it have long been in a state of disrepair.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, U.S. Department of Agriculture, Ogden, Utah, for the Forest Service; Royce B. Lee, Esq., Idaho Falls, Idaho, for contestee/appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF LAND APPEALS

On June 25, 1986, the U.S. Forest Service (FS), United States Department of Agriculture, filed a document requesting that the Bureau of Land Management (BLM) contest the Livingston tunnel site, ID-23098. The Livingston tunnel site is held by Livingston Silver, Inc. (LSI), Elmer H. Swanson, president. On July 2, 1986, BLM filed a contest complaint that charged: "The claimant has not met the requirements of the law as to monument, notice, starting a tunnel, and

diligently pursuing work on the tunnel from the date of withdrawal, August 22, 1972, to March 28, 1986."[1]

On August 15, 1986, Swanson filed a response to the contest complaint and the matter was assigned to Administrative Law Judge John R. Rampton, Jr. A hearing was held on August 25, 1987, in Challis, Idaho. A portion of Judge Rampton's summary of the hearing is set forth below:

> James J. Jones, a qualified mineral examiner employed by the U.S. Forest Service (see Exh. 3), testified that he visited the subject tunnel site seven times (Tr. 25). His first visit occurred September 11, 1973, in the company of contestee Elmer Swanson (Tr. 25-26). He observed a trench, but no tunnel, no monument, no notice and no evidence of tunneling activity (Tr. 26-28; Exh. 8). Nor did he observe any evidence or remnants of any tunnel that might have existed there previously (Tr. 28).
>
> Mr. Jones visited the site a second time, also in the company of contestee, on July 10, 1975 (Tr. 29). He observed no change from what he found during his first visit. Mr. Jones' third visit, made on July 24, 1978, yielded the same observations (Tr. 30; Exh. 9; *cf.* Exh. 8).
>
> Mr. Jones' fourth visit occurred on October 2, 1984, again in the company of contestee (Tr. 31). On this visit Mr. Jones observed that the old trench had been supplanted by a newer and longer trench (approximately 500-600 feet in length). He still observed no tunnel, no monument, and no notice (Tr. 31).
>
> Mr. Jones' fifth visit occurred on August 26, 1986, in the company of Mr. Alfred Swanson, contestee's son (Tr. 32). Mr. Jones observed nothing different from his visit in 1984 except that there was then a post (monument) at the trench.
>
> On his next visit, June 4, 1987, Mr. Jones observed that some sixteen timbers had been set. Still no tunnel had been commenced (Tr. 32-34; Exhs. 10-15).
>
> On his last visit, August 12, 1987, Mr. Jones noted several more timbers had been set, and he discovered a notice in a can attached to a post. Still no tunnel had been commenced (Tr. 34-39; Exhs. 16-25).

(Decision at 4).

Mr. Jones also testified that he had viewed aerial photographs of the area taken in 1959, 1969, 1972, and 1977. His opinion was the photographs show that within a 25-percent margin of error, the trench was the same size throughout the period from 1959 to 1977, and that there were no surface disturbances during the 1-year periods prior to the photographs (Tr. 40-49).

Randall Karstaedt, a forester employed by FS, also testified, essentially substantiating Mr. Jones' testimony for the period from 1984 through 1987. Karstaedt visited the site five times from December 2, 1984, through August 12, 1987, and never saw a tunnel (Tr. 14-18).

Elmer Swanson, president of LSI, was unable to attend the hearing due to illness. His son, Alfred Swanson, testified for appellant. Alfred Swanson stated that he worked on the tunnel site prior to 1977; however, he only has a record of the dates and type of work done from 1977 until the time of the hearing. Appellant's Exhibit A is six pages

[1] The tunnel site, described in the complaint as secs. 3, 4, 9, and 10, T. 9 N., R. 16 E., Boise Meridian, Custer County, Idaho, was located Mar. 1, 1926, by Arthur V. Corry, resident manager, Livingston Mines Corp. After mesne conveyances, it was transferred first to Elmer Swanson then, in 1975, to LSI. The lands covered by the tunnel site were withdrawn from location under the mining laws effective Aug. 22, 1972, by the Sawtooth National Recreation Area Act, 16 U.S.C. §§ 460aa through 460aa-9 (1988).

upon which are recorded the dates, number of hours, and other information concerning work performed on the tunnel site by Alfred Swanson from December 26, 1977, through August 23, 1987. Alfred Swanson testified that when he worked on the tunnel site from 1977 until 1984, he removed dirt and rock from the bottom of the trench with a pick and shovel, and put the dirt and rock outside the trench (Tr. 70-71, 87-88). He also testified that there were old dump piles visible on the site prior to the time he began work on the tunnel site (Tr. 71-72). Swanson testified that he performed at least $100 worth of work at the tunnel site each year from 1977 through 1987, and that to the best of his knowledge, proper assessment work had been performed each year (Tr. 73). He stated that in the course of digging on the tunnel site with a bulldozer, he dug up old timbers which he photographed at a later date (Tr. 74-76, 84-85; Exhs. B and C). Swanson stated that LSI intends to use the tunnel for draining water and removing ore from the Livingston mine, as well as exploring for new veins or lodes.

Alfred Swanson further testified that on August 21, 22, and 23, 1987, he dug a tunnel underground for about 25 feet on the Livingston tunnel site. He presented testimony concerning Exhibit I, which consists of copies of proofs of labor and notices of intent to hold filed with the county for many mining claims and related mill and tunnel sites for each year from 1972 until 1986. These annual filings apply to the Livingston tunnel site during the years 1972, 1973, 1975, and from 1978 through 1986.

At the hearing, counsel agreed to a stipulation that engineer Frank Taft was present in the courtroom and would testify, if asked, that the presence of timbers such as those described by Alfred Swanson would indicate a tunnel once existed (Tr. 95-96).

Answers to interrogatories were submitted by Elmer Swanson on September 21, 1987. His statement reads in part:

> In 1946 I was at the tunnel site. The Livingston tunnel was run for 250 feet at the Livingston tunnel site. The tunnel site notice was posted on a four foot stake. The tunnel site notice had aged but could still be read. In 1960 the tunnel site notice was moved to allow workmen to remove the slough in the tunnel. I have personally observed the monument and notice posted every year from 1972 to 1985. The stake upon which the tunnel site notice was posted was replaced in June 1978. The tunnel site notice was still readable but no forest service official has ever asked for the location. * * *
>
> * * * * * * *
>
> Although partly obliterated by recent work, evidence of past work at the portal site is easily recognized. Most notable are old cat-spoils with sage, lupine, and various grass species growing on them, and old rotted and broken mine timbers; obviously the work was done several years ago. * * *
>
> * * * * * * *
>
> * * * From August 22, 1972 to August 25, 1987 Livingston [S]ilver, Inc. and Elmer H Swanson spent $19,164.00 on the Livingston tunnel.

The tunnel is timbered for 71 feet. The tunnel is driven for 223 feet as a trench because the ground caved onto the floor of the tunnel. The total distance the tunnel has been driven equals 294 feet. Since it collapsed in 1975 after being driven seventy, eighty, a hundred feet.

Other costs on the Livingston tunnel site: In 1978 Ed Obenchain was paid one hundred dollars to reset the stakes. The road to the tunnel site cost $1,100.00.

Howard Cameroun had a lease on the Livingston mine and mill, paid Alfred Swanson $735.00 for working on the tunnel on the tunnel site claim.

Total Amount Spent On The Livingston Tunnel and Tunnel Site: $21,099.00.

(Answers to Interrogatories at 1-3).

Based on the evidentiary record, Judge Rampton found the tunnel site was not in compliance with the law and was therefore invalid:

Assuming that there was a tunnel at the site in question at one time, the tunnel had ceased to exist before September 1973 (see Exhs. 8 and 9) and has not since been restored (see Exhs. G, H, 11 through 16, and 18 through 24). If, as appears likely, the tunnel ceased to exist prior to August 22, 1972, contestee would be precluded from re-entry thereafter to establish a tunnel site because of the Sawtooth Recreation Area withdrawal.

Even assuming that a tunnel existed past the date of withdrawal, I must conclude that its restoration has not been prosecuted diligently as required by the Tunnel Site Act. There has been no tunnel for at least 14 years.

(Decision at 6).

In its statement of reasons (SOR), appellant argues the right to undiscovered veins or lodes found in the prosecution of the tunnel is not an issue herein; the Government failed to present a prima facia case of abandonment or any conclusive proof of abandonment; the contestee showed by a preponderance of the evidence that it had no intention of abandoning the tunnel site; the contestee established that a tunnel had actually been commenced at the Livingston tunnel site and that it was properly located in 1926; contestee complied with monument requirements; contestee prosecuted the tunnel site with reasonable diligence so as to prevent a finding of abandonment; and after a tunnel caves in, the owner of the tunnel site should be allowed to redevelop it. Counsel for FS characterizes the major issue of the case as whether the tunnel site was a valid claim pursuant to 30 U.S.C. § 27 (1988), on August 22, 1972, the date of establishment of the Sawtooth National Recreation Area, or at the time of the hearing (August 25, 1987). In its Answer, FS argues a tunnel did not exist in 1972 or at the time of the hearing, and the lack of a tunnel precludes a finding that a valid tunnel site exists, despite LSI's expenditures.

The statutory provision popularly known as the Tunnel Site Act reads:

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment *of the right to all undiscovered veins* on the line of such tunnel. [Italics supplied.]

30 U.S.C. § 27 (1988).

The validity of the Livingston tunnel site has previously been the subject of a Board opinion. In *United States* v. *Livingston Silver, Inc.*, 43 IBLA 84 (1979), *overruled to the extent inconsistent, United States* v. *Albert F. Parker*, 82 IBLA 344, 91 I.D. 271 (1984), we adopted an Administrative Law Judge opinion which dismissed a 1977 FS contest complaint relating to the tunnel site but which expressly found LSI's right to use the tunnel for development purposes continued. 43 IBLA at 86. In *United States* v. *Albert F. Parker*, we overruled a portion of the *United States* v. *Livingston Silver, Inc.* decision, but we did not overrule any portion of the decision relating to LSI's right to utilize the tunnel for purposes of developing mines on other sites.

The effect of our decision in *Albert F. Parker* was to reopen the issue of appellant's right to undiscovered veins or lodes in the line of the tunnel. This is the change of law which prompted the filing of the current FS contest complaint (Contestant's Brief of Aug. 1, 1988, at 2). Thus, despite the statement by counsel for appellant that this appeal does not involve the right to possess any blind vein or lode (SOR at 5), it is necessary to specify our conclusions with respect to both development rights and rights to any blind veins or lodes. This is important given the fact that appellant's witness at the hearing stated one purpose of the tunnel is to explore for new minerals (Tr. 82-83).

[1] We find appellant failed to diligently prosecute the work on its tunnel site for 6 months, thereby conclusively abandoning its right to any blind veins or lodes which might be discovered on the line of the tunnel claimed by appellant. The testimony and photographs presented by FS establish that from at least 1973 until 1978 the tunnel site remained virtually untouched. Although appellant presents evidence that Elmer Swanson visited the site each year from 1972 through 1985, diligent prosecution of a tunnel is not established by visitation. Furthermore, we agree with Judge Rampton that Alfred Swanson's testimony concerning the labor he performed at the tunnel site from 1977 through 1984 does not establish prosecution of a tunnel for those years.

[2] However, the Tunnel Site Act clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute the tunnel for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes. *Fissure Mining Co.* v. *Old Susan Mining Co.*, 63 P. 587 (Utah 1900); 1 *American Law of Mining* § 32.07[5] (2d ed. 1984); 2 C. Lindley, *Lindley on Mines* § 631 (3rd ed. 1914). To the extent this distinction is not recognized in the decision appealed from, it is modified accordingly.

[3] Although the right to use a tunnel for development purposes is not abandoned by failure to prosecute tunnel work pursuant to 30 U.S.C. § 27 (1988), such development rights can be abandoned.

1 *American Law of Mining* § 32.07[5] (2d ed. 1984). Tunnel sites are not mining claims but rights-of-way. *Creede & Cripple Creek Mining & Milling Co.* v. *Uinta Tunnel Mining & Transportation Co.*, 196 U.S. 337, 357 (1905); *David Doremus*, 115 IBLA 336, 341 (1990); *Elsworth & Dolores Loveland*, 89 IBLA 205, 207 (1985). Abandonment of a right-of-way may be predicated upon a showing that the means of enjoyment of the right-of-way have long been in a state of disrepair. *City of Stockton* v. *Miles & Sons, Inc.*, 165 F.Supp. 554, 559 (N.D. Cal. 1958); *Flanagan* v. *San Marcos Silk Co.*, 106 Cal. App. 2d 458, 235 P.2d 107 (Cal. Dist. Ct. App. 1951); *Raedell* v. *Anderson*, 98 Kan. 216, 158 P. 45 (Kan. 1916). Abandonment occurs immediately when an intent to abandon exists along with an act of abandonment. 25 Am. Jur. 2d *Easements & Licenses* § 103 (1966); 2 *American Law of Mining* § 46.01[6] (2d ed. 1984).

There have been no allegations or evidence whatsoever that a tunnel to be utilized in development of the Livingston mine ever existed. It is clear that use of the subject land for the purpose of developing the nearby Livingston mine was impossible for many years. The fact that the means of enjoyment of the right-of-way had long been in a state of disrepair is persuasive evidence of abandonment of the right-of-way.

We have carefully weighed the evidence submitted and find none of it establishes the validity of the tunnel site for use as a right-of-way. Filing of annual proofs of labor or notices of intent to hold can be evidence of a lack of intent to abandon, 2 *American Law of Mining* § 46.01[8][a] (2d ed. 1984), and failure to file documents on an annual basis has evidentiary value in proving a charge of abandonment, *United States* v. *Catlin Bohme*, 48 IBLA 267, 302, 87 I.D. 248, 265 (1980). Appellant establishes that proofs of annual assessment work or notices of intent to hold for the tunnel site were filed with the county in 1972, 1973, 1975, and from 1978 through 1986. However, the documents filed with the county in 1974, 1976, and 1977 do not pertain to the Livingston tunnel site. Thus, the filings with the county are insufficient to overcome the evidence of abandonment.

Work on the tunnel site could also serve to negate any evidence of abandonment. The only evidence of activity on the site from 1973 until December 1977 is Alfred Swanson's testimony that he worked on the Livingston tunnel site prior to 1977, but no longer has records which would allow him to specify when this work occurred. Moreover, when asked to describe the tunnel site in 1972, Alfred Swanson testified, "My memory doesn't go that far. I remember very little at that time" (Tr. 68). The aerial photographs, coupled with the testimony of contestant's witnesses at the hearing, constitute strong evidence that no labor was performed on the tunnel site from 1973 until sometime after Mr. Jones' third visit to the site on July 24, 1978. Consequently, we find that appellant has failed to establish by a preponderance of the evidence that its tunnel site is valid.

We find appellant abandoned the Livingston tunnel site. Appellant's renewed interest in the tunnel site, which appears to have commenced

in defending the claim against the initial contest complaint in 1977, is not sufficient to create a new tunnel site right-of-way because the land had been withdrawn from entry in 1972. *See* Maley, *Mining Law from Location to Patent* (1985) at 103.

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 as modified.

WM. PHILIP HORTON
Chief Administrative Judge

I concur:

FRANKLIN D. ARNESS
Administrative Judge

November 30, 1990

MESA OPERATING LIMITED PARTNERSHIP *

MMS-88-0182-OCS *November 30, 1990*

Outer Continental Shelf Lease No. 054-002739; appeal of order requiring repayment of unauthorized credit adjustments.

Appeal denied.

STATEMENT OF FACTS

By letter dated July 22, 1987, the Minerals Management Service (MMS) informed Mesa Operating Limited Partnership (Mesa) that it was initiating an audit of Mesa's royalty payments for its Federal and Indian leases. By letter dated April 19, 1988, MMS informed Mesa that it had reviewed Mesa's royalty payments for gas production on Outer Continental Shelf (OCS) Lease No. 054-002739, High Island Block 339 (Lease), for the months April 1979 through March 1987. In this letter, MMS informed Mesa that this review showed that Mesa took unauthorized unilateral credit adjustments on the Lease by improperly reducing current months' royalty payments by $3,193,581.41 to recoup royalties allegedly overpaid in prior months. MMS stated that such unauthorized credit adjustments are in violation of §10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1339 (§10). Section 10 requires that the payor submit a written request for a refund from the Department (DOI) within 2 years after the making of the payment, that the Department notify Congress of that request and its determination that the refund should be allowed, and, after waiting a prescribed period, that the Department authorize a refund or credit.

Because it concluded that Mesa's unauthorized credit adjustments violated §10, MMS ordered Mesa to repay those credit adjustments and notified Mesa that late payment charges would be assessed upon receipt of the payment. (Of the $3,193,581.41 in unauthorized credits, $2,943,944.05 were recouped more than 2 years after the date of the original alleged overpayment while the remaining $249,637.36 in unauthorized credits were taken within 2 years of the date of the original alleged overpayment.)

Mesa timely filed an appeal or the April 19, 1988, order with the Director of MMS pursuant to 30 CFR Part 290. Pursuant to 30 CFR 243.2, Mesa posted a bond in lieu of repaying the unauthorized credits. On November 29, 1990, the Secretary of the Interior notified Mesa and the MMS Director that, pursuant to 43 CFR 4.5(c), the Secretary was taking jurisdiction to decide Mesa's appeal.

* Not in chronological order.

DISCUSSION

The procedure which a payor must follow to obtain a refund of royalties paid pursuant to an OCS lease is prescribed by §10 of the OCSLA, 43 U.S.C. §1339, which states in pertinent part:

> (a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment * * *
>
> (b) No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: *Provided*, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress.

When Mesa reduced a current month's royalty payment by taking a credit for the amount it allegedly overpaid in a previous month, in effect it received an immediate refund of the allegedly overpaid amount without complying with the procedures in §10(b). To the extent these credit adjustments were made more than 2 years after the date of the original overpayment, Mesa obtained refunds that would have been barred by §10(a) even if Mesa had at that time filed a proper written refund request.

In its Statement or Reasons filed in this appeal, Mesa raises several arguments as to why MSS' April 19, 1988, letter is based on an erroneous interpretation of §10. However, the question of whether a royalty payor may take an unauthorized credit adjustment to recoup an overpayment in lieu of submitting a request for refund or credit pursuant to §10 has been addressed several times in prior decisions of the Department. It is well-established that such credit adjustments contravene the express requirements of §10. Solicitor's Opinion, M-36942, 88 I.D. 1090 (1981); *Kerr-McGee Corp.*, 103 IBLA 338, 340 (1988) ("If this procedure [unauthorized credit adjustments] were countenanced, we would thwart the will of Congress, which has expressly provided how refunds for overpayments are to be processed. The Secretary of the Interior, not the individual claimant, is empowered to pass judgment on refund requests and only requests which are timely filed are entitled to be approved."); *Santa Fe Energy Co.*, 107 IBLA 32, 34-39 (1989) ("SFE's attempt to obtain credits for prior overpayments through an offsetting procedure which circumvents section 10 of OCSLA cannot be endorsed by this Board."); *Mesa Petroleum Co.*, 107 IBLA 184, 190 (1989) ("We have consistently held that 43 U.S.C. §1339 (1982) requires that a person must file a request

for a refund, rather than deduct or credit the amounts it believes it overpaid on later monthly royalty reports, and that such a request must be filed within 2 years of the date the payment was made."). *See also Santa Fe Energy Co.*, 106 IBLA 333 (1989).

Mesa argues, however, that it owes no royalties because its underpayments are offset by overpayments on the lease, in accord with this Department's decisions in *Shell Oil Co.*, 52 IBLA 74 (1981), and *Mobil Oil Corp.*, 65 IBLA 295 (1982). In its Supplemental Comments of Mesa Operating Limited Partnership Objecting to Report and Recommendation (Supplemental Comments), Mesa argues that the type of offsetting authorized in *Shell* and *Mobil* must be applied to the April 19, 1988, order as a result of a recent IBLA decision in *Forest Oil Corp.*, 113 IBLA 30 (1990) (*Forest I*)[1]

In *Shell*, DOI's audit disclosed both overpayments and underpayments occurring on the same lease but in different months during the period covered by the audit. The overpayments and underpayments occurred as a result of a variety of different errors. None of the underpayments was intentionally made to recoup past overpayments. The Board held that despite the fact that Shell had not, and now could not, obtain a refund of the overpayments because more than 2 years had passed, as a matter of fairness and equity, DOI's auditors must offset those overpayments against underpayments discovered on the same lease during the audit period to determine a net amount of underpaid royalties due. The IBLA stated:

> Had Shell initiated a request in 1979 for a refund of its November 1974 overpayment, we believe Survey would have been correct in denying such request as untimely. In *Phillips Petroleum Co.*, 39 IBLA 393 (1979), we so held. Where, however, Survey undertakes to audit a producer some 4 years after the payments at issue have been made, we hold that a sense of fundamental fairness requires Survey to recognize both a producer's underpayments and overpayments of royalty. We believe Survey should have properly offset Shell's underpayment by the amount of its overpayment. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments.

52 IBLA at 78. In the Solicitor's Opinion, *supra*, this type of so-called "Shell-Offsetting" was recognized as consistent with §10. 88 I.D. at 1103, 1104.[2]

In *Forest*, the payor, like Mesa, took unauthorized unilateral credit adjustments against current royalty obligations to recoup prior overpayments. The MMS argued there, as it does here, that such credit adjustments violate the refund procedure of §10, and thus have to be

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[1] The MMS sought reconsideration of *Forest I*. In a decision issued after the filing of Mesa's Supplemental contents in this proceeding, the IBLA reaffirmed its holding in *Forest I*. *Forest Oil Corp. (On Reconsideration)*, 116 IBLA 176 (1990) (*Forest II*).

[2] In *Mobil Oil Corp., supra*, the Board extended the *Shell* offsetting principle to require DOI to offset, in the course of an audit, overpayments against unrelated underpayments under the same lease which the lessee (instead of the auditors) discovered.

repaid. In *Forest I*, the Board concluded that since the allegedly unlawful credit adjustments taken by Forest were discovered in the course of an audit, *Shell Oil Co., supra*, and *Mobil Oil Corp., supra*, were relevant:

> However, the appeal in this case is filed from a decision after audit refusing to consider the overpayments which were the subject of the recoupments as an offset to underpayments disclosed by the audit rather than from a decision disallowing an unauthorized recoupment. [Footnote omitted.] In the context of the appeal of the audit the issue is what, if any, additional royalty is due from the lessor. [Footnote omitted.] Accordingly, we find it necessary to set aside and remand the Director's decision for further consideration of those overpayments which may offset the underpayments at issue.

Forest Oil Corp., 113 IBLA at 45-46.

Pursuant to 43 CFR 4.403, the MMS sought reconsideration of *Forest I*. MMS generally concurred with IBLA's conclusion that offsettinq overpayments against unrelated underpayments on a lease during an audit period is justified under §10. However, it argued that allowing a payor to intentionally create underpayments by taking credit adjustments, and then to allow offsetting of the very overpayments that were recouped, would render §10 mostly, if not completely, ineffective. Since the amounts of the overpayments and underpayments would correspond and result in no payment obligation (except in an unusual circumstance where an overpayment may be outside the audit period), payors would have no reason not to simply take unauthorized credit adjustments instead of complying with §10 refund procedures.

In *Forest II*, the Board reaffirmed the principle that taking unauthorized credit adjustments violates §10:

> The Board has upheld the view of the Solicitor and MMS that the recoupment of past royalty overpayments through applying a credit against current royalty obligations is a form of "refund" which may not be taken unilaterally, but which requires compliance with the procedures of section 10 of the OCSLA. [Footnote omitted.]

116 IBLA at 181.

Despite this unequivocal recognition that the law establishes strict preconditions to effect refunds of overpayments on OCS leases, the Board reasoned:

> Notwithstanding this principle, the purpose of a royalty audit is to ascertain the net amount of royalty due and owing to the United States. In resolving this issue it is necessary in the context of an individual lease to offset overpayments against underpayments within the time frame of the audit. Although all underpayments are by definition improper, that fact provides no basis for ignoring the overpayments in determining the amount of the royalty due.

Id. at 181-182. Therefore, the Board reaffirmed its view that within the audit period and on the same lease, MMS must offset overpayments on the lease against underpayments created by unauthorized unilateral credit adjustments.

The assessment for underpayments caused by Mesa's credit adjustments for the Lease resulted from an MMS audit. Therefore, Mesa would be correct that, if the offsetting principle enunciated in *Forest I* and *Forest II* were applied to the April 19, 1988, order, the order must be reversed. However, I decline to apply the offsetting approach set forth in the *Forest* cases to this case and hereby expressly overrule the Board's conclusions in those cases. My reasons are as follows.

As a general principle, I agree with the precedent established in the *Shell Oil Co.* case that overpayments discovered during an audit of a lease may be offset against underpayments discovered in the same audit period on that lease to determine a net amount of royalty owed. In the *Shell* case, and for two of the three leases involved in the *Mobil* case, the overpayments and underpayments discovered during the audit were unrelated.[3]

For example, the overpayments may have been caused by a pricing error, whereas the underpayments may have been caused by misreporting sales volumes for a later, unrelated production month. The IBLA correctly concluded that in the audit context it would be inequitable to require the lessee to pay all the underpaid royalties and yet deny a refund of the overpaid royalties because a refund request would be time-barred by the 2-year limit in § 10. Consequently, the Board held that the MMS must offset the overpayments against the underpayments.

The situation in Forest's appeal and in Mesa's appeal is different principally because the overpayments and underpayments are related. When Forest and Mesa discovered that they overpaid royalties for a particular month, they intentionally took a credit adjustment in a later month, thereby underpaying royalties. In each instance, the amount of the overpayment and underpayment should be identical. If the Department allows *Shell*-type offsetting in situations involving underpayments caused by unauthorized unilateral credit adjustments, a payor discovering an overpayment could simply effect a refund without going through the § 10 process by taking a credit adjustment. If the credit is discoverd in an audit, no royalty or interest would be due because the netting would result in a zero sum, and the lessee still would have effected its refund without approval. Thus, the effect of the Board's conclusion in Forest is to read § 10 out of existence.

The lessee's only risk would be that the overpayment month and the credit adjustment month would not be in the same audit period, and

[3] With respect to the third lease (OCS-G-1440), Mobil had taken unauthorized unilateral credit adjustments to recoup prior overpayments discovered during an audit. MMS' predecessor agency then required Mobil to repay these amounts in full (approximately $120,000) and then file a request for refund. The Agency allowed refund of overpayments made within the 2-year period prescribed by §10 (approximately $18,000) and denied the request for the remaining $102,000. The Board upheld this result. 65 IBLA at 302-303.

thus would be beyond the scope of *Shell* offsetting. However, since MMS tends to audit time periods of three to six years, this risk is minimal. Therefore, if § 10 is to be given effect, lessees cannot be permitted to offset a royalty underpayment caused by an unauthorized credit adjustment against the overpayment for which the credit was taken.

If the Department allows *Shell*-type offsetting of underpayments caused by unauthorized unilateral credit adjustments, there also would appear to be no rational basis for not allowing credit adjustment underpayments to be offset by overpayments made more than 2 years previously, as in the case of other offsets allowed in the audit context.[4] The lessee thus could unilaterally effect a refund of overpayments made more than 2 years before, whereby contravening §10(a).

In its Supplemental Comments, Mesa also argues that as a result of the decision in *Chevron U.S.A., Inc.* v. *United States*, 17 Cl. Ct. 537 (1989), the April 19, 1988, order is invalid to the extent it concludes that the 2-year limit in §10(a) runs from the date of the original alleged overpayments. Mesa concludes that when this case is applied, its offsets must be considered to be proper because *Chevron* held "that the two-year period set forth in Section 10 for filing refund requests does not begin to run until the royalty payment becomes excessive." Supplemental Comments at 19. Mesa fails to provide any reasoning in its Supplemental Comments to support this conclusory assertion.

However, I conclude that the *Chevron* decision does not require reversal of the April 19, 1988, order. First, the decision in *Chevron, id.*, is on appeal because the United States believes the Claims Court's decision is in error. *Chevron U.S.A., Inc.* v. *United States*, No. 90-5053 (Fed. Cir.). Additionally, this Department has decided not to follow the Claims Court's decision in *Chevron U.S.A., Inc., supra. Conoco Inc.*, 114 IBLA 28, 32-36 (1990). In any event, the rationale in *Chevron* does not apply to Mesa's situation. In *Chevron*, the court held that the 2-year period in §10 began to run at the time the court determined that Federal Energy Regulatory Commission Order Nos. 93 and 93A were unlawful.[5] In the court's view, that is when Chevron's payment became "excess." Mesa's royalty payments, however, were not affected by a subsequent change in the applicable law. The overpayments Mesa made were clearly "excess payments" from the time they were made. Thus, the *Chevron* decision has no relationship to Mesa's situation.

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[4] *Forest* involved only credit adjustments taken within 2 years of the initial overpayments. Most of Mesa's credit adjustments, however, were made more than 2 years after the initial overpayment.

[5] Chevron paid its royalties based on the price it received for its gas sold pursuant to FERC order Nos. 93-93A. Thus, it paid MMS royalties based on this higher price. When the court invalidated the FERC orders, Chevron was required to make refunds to its purchasers and requested a refund of the royalties it paid pursuant to these FERC orders. The Department denied Chevron's refund request because it was not filed within 2 years of the making of the payment, as required by §10.

November 30, 1990

CONCLUSION AND ORDER

Mesa took a series of unauthorized credit adjustments on its royalty reports (Form MMS-2014) to recoup $3,193,581.41 in royalty overpayments made in previous months for gas production from the Lease. This Department has consistently held that the unauthorized taking of such credit adjustments violates the requirements or §10 of the OCSLA, and I reaffirm that conclusion. Therefore, each credit adjustment Mesa took on its royalty reports created an underpayment for that month which is subject to repayment.

Mesa's credit adjustments were discovered as a result of a MMS audit or Mesa's royalty payment procedures. The IBLA has established a general principle that a lessee may offset overpayments found on a lease during an audit period against underpayments discovered on that same lease during the same audit period. *Shell Oil Co., supra; Mobil, supra.* That principle was established in situations where the overpayments and underpayments were not related. However, in situations where a payor, like Mesa, intentionally creates an underpayment by taking a credit adjustment to recoup an overpayment made in a previous month, the overpayment always will completely offset the corresponding underpayment. Thus, the payor will have effected a refund without satisfying the statutory preconditions to receiving a refund. Therefore, the principle established in *Shell* and *Mobil* cannot be applied to underpayments caused by unauthorized credit adjustments because to do so would render both §10(a) and §10(b) meaningless. I therefore hold that to the extent that the decisions in *Forest Oil Corp.*, 113 IBLA 30 (1990), and *Forest Oil Corp. (On Reconsideration)*, 116 IBLA 176 (1990), authorize such offsetting, those decisions are overruled.

On the basis of the record before the Department, the April 19, 1988, order of the Dallas Area Compliance office is hereby approved in accordance with this final decision of the Department of the Interior. Upon payment of the $3,193,581.41 required by that order, in accordance with 30 CFR 218.54 and 218.150, MMS will bill Mesa for interest from the date that Mesa took the unauthorized credit adjustments until the date of repayment.

The Director of the Office of Hearings and Appeals shall publish this decision in *Interior Decisions.*

MANUEL LUJAN, JR.
Secretary of the Interior

LARRY MARTIN *v.* BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

19 IBIA 279 Decided: *April 4, 1991*

Appeal from a decision declining to consider an appeal by a subcontractor under an Indian Self-Determination Act contract.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contract under the Act.

2. Board of Indian Appeals: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Contracts: Indian Self-Determination and Education Assistance Act: Generally

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

3. Bureau of Indian Affairs: Administrative Appeals: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Generally

In connection with its authority to rescind an Indian Self-Determination Act contract under 25 U.S.C. §450m (1988), the Bureau of Indian Affairs has authority to investigate an Indian tribe's performance under the contract.

4. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally--Indians: Tribal Government: Judicial System

The Bureau of Indian Affairs must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

APPEARANCES: Rene A. Martell, Esq., Wolf Point, Montana, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for appellee; Reid Peyton Chambers, Esq., and Tassie Hanna, Esq., Washington, D.C., for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

INTERIOR BOARD OF INDIAN APPEALS

Appellant Larry Martin seeks review of a July 10, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take action on appellant's allegations against tribal

officials acting under an Indian Self-Determination Act (P.L. 93-638)[1] contract. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

During FY 1989, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Tribes) operated a Housing Improvement Program (HIP) under P.L. 93-638 contract No. CTC50583489. On May 12, 1989, the Tribes' HIP contracted with appellant, an enrolled member of the Tribes, to renovate the residence of another tribal member. The contract amount was $5,598. Work was to begin on May 15, 1989, and be completed by June 15, 1989. Appellant began work on May 15, 1989. Almost immediately, HIP officials became dissatisfied with the quality of his work; later, they also became concerned that he was not complying with his contractual obligations. Ultimately, in July 1989, HIP terminated appellant's contract and hired others to complete the work.

By letter of September 19, 1989, appellant requested the Billings Area Contracting Officer to

> have an entity outside the Billings area do a formal review and audit of the Fort Peck HIP program; * * * insure that [appellant] is reinstated in good standing as an eligible contractor for HIP bids; * * * rectify with the Fort Peck Housing Authority, the damage done to [appellant's] credibility and reputation due to the inappropriate actions of their grantee, the Fort Peck Tribes; [and award appellant] damages of [a total of $5700] for lost profits * * *.

Appellant attached an affidavit alleging, *inter alia*, that actions of the tribal HIP Director had precluded him from being awarded a contract in April 1989 in the amount of his original bid of $15,100, prevented him from completing work on time, and deprived him of the opportunity to be awarded other contracts in June and July 1989.

On September 26, 1989, the Contracting Officer advised appellant that he would have to resolve the matter with the Tribes, but stated that Area housing personnel would meet with appellant and the HIP Director on their next trip to Fort Peck "to work out any problems with the contract."

On January 22, 1990, appellant again wrote to the Contracting Officer, stating that no meeting had occurred. The Contracting Officer responded on February 13, 1990, indicating that travel restrictions precluded the housing personnel from traveling to Fort Peck and suggesting that appellant contact the HIP Director and request that he set up a meeting with the Tribal Executive Board to resolve the matter.

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[1] 25 U.S.C. §§450-450n (1988 and Supps). All further references to the *United States Code* are to the 1988 edition and its supplements.

By letter of April 9, 1990, appellant submitted an appeal, as well as a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§2671-2680, to the Superintendent, Fort Peck Agency, BIA. Appellant's tort claim was referred to the Billings Field Solicitor, who denied it on May 31, 1990. His appeal was referred to the Area Director who, by decision dated July 10, 1990, affirmed the Contracting Officer's conclusion that appellant would have to resolve his problem directly with the Tribes.

Appellant's notice of appeal from the Area Director's decision was received by the Board on August 2, 1990. Appellant, the Area Director, and the Tribes filed briefs.

Discussion and Conclusions

Appellant argues that the Area Director's decision denies him a right of appeal which would be available to him if he contracted directly with BIA; he contends that this denial raises due process and equal protection questions and that he should therefore be entitled to appeal the Tribes' action either under 25 CFR Part 2 or through the disputes clause of the Tribes' P.L. 93-638 contract. Further, appellant argues, the Area Director should have conducted an investigation of the Tribes' HIP program pursuant to appellant's complaint.

[1] 25 CFR Part 2 does not provide an explicit avenue of relief for appellant. This part is applicable to "appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions." 25 CFR 2.3(a). It contains no specific authorization for BIA officials to decide appeals from tribal actions.[2] If such authority exists, it must be found elsewhere.

Appellant does not identify any source of that authority. The Area Director and the Tribes argue that there is none. The Board is not aware of any statute or regulation which specifically authorizes BIA to hear appeals from tribal actions under P.L. 93-638 contracts; it considers, therefore, whether there is an implied right to appeal such actions to BIA.

Any implied right of appeal must be gleaned from P.L. 93-638 itself or, at a minimum, must be consistent with the intent of Congress in that statute.[3] Congressional intent is explicitly declared in section 3 of the Act, 25 U.S.C. §450a, which provides:

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[2] It does, however, provide a right of appeal from decisions of BIA officials who deny the relief requested by a party, even if the reason for denial is the official's lack of authority to grant relief or the necessity for the party to seek relief from a tribe. *Cf. Oglala Sioux Tribe* v. *Aberdeen Area Director*, 16 IBIA 201 (1988). Clearly, such decisions have an adverse effect on the party who is denied relief. The Board rejects the Area Director's argument that the Board lacks jurisdiction over this appeal (Area Director's Brief at 7).

[3] In certain limited circumstances, the Board has recognized the authority of BIA and the Board, despite the lack of any explicit statutory or regulatory provision, to review tribal actions where necessary to carry out the United States' trust responsibility or its government-to-government relation with Indian tribes. *E.g., Prairie Band of Potawatomi Indians* v. *Acting Anadarko Area Director*, 17 IBIA 97 (1989); *Rogers* v. *Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 15 IBIA 13 (1986); *Crooks* v. *Minneapolis Area Director*, 14 IBIA 181 (1986). In such cases, the Board has required those who seek relief from the Department to exhaust tribal remedies. *E.g., Totenhagen* v. *Minneapolis Area Director*, 16 IBIA 9 (1987). Further, the Board has recognized as binding on Departmental officials the resolution of internal disputes by valid tribal forums. *E.g., Smalley* v. *Eastern Area Director*, 18 IBIA 459 (1990).

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

Congress has made explicit provision for relief against tribal misfeasance under P.L. 93-638 contracts. 25 U.S.C. §450m authorizes the Secretary to rescind a contract for, *inter alia*, a tribe's "violation of the rights or endangerment of the health, safety, or welfare of any persons."[4] 25 U.S.C. §450f(c) requires the Secretary to obtain liability insurance for tribes performing under contract. In addition, Congress has extended FTCA coverage to tribes and their employees.[5] Given these explicit remedial provisions, it is questionable whether Congress intended yet another remedy to be read into the statute.

In *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), the Supreme Court considered whether Congress intended in the Indian Civil Rights Act (ICRA), 25 U.S.C. §§1301-1341, to create a Federal cause of action

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[4] 25 U.S.C. §450m provides:

"Each contract or grant agreement entered into pursuant to sections 450f, 450g, and 450h of this title shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and hearing on the record to such tribal organization rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by him: *Provided*, That the appropriate Secretary may, upon notice to a tribal organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if he finds that there is an immediate threat to safety and, in such cases, he shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970, as amended [29 U.S.C. §651 et seq.]."

[5] Act of Oct. 23, 1989, §315, 103 Stat. 701, 744; Act of Nov. 5, 1990, §314, 104 Stat. 1915, 1959. The 1989 statute provided:

"[W]ith respect to claims resulting from the performance of functions, during fiscal year 1990 only, or claims asserted after the effective date of this Act, but resulting from the performance of functions prior to fiscal year 1990, under a contract, grant agreement, or cooperative agreement authorized by [P.L. 93-638], an Indian tribe, tribal organization or Indian contractor is deemed to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided* * * *, That upon the effective date of this legislation, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor, or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act: *Provided further*, That beginning with [fiscal year 1991], and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions: *Provided further*, That nothing in this section shall in any way affect the provisions of [25 U.S.C. §450f(d) (concerning FTCA coverage of certain health-related functions)]."

The 1990 statute extended FTCA coverage, in virtually identical language, to "functions performed during fiscal year 1991 and thereafter."

While the term "claims" in the first part of this provision may, at first glance, appear to be capable of interpretation to include administrative appeals under 25 CFR Part 2, it is apparent from the section read as a whole that only tort claims are intended.

for its enforcement, beyond the habeas corpus remedy specified in the Act. The Court found that "[t]wo distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.' " 436 U.S. at 62. The Court continued:

> Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with [25 U.S.C.] §1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums * * * but it would also impose serious financial burdens on already "financially disadvantaged" tribes. * * *
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> Moreover, * * * implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA * * *. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. [Citations and footnotes omitted.]

436 U.S. at 64-65. The Court accordingly held that only the remedy of habeas corpus, specified in the ICRA, was available to enforce the Act.

The Supreme Court's analysis in *Santa Clara Pueblo* is, if anything, even more fittingly applied to P.L. 93-638, in which no "dual objectives" are apparent but, rather, a single unified purpose, *i.e.*, the promotion of tribal self-determination, including the "development of strong and stable tribal governments." An implied right of appeal under 25 CFR Part 2 would undermine the authority of tribal forums and therefore impede, rather than promote, the development of strong and stable tribal governments. It would disserve the purpose of P.L. 93-638 in the same way an implied Federal cause of action would disserve the ICRA purpose to protect tribal government. The Board holds that P.L. 93-638 does not include an implied right to appeal a tribal action under 25 CFR Part 2.

[2] Appellant next argues that he has a right to appeal through the disputes clause of the Tribes' P.L. 93-638 contract. This clause, however, concerns disputes arising between the parties to that contract, not disputes between the Tribes and third parties with whom it subcontracts. Section 329 of the contract provides in part: "Except as otherwise provided in this contract, any dispute concerning a question of fact arising *under this contract* which is not disposed of by agreement shall be decided by the contracting officer * * *. The decision of the contracting officer shall be final and conclusive unless within thirty (30) days from the date of receipt of such copy, the contractor mails or otherwise furnishes to the contracting officer a written appeal addressed to the Secretary." (Italics added.)[6]

[6] P.L. 93-638 contracts are now subject to the Contract Disputes Act, 41 U.S.C. §§601-613, which controls in matters concerning appeal rights. *See* 25 U.S.C. §450m-1(d).

Appellant did not follow the procedures for appealing a BIA contracting officer's decision under a disputes clause. Under the Department's regulations, those appeals are heard by the Interior Board of Contract Appeals. 43 CFR 4.1(b)(1); 4.100-4.128. Had appellant followed the disputes procedures, however, it is unlikely that the Board of Contract Appeals would have entertained his appeal. Even assuming appellant's complaint could somehow be construed as a dispute arising under the Tribes' contract, the Board of Contract Appeals recognizes a subcontractor as possessing a right to appeal in only very limited circumstances. That Board has held that, unless the prime contractor has authorized or ratified the appeal, a "subcontractor is without any standing to invoke the provisions of [a disputes clause], from which the Board's jurisdiction is derived, as a means of securing an adjudication by the Board of the rights and obligations of the contesting parties." *Divide Constructors, Inc.*, 84 I.D. 119, 122 (1977). In support of its conclusion in that case, the Board quoted from *Beacon Construction Co. of Mass., Inc.* v. *Prepakt Concrete Co.*, 375 F.2d 977, 981 (1st Cir. 1967):

> [T]he requirement of privity is not merely technical, but reflects the purpose of the disputes clause. The Contracting Officer does not agree to act as general arbiter for the project; rather, his decision on disputes is made authoritative for the benefit of the government, to provide for efficient settlement of matters affecting the government's liability under the general contract. And, at least under the usual form of general contract, that liability is only to the general contractor, not to the subcontractors.

84 I.D. at 122 n.9. *See also Ohbayashi-Gumi, Ltd.*, 91 I.D. 311 (1984).

In any event, because appeals arising under the disputes clause of a P.L. 93-638 contract are within the jurisdiction of the Board of Contract Appeals, the Board of Indian Appeals has no jurisdiction over them.

[3] Appellant's last contention is that BIA should have investigated the Fort Peck HIP program pursuant to his complaint. The Tribes respond to this contention as follows:

> Appellant has no grounds under [P.L. 93-638] to demand that the BIA review the program, for the federal statute and regulations provide no such rights to subcontractors or third parties. The BIA may certainly receive complaints from third parties and may, where the complaints are serious and pervasive, even *choose* to investigate. This does not, however, grant Appellant a statutory right to *demand* an investigation of the Fort Peck HIP program. The Area Office was well within the parameters of its discretion in declining to investigate the HIP program or act on Appellant's other requests. [Italics in original.]

(Tribes' Brief at 4).

As noted above, the Secretary has authority under 25 U.S.C. §450m to rescind a contract and reassume control of a contracted program where he determines that a tribe's performance under the contract "involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of [contract] funds" and where he also determines that the tribe "has not taken corrective action as

prescribed by him." BIA clearly has authority to investigate a tribe's contract performance as necessary to enforce this provision. However, the purpose for conducting such an investigation would be to determine whether a tribe's contract should be rescinded, not to provide personal relief to an individual complainant.

In light of this purpose, the Board considers whether appellant's complaint compelled a BIA investigation of the HIP program under section 450m. While the Tribes suggest that the decision to investigate a tribe's contract performance is entirely within BIA's discretion, it is possible that, under some circumstances, BIA would have a duty to act. The Board is not required to decide what circumstances might give rise to such a duty, however, because it finds that, under the circumstances of this case, BIA had no obligation to initiate an investigation.

[4] Appellant did not allege in his complaint to BIA that any grounds for rescinding the Tribes' contract were present. He did not, for instance, allege that his rights had been violated by the Tribes.[7] Nor did he allege, as he does before the Board, that "[n]o tribal appeals process exists for Appellant" (Appellant's Opening Brief at 3). If appellant had made *and substantiated* this allegation before BIA, it is conceivable that he would have provided BIA with grounds to initiate an inquiry under authority of 25 U.S.C. §450m.[8] However, not only did appellant fail to raise this issue with BIA, but nothing in any of his filings with the Board indicates that he ever attempted to obtain relief from the Tribes.

The Tribes have a court with "jurisdiction over Indians in all substantive legal areas, including criminal, civil, traffic, and hunting and fishing matters."[9] Respect for tribal courts is a well-recognized aspect of the Federal Government's commitment to tribal self-determination. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 65 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"); *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987) ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. * * * Tribal courts play a vital role in tribal self-government * * * and the Federal Government has consistently encouraged their development"). BIA is obligated to implement the Federal self-determination policy in fulfilling its P.L. 93-638 contract oversight responsibilities. It would clearly have been inappropriate for BIA to initiate an investigation under 25 U.S.C.

[7] Appellant's allegation before the Board that he has been denied due process and equal protection is apparently directed against BIA's refusal to hear his appeal, rather than against any actions taken by tribal officials. It appears to be based on the premise that, because BIA would not hear his appeal, appellant was denied any right to appeal, an allegation he fails to support. *See* discussion *infra*.

[8] A tribe which provides no procedures at all through which to seek relief from acts of tribal officials or employees, in their performance under P.L. 93-638 contracts, is arguably in danger of violating the rights of those who are aggrieved by the tribal actions. A tribe does not violate an individual's rights, however, simply by declining to grant the relief he seeks.

[9] National American Indian Court Judges Association and Branch of Judicial Services, Bureau of Indian Affairs, *Native American Tribal Court Profiles, 1984* at 4.

§450m in the circumstances of this case, where appellant failed even to allege before BIA, much less demonstrate, that no tribal review was available to him.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Billings Area Director's July 10, 1990, decision is affirmed.

ANITA VOGT
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Chief Administrative Judge

MOBIL EXPLORATION & PRODUCING U.S., INC.

119 IBLA 76 Decided: *April 5, 1991*

Appeal from a decision by the Wyoming Acting Deputy State Director, Bureau of Land Management, affirming a decision by the Platte River Resource Area Manager assessing a Federal lessee the full value of vented gas found to have been avoidably lost. WY-90-04.

Reversed in part, affirmed in part, and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties: Payments

A finding that a lessee must pay the United States for the full value of vented gas that was avoidably lost from 1980 to 1984 is reversed, because 43 CFR 3162.7-1(d), issued in October 1984, changed Departmental policy to require that compensation for avoidably lost gas shall be limited to payment of the royalty value of gas so vented. Because the 1984 regulation changed the prior policy, which had been to assess vented gas at full value, affected lessees who would benefit by the amended rule are allowed the benefit of the change.

2. Administrative Authority: Generally--Appeals: Jurisdiction--Board of Land Appeals--Judicial Review

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within the Department of the Interior.

APPEARANCES: Robert A. Luettgen, Esq., Dallas, Texas, and Charles L. Kaiser, Esq., Denver, Colorado, for appellant; Michael F. Deneen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Mobil Exploration & Producing U.S., Inc. (Mobil), has appealed from an October 25, 1989, decision by the Wyoming Acting Deputy State Director, Division of Mineral Resources, Bureau of Land Management (BLM), finding that Mobil should pay the United States the full value of gas vented from the Bear Creek No. 1 well on lease No. WYW-089382 from April 1, 1980, to October 21, 1984. It is undisputed that the gas was vented without authorization. The only question before us on appeal is whether compensation should be paid for the full value of the vented gas, or whether payment of the royalty value for the gas would satisfy the requirements of law.

On August 3, 1989, BLM's Platte River Resource Area Manager notified Mobil that an audit of the Bear Creek Unit revealed that Mobil had avoidably lost gas which it had reported flared because of compressor failure. The Area Manager found that:

> We have calculated the maximum allowable flared volumes under the provisions of NTL-4A and determined from that figure any excess flared volumes * * *. From this analysis we have determined that between the dates of April 1, 1980 thru October 21, 1984, that avoidably lost gas (excess flared volume) total 9,139 MCF. You will be assessed full value on this amount of production. Since October 21, 1984 to the present, we have determined avoidably lost gas totaled 19,791 MCF. You will be assessed royalty value of this amount of production.

From this decision, Mobil appealed to the State Director, whose office conducted a hearing on October 11, 1989. The Acting Deputy State Director set aside so much of the Area Manager's decision as assessed compensatory royalty from January 1985 to September 1987, but, pertinent to this appeal, affirmed the determination that full value should be assessed from April 1980 to October 21, 1984, explaining, concerning this aspect of the case, that:

> We agree with the Area Manager's interpretation. The longstanding practice of assessing compensation that equals the full value of the avoidably lost gas is clearly stated in the Mineral Leasing Act of 1920, as amended in 1931, Section 1(h). Apparently, at that time, and in an attempt to discourage waste, the Department deemed it necessary to assess full value compensation for avoidably lost gas. The fact that the percentage value due the government exceeds the royalty rate may be construed as a "penalty." As oil and gas prices began to rise in the late 70's and early 80's, the Department concluded that assessing only the royalty value for avoidably lost gas would be a sufficient deterrent, in most cases, to insure that an operator would not waste gas that is economically feasible to market. We affirm the Area Manager's decision to assess compensation that equals the full value of the avoidably lost gas for the period from April 1, 1980, to October 22, 1984 (the effective date of the revised regulations at 43 CFR 3162.7-1(d).

(Decision at 3).

Pertinently, 43 CFR 3162.7-1(d) provides that one in the position of Mobil "shall be liable for royalty payments on * * * gas lost or wasted from a lease." BLM argues that this regulation, however, may not be applied retroactively, because to do so would disparage other provisions of the Mineral Leasing Act not repealed by enactment of the Federal

Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§1701-1757 (1988), the statute implemented by 43 CFR 3162.7-1(d).

[1] Similar arguments were rejected by this Board in *Conoco*, 115 IBLA 105 (1990), where it was urged that retroactive application of a rule more generous to a Federal lessee than the rule it replaced would be in derogation of past policy in effect before the rule change. Rejecting this argument and a parallel contention that retroactive application of the new rule would overrule past decisions of the Department that implemented the prior rule, we found that "the Department may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases." *Id.* at 106. Insofar as the argument that to do so would derogate the effect of prior law, we reasoned that "[i]t [the prior rule] has now been amended; thus, the law has changed. The only question is whether [the appellant] should have the benefit of the change. * * * there is ample authority for providing an affected party with the benefits of a regulatory change." *Id.* at 107 n.3.

We also gave retroactive effect to policy changes in the administration of oil and gas royalty payments involving vented gas in *Ladd Petroleum Corp.*, 107 IBLA 5 (1989). In that case, compensation for avoidably lost gas was at issue. Setting aside the BLM decision finding that payment was due the United States Government as described by NTL-4A Part I, we ordered BLM to reconsider whether the gas had been avoidably lost in light of the fact that Departmental policy had changed. We explained that, while the new policy had not been in effect when the decision under review had issued, the regulatory change made necessary a reconsideration of the question of payment because the newly promulgated rules

> reflect the present policy of BLM concerning the proper application of NTL-4A and the regulations on which it is based to make determinations of avoidably lost gas. In the past, this Board has applied an amended version of a regulation to a pending matter if to do so would benefit the affected party, and if there were no countervailing public policy reasons or intervening rights. *James E. Strong*, 45 IBLA 386 (1980). The rationale for such an action is equally appropriate here where BLM has indicated a change in its policy regarding the application of NTL-4A concerning avoidably lost gas which would benefit appellants, and there are no countervailing regulations, public policy considerations, or intervening rights. *See Somont Oil Co., Inc.*, 91 IBLA 137 (1986).

Id. at 8.

The case under review is such a case. As we pointed out in *Conoco, supra*, to give retroactive application to the 1984 regulation in this case also permits us to avoid an inequitable inconsistency in administration of this gas lease, since to do otherwise would allow assessment of two different rates of compensation for gas vented at the No. 1 well although the only distinction between the two very different charges is the passage of an instant of time at midnight on October 21, 1984. On the record before us, we find that the application of 43 CFR 3162.7-1(d) will not adversely affect intervening rights or prejudice the interests of

the United States, and is not in derogation of prior law, but a proper implementation of existing law after amendment.

[2] Mobil also argues that the limitation on actions provided by 28 U.S.C. §2415 (1988), bars recovery of compensation on gas flared by Mobil before August 3, 1983. This statute, which governs civil actions for money damages brought by the United States, does not affect the administration of this Federal lease by BLM. Whether the manner in which the flared gas audit was conducted was so slow that it would bar recovery in some hypothetical suit for damages we are unable to say, nor is it "within our authority to decide" such a question. *Alaska Statebank*, 111 IBLA 300, 312 (1989). An appeal to this Board is in no sense the commencement of an action for damages: it is the continuation and conclusion of administrative review that began in the Area BLM office with the audit of Mobil's operation of the Bear Creek Unit No. 1 well. Our review is conducted on behalf of the Secretary, pursuant to Departmental regulation, and is not a commencement of an action for damages. The purpose of our review in the instant case is limited to a determination, on the record before us, of how compensation due the United States should be calculated. *See* 43 CFR 4.1. We do not hold that there are no limits on the time that may be spent in administrative review, but only find that, in this case, there has been no showing that any limit on such review set by law has been infringed. On March 1, 1989, Mobil was placed on notice that an audit of the No. 1 well had taken place. Thereafter, it has vigorously defended its interests before the Department. There has been no showing that it was denied the right to participate effectively in the administration of the affected lease. *See generally Leo Titus, Sr.*, 89 IBLA 323, 92 I.D. 578 (1985).

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 in part, affirmed in part, and the case file is remanded to permit computation of the amount of royalty due on gas avoidably lost from Bear Creek Unit No. 1 well between April 1, 1980, and October 21, 1984.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

JAMES L. BYRNES
Administrative Judge

APPEALS OF J. C. EQUIPMENT CORP.

IBCA-2885-89 Decided: *May 31, 1991*

Contract No. H50C142202868, Bureau of Indian Affairs.

May 31, 1991

Motion to dismiss denied.

1. Rules of Practice: Appeals: Motions--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

APPEARANCES: Samuel A. Anderson, Kevin J. O'Brien, Constantine & Anderson, P.C., Attorneys At Law, Englewood, Colorado, for Appellant; Wayne C. Nordwall, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

The Government moved to dismiss these appeals on two alleged grounds:

(1) We lack jurisdiction to entertain them because appellant's claims were not certified in accordance with the requirements of section 605(c)(1) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, and (2) The appeals were not brought within 3 years of the Board's September 19, 1984, dismissal without prejudice of appellant's June 1984 appeal, which was based upon the same allegations. This purportedly is in contravention of our Rule 4.127(a) (codified at 43 CFR 4.127(a)).

The Government has withdrawn its certification challenge, but persists in its contention that appellant violated Rule 4.127(a) and that, therefore, we lack jurisdiction over its appeals. The Government is incorrect.

Rule 4.127(a) provides:

(a) *Dismissal without prejudice.* In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with the disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the [B]oard may, in its discretion, dismiss such an appeal from the docket without prejudice to its reinstatement when the cause of suspension has been removed. Unless either party or the Board acts within 3 years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed to have been made with prejudice.

Preliminarily, the Rule is one of procedure. It is not jurisdictional. Our jurisdiction derives from the CDA, which contains no parallel to

our Rule nor any provision limiting our jurisdiction in the manner suggested by the Government.

Further, the Rule does not apply to this case. It applies to appeals that were in a suspense status, which the Board dismissed without prejudice *for that reason*, and which neither the parties nor the Board acted to reinstate within 3 years of dismissal. Appellant's earlier appeal was not in a suspense status and the Board's dismissal was not based upon Rule 4.127(a). This alone is sufficient to render the Rule inapplicable.

Moreover, appellant's current appeals are not "reinstated." Contrary to the Government's statement in its response to appellant's opposition to its motion to dismiss, the earlier appeal was not dismissed for failure to prosecute. By order to show cause dated August 14, 1984, the Board discussed the CDA's certification mandate, cited the Government's allegation in its answer to the complaint that the Board lacked jurisdiction because appellant's claim was not certified as required by the CDA, and noted that the complaint did not allege that the claim had been certified. The order concluded:

> The appellant shall have 20 days from the date of receipt of this Order in which to show cause why the instant appeal should not be dismissed for lack of present jurisdiction in the Board, upon the understanding that any such dismissal shall be without prejudice to appellant's filing a new claim, properly certified, with the contracting officer.

Appellant did not respond to the order to show cause and, by order dated September 19, 1984, its appeal was dismissed without prejudice, with specific reference to, and pursuant to the dictates of, the August 14, 1984, order. That is, it was dismissed for lack of jurisdiction due to appellant's failure to produce evidence that its claim had been certified pursuant to the CDA.

As stated in the order to show cause, the United States Court of Appeals for the Federal Circuit has emphasized that "the submission of an uncertified claim, for purposes of the CDA, is, in effect, a legal nullity." *Fidelity Construction Co.* v. *United States*, 700 F.2d 1379, 1384 (1983). The Court stressed that "[u]nless [the certification] requirement is met, there is simply no claim on which a contracting officer can issue a decision." *Id.* Thus, as appellant declares in its opposition, its current appeals are not "reinstated." They are based upon "new," properly certified, claims, as contemplated at the conclusion of the Board's order to show cause.

Accordingly, the Government's motion to dismiss is denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

June 6, 1991

APPEAL OF BLAZE CONSTRUCTION CO., INC.

IBCA-2863 Decided: *June 6, 1991*

Contract No. CBH50913889, Bureau of Indian Affairs.

Motion to Dismiss for Summary Judgment Granted.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Motions--Rules of Practice: Jurisdiction

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

3. Contracts: Construction and Operation: Actions of Parties

Appellant's allegations that the Government breached implied duties under the road contract to cooperate with it and assist its performance – duties which appellant alleges were enhanced because it is an Indian contractor – fail as a matter of law. The Government was not subject to a higher standard of conduct because appellant is an Indian contractor and did not have any responsibility under the road contract to assist appellant in obtaining or retaining a yard and pit site.

4. Contracts: Construction and Operation: Actions of Parties

Appellant's allegations of delay and interruption to its work under the road contract, due to alleged delays by the Government in connection with its initial lease and in processing a replacement lease, fail as a matter of law. Even if there were delays, they would not be attributable to Governmental action under the road contract. The Government had no duty under that contract to obtain a yard or pit site for appellant.

5. Contracts: Construction And Operation: Changes And Extras

Appellant's allegation that it is entitled to recover under the Changes clause of the road contract, because Indian litigation caused it to relocate its yard and pit, fails as a matter of law. The leased area was not part of the contract. Even if it had been, there was no relevant act by the contracting officer constituting an actual or constructive change.

6. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

Appellant's allegation that it is entitled to an equitable adjustment under the road contract's Differing Site Conditions clause because its leased yard and pit location was part of a secret, sacred Indian religious site, fails as a matter of law. The leased area was not a contract site.

7. Contracts: Construction and Operation: Intent of Parties--Contracts: Disputes and Remedies: Extraordinary Remedies--Contracts: Formation and Validity: Mistakes

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was no mutual mistake in the formation of the road contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

8. Contracts: Disputes And Remedies: Burden of Proof--Contracts: Rules of Practice: Motions

The Government has established that there are no material facts in dispute and that it is entitled to summary judgment on appellant's road contract claims.

APPEARANCES: Daniel S. Press, Paul C. Blackburn, Van Ness, Feldman & Curtis, Attorneys At Law, Washington, D.C., for Appellant; Wayne C. Nordwall, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss this appeal from the contracting officer's decision denying the claims of Blaze Construction Co., Inc. (Blaze), an Indian contractor. Blaze alleges that the Bureau of Indian Affairs (BIA) is responsible for $49,638.30 in costs the company incurred in connection with the ultimate relocation of a construction yard and sand pit which it had leased from certain Indians, with BIA approval. The leased area was for use in connection with Blaze's contract with BIA to perform road work. BIA's motion requests that we dismiss for failure to state a claim upon which relief may be granted, because BIA was not a party to the lease, or, in the alternative, that we grant summary judgment for the Government.

The record consists of the appeal file (AF) and a summons and complaint filed against Blaze in the Hopi Tribal Court, appended to BIA's dispositive motion. Appellant asserts that we require more facts in order to decide this appeal. We disagree. The material facts of record are undisputed and are sufficient to sustain the Government's dispositive motion as a matter of law.

Undisputed Material Facts

On November 23, 1988, BIA awarded Blaze a contract, eventually numbered CBH50913889, in the amount of $1,983,109.40, to perform work on certain roads on the Hopi Indian Reservation in Arizona, part of a total buy-Indian set-aside project (hereafter, "contract") (AF 4-1, AF 3 at 1, 3, 4, AF 10-1).

The contract contained the following relevant provisions:

June 6, 1991

SCOPE OF WORK

Furnish all labor, materials, equipment, and services required for grading, draining, placing subbase, aggregate base and hot asphaltic concrete pavement. [Italics added.]

(AF 3 at 4).

SUSPENSION OF WORK (APR 1984)(FAR §52.212-12)

* * * * * * *

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by *an act of the Contracting Officer in the administration of this contract*, or (2) by the *Contracting Officer's* failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract * * *. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved * * * and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension (sic) delay, or interruption. [Italics added.]

(AF 3, Part II at 5 (clause 11)).

EXCUSABLE DELAYS (APR 1984)(FAR §52.249-14)

(a) * * * the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. *Examples* of these causes are (1) act of God * * *, (2) acts of the Government in either its sovereign or contractual capacity * * *, * * * (7) strikes * * *.

* * * * * * *

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised * * *. [Italics added.]

(AF 3, Part II at 46 (clause 73)).

CHANGES (APR 1984)(FAR §52.243-4)

(a) The Contracting Officer may * * * by written order designated or indicated to be a change order, make changes in the work *within the general scope of the contract*, including changes–* * *.

(3) In the *Government-furnished* facilities, equipment, materials, services, or *site*; * * *.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer *that causes a change* shall be treated as a change order under this clause * * *.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment. [Italics added.]

(AF 3, Part II at 39-40 (clause 67)).

DIFFERING SITE CONDITIONS (APR 1984)(FAR §52.236-2)

(a) The Contract[or] shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of * * * (2) unknown physical conditions *at the site,* of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character *provide[d] for in the contract.*

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly. [Italics added.]

(AF 3, Part II at 34 (clause 50)).

SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984)(FAR §52.236-3)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work *and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials;* the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. * * *. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficult[y] and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the [G]overnment.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. *Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.* [Italics added.]

(AF 3, Part II at 34-35 (clause 51)).

PERMITS AND RESPONSIBILITIES (APR 1984)(FAR §52.236.7)

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State and municipal laws, codes, and regulations applicable to the performance of the work.

(AF 3, Part II at 35 (clause 55)).

TRIBAL TAXES, REQUIREMENTS AND/OR RESTRICTIONS

Special attention is called to General Provisions Clause No. 53, Permits and Responsibilities, and Clause No. 41, Federal, State and Local Taxes. *Bidders are responsible for contacting the tribe or tribal organization involved with regard to their resolution regarding tribal taxes, requirements and/or other applicable tribal laws.* [Italics added.]

(AF 3, Part III, *Special Conditions*, at 2 (clause 7)).

DISPUTES (APR 1984)(FAR §52.233-1)

* * * * * * *

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.

(AF 3, Part II at 32-33 (clause 47)).

Prior to contract award, Blaze and the Hopi Tribe, on behalf of the Village of Sipaulovi, had entered into a "Sand & Surface Lease Agreement," dated November 14, 1988. The lease was executed on behalf of Blaze, as "Lessee," on October 29, 1988, and on behalf of the Village and Hopi Tribe, as "Lessors," on November 1 and 14, 1988, respectively. A Hopi Tribal Council Resolution, adopted on November 14, 1988, subject to approval of the Secretary of the Interior, had authorized a tribal representative to sign the lease and had noted that Blaze would provide an archeological clearance and an environmental assessment of the site and would agree to the recommendations of the report. The lease stated that it required approval by the Secretary of the Interior. Following the signatory blocks for lessors and lessee, the lease contained a BIA approval block. The Superintendent, BIA, Hopi Indian Agency, signed the approval block on December 12, 1988, 19 days after contract award (AF 19-3, 19-12, 19-14, 19-15).

The lease, for 1 year, covering 2.8 acres of land, stated that Blaze had requested to lease the land for a construction site, storage yard, temporary office, and to extract approximately 15,000 tons of sand for the road project. Blaze was to use the land only for batch plant operation, heavy equipment parking, material storage, office space and lab trailer, personal and company vehicle parking, campers for employees, and for a fence (AF 19-3, 19-4). The lease contained the following additional pertinent provisions:

10. STATEMENT OF LIABILITY

* * * * * * *

LESSEE hereby waives, on Lessee's behalf, *all claims* against LESSOR *and the Secretary* and agrees to hold LESSOR *and the Secretary free and harmless from liability for all claims* for any loss, cost, damage, or injury *arising from the use of the premises by LESSEE*, together with all costs and expenses in connection therewith[.] [Italics added.]

(AF 19-7).

17. RELINQUISHMENT OF SUPERVISION BY THE SECRETARY

Nothing contained in this leas[e] shall operate to delay or prevent the termination of the Federal trust responsibility with respect to the premises which are the subject of this lease; however, such termination shall not serve to abrogate this lease.

(AF 19-9).

19. TRUST OR RESTRICTED STATUS

While the leased premises are in trust or restricted status, all of the Lessee's obligations under this lease * * * are to the United States as well as to the owner of the land.

(AF 19-9).

20. DISPUTES

Both Parties agree to submit to the jurisdiction of the Hopi Tribal Court for settlement of any claims or disputes arising out of this Agreement.

(AF 19-9, 19-10).

On December 16, 1988, Blaze requested a partial notice to proceed under the contract in order to crush, haul, and stockpile the roadway surfacing aggregates during the winter months and to commence full construction operations upon the arrival of warmer weather. The contracting officer granted Blaze's request, authorized it to recommence work on March 27, 1989, and extended the contract completion time by 60 days, to August 6, 1989, to compensate for the partial suspension (AF 5, 6, 7, 8).

On or about June 30, 1989, Blaze was served with a Complaint for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction.[1] The action was brought by the Snake Society Priest of the Village of Shungopavi, members of the Shungopavi Village Board, and village and religious leaders. In addition to Blaze, and two senior company personnel, the Hopi Tribal Council and certain of its members were named defendants. The Government was not a defendant. The complaint alleged, *inter alia*, that the plaintiffs had communicated with the defendants several times to protest the location of Blaze's yard and pit, and the failure to give prior notice to the Village of Shungopavi, which owned at least a portion of the leased site; that Blaze's operations at the leased site were destroying the habitat of snakes used in the sacred snake dance ceremony performed by the Village of Shungopavi and might cause the extinction of the ceremony; that ancient instructions handed down to plaintiffs by the Creator mandated them to protect the ceremony, the destruction of which could lead to the destruction of the Hopi religion and the Hopi way of life; that plaintiffs' religious freedom, rights under the Hopi constitution and rights to due process and equal protection under the Constitution of the United States and the Indian Civil Rights Act of

[1] Although the Board's copy of the summons is dated Nov. 24, 1989, the complaint appends plaintiffs' verifications, all notarized on June 30, 1989. Moreover, appellant's Oct. 30, 1989, letter to the Contracting Officer's Representative (COR), *infra*, states that Blaze was served with a lawsuit on or about June 1989 (AF 18-2).

1968 had been abrogated; that defendants had violated the National Historic Preservation Act of 1966 (NHPA) by failing to submit an environmental impact statement, environmental assessment, or archeological survey prior to executing the lease and "tearing into the land"; that on June 22, 1989, based upon an archeological survey received on June 14, 1989, the State Historic Preservation Office notified defendants that the NHPA had been violated; that defendants had failed to follow Hopi tribal permitting and business licensing procedures; that defendants had violated the National Environmental Policy Act of 1969; that defendants violated the lease by using excess acreage, among other things; that defendants were served with a trespass notice, ordered by the Secretary of the Interior, regarding the illegal use of additional acreage; and that defendants had failed to obtain permission from the Secretary for a right-of-way for utilities and for an access road.

By letter dated August 25, 1989, to the COR, Blaze requested that 60 days be added to the contract performance period "due to unforseen [sic] problems," including:

1. Obtaining pit clearance. Clearance was applied for, and it took an unreasonable amount of time obtaining clearance.
2. Movement of yard. We had permits from the Hopi Tribe and the B.I.A. but, we were forced to vacate property.
3. Third party intervention. Contract does not allow extra time for problems we encountered.

(AF 11).

Bilateral contract modification No. 4, effective October 30, 1989, made pursuant to the Changes and Excusable Delays clauses, extended the contract performance period 60 days, to October 5, 1989, "due to unforseen delays encountered on the project" (AF 13). The contract was substantially complete on September 14, 1989 (AF 17).

Course Of The Claim And The Parties' Allegations

By letter dated October 30, 1989, to the COR, Blaze requested reimbursement for $49,638.30 in costs incurred because it had to relocate its yard and pit site to satisfy a court order. Blaze described the events as "truly beyond the scope of our contract" (AF 18-2). An attachment to the letter identified Blaze's expenses as follows:

Moving Batch Plant From 1st yard site to 2nd yard site	$2,500.00
Moving Scales From 1st yard site to 2nd yard site	1,000.00
Certify Scales and Batch Plant	858.30
Labor & Equipment to Move From 1st yard side (sic) to 2nd yard site	2,750.00
Loading and Hauling Stockpiles [sic] Rock from 1st Yard Site to Second Yard Site	5,600.00
Hauling Sand 20 miles, 5600 Tons @ .12 per ton mile	6,720.00
Moving Pug Mill and Generator Set from 1st yard site to 2nd yard site	1,200.00
Legal Fees	22,125.00
Rent on Land at Village of Sipaulovi	400.00

Rent on Land at Consolidated First Mesa	400.00
Royalty Fee at Second Mesa	2,800.00
SWCA (Archaeological Report)	3,285.00
	$49,638.30

(AF 18-3).

Among other evidence of its costs, Blaze appended a letter from its attorneys concerning the basis for their $22,125 fee. The letter attributed the fee to opposing two motions for temporary restraining orders, two motions for contempt, a motion to dismiss, and a motion to force Blaze to vacate the yard during certain ceremonies, and to participating in eight court hearings. It concluded that "[t]he sole purpose of Blaze's legal effort was to maintain Blaze's right to use the construction yard and sand pit to which Blaze had a legal right under its BIA approved lease from the Hopi Tribe"(AF 18-6).

On January 11, 1990, Blaze wrote to Wilson Barber, Jr., BIA's Area Director, stating that it had not received a reply to its earlier correspondence, and alleging that the "legal actions, which required us to relocate our yard site, resulted in extra expenses to this company, as outlined in the attached [October 30, 1989] correspondence, and, as well, in delays and interruptions to our construction operations at the job site" (AF 18-1, 19-2).

Mr. Barber responded on February 9, 1990, denying that the Government had any responsibility for Blaze's costs and noting:

> Although the Government was not a party to the [lease] agreement, we did grant an extension of time to accommodate delays experienced in complying with the provisions of the agreement. [2] Due to the unforeseen circumstances involved, we opted not to invoke Clause 9, "Liquidated Damages," thereby further mitigating expenses incurred by your company.

(AF 19-1).

In a March 30, 1990, letter to contracting officer Linus Brown, Jr., Blaze presented what it described as its "formal claim":

> The Blaze Construction Company hereby files this formal claim for $49,638.30 to be compensated for extra costs incurred due to the forced relocation of our construction yard and sand pit at the referenced contract. Blaze had a legal right under its B.I.A. approved lease from the Hopi Tribe to utilize the construction yard and sand pit. However, we were later forced to relocate to other sites. In an earlier letter, the Area Director denied liability on the grounds that B.I.A. was not a party to the lease. This is incorrect. B.I.A. approval was required and received on the lease. As provided by 25 CFR *Part 162*, the B.I.A., as trustee has final and ultimate authority on all matters involving leases. 25 CFR 162.5(g)(1) specifically states that all obligations of a lessee are obligations to the United States as well as to the land owner. Also, pursuant to Section 162.14 only the Secretary has the authority to cancel a lease. Thus, the B.I.A. had the full authority and responsibility to protect Blaze's quiet enjoyment and continued use of its leased property [sic] was directly and proximately responsible for Blaze's additional costs. The B.I.A. was made aware of the additional costs Blaze was occurring [sic] and thus had full notice of the problem. *Also B.I.A. delays in processing a replacement lease added to our costs.*

[2] It is apparent from this remark, and from the Hopi complaint, that there are factual issues concerning Blaze's compliance with the lease provisions. Those issues are immaterial to our decision.

The attached copies of correspondence, previously forwarded to your office, clearly list the extra costs we incurred and the events which required Blaze's relocation. These events and extra costs were completely out of the control of the Blaze Construction Company. [Italics added, except for "Part 162."]

(AF 20-1, 20-2).

In a decision dated May 29, 1990, contracting officer Brown denied Blaze's claim, on the ground that the Government was not a party to the Hopi lease and that the Federal regulatory requirements imposed in connection with the lease do not create a cause of action against the United States (AF 21-1).

On August 23, 1990, Blaze appealed to this Board. In its complaint, filed September 25, 1990, Blaze alleged, *inter alia*, that BIA approved its leased construction yard and sand pit site as meeting the requirements of the National Environmental Policy Act and the Historic Sites, Buildings and Antiquities Act; that Blaze moved road construction equipment and supplies, including aggregate material, onto the site and removed sand from the sand pit; that Blaze could not continue performance of the contract without continuous access to the site or a substitute site; that the Hopi lawsuit began 4 months after Blaze occupied the yard and pit site; that members of the Shungopavi Village picketed the site, blocked the entrance, and threatened Blaze, its employees and its equipment if Blaze refused to vacate; that BIA was a party to the lease but failed to take any steps to protect Blaze's rights under the lease or to permit Blaze to perform the contract at the leased site, even though BIA knew of the obstructions to Blaze's performance; that Blaze's moving expenses were caused by BIA; and that the claim was "brought pursuant to Contract provisions including CHANGES." The $49,638.30 in damages listed were the same as those presented in Blaze's October 30, 1989, letter.

The introduction to the appeal file, received September 28, 1990, concludes with what is denoted "Contracting Officer's Decision" by Mr. Brown:

Based on the information provided in the exhibits, the Contracting Officer stands firm on the decision that the claim of $49,638.30 is not the responsibility of the Government.

There are no provisions in the contract that requires [sic] the Government to provide a yard or aggregate sources to the Contractor. Therefore, there is no basis to reimburse the Contractor for expenses incurred.

(AF Section II at II-2).

Blaze's opposition to the Government's dispositive motion contended that: the complaint alleged sufficient facts related to the contract upon which to base a claim for relief; BIA had breached an implied, enhanced duty to cooperate with Blaze as an Indian contractor and to assist its performance under the contract; Blaze had encountered a "Type II" differing site condition; or it is entitled to relief in the nature of contract reformation because the Government should share the risk of the unanticipated condition and events which caused Blaze to

relocate its construction yard and sand pit. Appellant also asserted that summary judgment is inappropriate, because relevant facts remain to be determined, such as "what actions the BIA took with regard to the conflict between Blaze and the members of Shungopavi, the extent of the land claimed sacred by the Shungopavi, and whether unmarked 'sacred' land is an unusual site condition for road construction contracts on reservations."

The Government replied that the grounds for relief alleged in appellant's opposition papers were not contained in its complaint and were not presented to the contracting officer for decision. Therefore, the Board lacks jurisdiction to consider them. The Government also challenged each contention.

Blaze responded that we have jurisdiction, because all of the legal theories alleged are based upon the same facts as those presented to the contracting officer, concern the same issue, and seek the same relief.

Discussion

[1] The Board does not have jurisdiction to entertain Blaze's claims arising under its lease with the Hopis. In reaching this conclusion, we have considered the facts alleged by appellant to be correct and have construed its lease allegations most favorably to it. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

The Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, grants us "jurisdiction to decide any appeal from a decision of a contracting officer * * * relative to a contract made by" the Department of the Interior. 41 U.S.C. § 607(d). Blaze's lease with the Hopis was not a contract made by the Department of the Interior. The Government was not a party to it. The opening paragraph of the lease states:

> THIS AGREEMENT, made and entered into this *14* day of *November*, 19*88*, by and between the HOPI TRIBE, in behalf of the Village of Sipaulovi, Arizona (hereinafter referred to as LESSOR); and BLAZE CONSTRUCTION COMPANY, INC., of ALBUQUERQUE, NEW MEXICO (hereinafter referred to as LESSEE).

(AF 19-3). "This makes it rather clear who the parties are and defendant is not one of them." *Housing Corp. of America* v. *United States*, 468 F.2d 922, 924 (Ct.Cl. 1972).

The facts that: Congress has made the lease of Indian lands for business and other purposes subject to the approval of the Secretary of the Interior, under such terms and regulations as the Secretary may prescribe, 25 U.S.C. § 415(a) (Supp. 1986); regulations, 25 CFR 162.5(g)(1) (1989), and the lease which incorporates them (AF 19-9), provide that, while the leased premises are in trust or restricted status, the lessee's obligations are to the United States as well as to the owner of the land; and a representative of BIA signed the lease acknowledging BIA's approval; do not make the Government a party to the lease. The actions of the Department of the Interior, through BIA, with respect to the lease, were those of the United States acting in its

sovereign capacity, pursuant to its statutory rights and obligations. *See Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 372 (1968); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 421-24 (1939). The lease itself notes that any termination of the Federal trust responsibility concerning the leased premises would not abrogate the lease. *See* Relinquishment of Supervision by the Secretary. Extensive Governmental involvement, including even drafting and funding, as well as approval of, certain congressionally sanctioned and supported contracts between private parties and entities other than the Federal Government, does not place the United States in privity with the contracting parties. *Housing Corp., supra.*

Thus, Blaze's claims under the lease do not involve any contract with the Department of the Interior and the Board does not have jurisdiction to decide them.[3]

[2] We next consider Blaze's claims under its contract. Preliminarily, BIA asserts that the allegations that the Government violated an enhanced duty to cooperate with Indian contractors, Blaze encountered a Type II differing site condition, and the contractor is entitled to contract reformation, were not presented to the contracting officer for decision. Thus, according to BIA, the CDA's claim submission requirements, 41 U.S.C. § 605(a), have not been satisfied, and we lack jurisdiction to consider the claims. We conclude otherwise.

The CDA requires that "[a]ll claims by a contractor against the government relating to a contract" be in writing and be submitted to the contracting officer for decision. 41 U.S.C. § 605(a). However, the CDA does not prescribe any particular format for a claim. The United States Court of Appeals for the Federal Circuit has adopted a liberal construction: "[A]ll that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc.* v. *United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). "Adequate notice" requires a sufficient statement "to enable the contracting officer to undertake a meaningful review of the claim." *Holk Development, Inc.*, ASBCA Nos. 40579, 40609, 90-3 BCA ¶ 23,086 at 115,938. *Cerberonics, Inc.* v. *United States*, 13 Cl. Ct. 415, 418 (1987).

[3] If BIA had been a party to the lease, Blaze still would be in the wrong forum. The parties agreed under the lease's Disputes clause to submit all claims arising out of the lease to the jurisdiction of the Hopi Tribal Court. Moreover, BIA would be entitled to summary judgment on the lease claims. Through the lease's Statement of Liability clause, Blaze waived "all claims" against the Secretary of the Interior and held the Secretary harmless for "all claims for any loss, cost, damage, or injury" arising from Blaze's use of the leased premises. Finally, by its allegation that BIA was a party to the lease, appellant asserted that it had an express contract with the Government. Even if, according Blaze's claims a liberal interpretation in the context of this dispositive motion, Blaze were deemed to have alleged a contract implied-in-fact with the Government in connection with the lease, appellant has not made the specific allegations necessary to such a contract. That is, that there was a mutual intent to contract; consideration; a lack of ambiguity in offer and acceptance; and agreement to the contract by an officer of the Government who had authority to bind it. *City of El Centro* v. *United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *Housing Corp.*, 468 F.2d at 925. The record is devoid of any allegation or intimation that could support a finding of a contract implied-in-fact.

The assertion of a new legal theory of recovery, based upon the same operative facts included in the original claim, does not constitute a new claim. *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. *Accord Flores Drilling & Pump Co.*, AGBCA No. 82-204-3, 83-1 BCA ¶ 16,200 at 80,484. *See also Placeway Construction Corp.* v. *United States*, 910 F.2d 835, 840 (Fed. Cir. 1990). Essentially, whether a sufficient claim has been presented to the contracting officer "is a question of judgment, which must be exercised on a case by case basis as the particular facts present themselves." *Holk Development, Inc., supra.*

BIA relies upon *Trepte, Bradley Construction, Inc.*, ASBCA No. 39733, 90-2 BCA ¶ 22,650, and *Spirit Leveling Contractors* v. *United States*, 19 Cl. Ct. 84 (1989), in support of its contention that we lack jurisdiction over those of Blaze's claims identified above. *Bradley Construction, Inc.*, involved patently different claims before the contracting officer and the Board and is not apposite. In *Trepte*, the Armed Services Board of Contract Appeals (ASBCA) found that the basic operative facts necessary to establish each of the contractor's claims were substantially different. More than just an alternate theory of recovery was involved. Similarly, in *Spirit Leveling*, the contractor's written claim to the contracting officer had not blamed the Soil Conservation Service for alleged differing site conditions and quantity variations. It had blamed the weather. In its submissions to the Claims Court, the plaintiff charged the Government with blatant misrepresentation, deliberate withholding of superior knowledge, negligence, and breach of warranty. Those allegations required very different sorts of factual inquiries.

In contrast, the basic operative facts underlying each of Blaze's claims were alleged to the contracting officer; only the theories of recovery differ. Blaze's claim, in its various iterations, alleges entitlement to an equitable adjustment under the contract due to changes, unforeseen events, and conditions at a site Blaze associated with the contract work site, and due to contract administration and construction delays, for which Blaze notified BIA that it held it responsible. The claim also may be deemed to allege a right to an equitable entitlement regardless of responsibility. In any case, it is clear that Blaze has alleged both unforeseen conditions and Governmental blame. In accordance with the Federal Acquisition Regulation's definition of "claim," contained in the contract's Disputes clause, Blaze several times asserted allegations, culminating in a claim for the same sum certain, both arising under and related to the contract. Despite the different legal theories alleged at different times, and while Blaze's claim may not have been a "model," the contracting officer had no misapprehensions about the basic factual allegations in reaching his decisions to deny it. *See Paragon Energy Corp.* v. *United States*, 645 F.2d 966, 976 (Ct. Cl. 1981).

Thus, under the circumstances of this case, the same or related evidence is involved in connection with each of Blaze's contract claims,

no prejudice to the contracting officer results from our broad construction of Blaze's claims, and we have jurisdiction to decide them.

[3] Blaze alleges that BIA breached implied duties under the contract to assist it in performance, and to cooperate with it, in connection with its lease with the Indians. Appellant states that the Government's duty to cooperate is increased when it has special responsibilities pursuant to legislation promoting small or disadvantaged businesses, citing *Johnson Electronics, Inc.*, ASBCA No. 9366, 65-1 BCA ¶ 4628. With mere general references to the Buy Indian Act, 25 U.S.C. § 47 (1988), and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1988), and regulations implementing it, 48 CFR Subpart 1404.70, appellant posits that BIA's duties to it were enhanced because it is an Indian contractor.

We dispose readily of the latter assumption. We find nothing in the statutes and regulations cited that supports it or that is relevant to the contractual duty alleged. Further, the ASBCA in *Johnson Electronics* held that a termination of a small business set-aside contract for default should be converted to a termination for convenience due to the Government's superior knowledge about the difficulties of performance, misleading representations that a small business could perform the contract, and other Governmental acts. The Board did not state that the Government owed a greater contractual duty to the contractor because it was a small business. Indeed, the ASBCA recently confirmed that this is not so:

> Appellant seems to suggest that we should hold the Government to a higher standard of conduct and subject that conduct to special scrutiny because appellant was a small, 8(a) contractor * * *. We disagree. As we stated in *Torres Construction Company, Inc.*, ASBCA No. 25697, 84-2 BCA para. 17,397 at 86,655: [4]
>
> Appellant is really espousing the proposition, which has no foundation in law, regulation, or contract, that there is a lesser standard for equitable adjustment entitlement under the section 8(a) program – that the contractor's risk should be less, and that when [allegedly] unforeseen circumstances increase the contractor's costs, the Government should pay or share those costs without the normally required showing of legal entitlement. We cannot accept that proposition.
>
> *Huff & Huff Service Corp.*, ASBCA No. 36039, 91-1 BCA ¶ 23,584.[5]

Therefore, we examine appellant's allegations in light of the parties' duty to cooperate with one another implicit in every contract. In the realm of Government contracts, in determining whether there has been any Governmental breach of that duty, the court of appeals,

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[4] The *Torres* decision refers to a provision in the Defense Acquisition Regulation whereby the Government undertakes to provide production assistance to section 8(a) subcontractors. 84-2 BCA at 86,655. Appellant has not directed us to any statutory or regulatory provision requiring the Government to provide construction assistance in this Indian set-aside contract. The Government denies any such requirement, and we are not aware of any.

[5] That a contractor is a small business may be a factor in assessing whether the Government has superior knowledge concerning the difficulties of contract performance, or whether the contractor assumed the risk of commercial impracticability of performance. *Numax Electronics, Inc.*, ASBCA No. 29080, 90-1 BCA ¶ 22,280. Here, Blaze has not alleged, and there is no evidence, that BIA possessed superior knowledge. In any case, there is no question of practical impossibility of performance. Blaze fully performed the contract.

Boards, and Claims Court largely have applied a standard of willful, negligent, or unreasonable interference with, or hindrance of, a contractor's performance. This includes unreasonable administration of a contract amounting to material breach; or unreasonable delay by the Government in meeting some obligation it was required by the contract to fulfill. *See Malone* v. *United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Lewis-Nicholson, Inc.* v. *United States*, 550 F.2d 26, 32 (Ct. Cl. 1977); *Peter Kiewit Sons' Co.* v. *United States*, 151 F. Supp. 726, 731 (Ct. Cl. 1957); *George A. Fuller Co.* v. *United States*, 69 F. Supp. 409 (Ct. Cl. 1947); *John S. Vayanos Contracting Co.*, PSBCA No. 2317, 89-1 BCA ¶ 21,494; *CRF, A Joint Venture*, ASBCA No. 18748, 76-2 BCA ¶ 12,129; *Cedar Lumber, Inc.* v. *United States*, 5 Cl. Ct. 539, 549-50 (1984).

Additionally, some ASBCA decisions have addressed what they term an implied affirmative obligation upon the Government to do whatever is reasonably necessary to enable a contractor to perform. *See G. W. Galloway Co.*, ASBCA Nos. 16656, 16975, 73-2 BCA ¶ 10,270 at 48,499 and the Board cases cited there. However, *Galloway* involved Government conduct in inspection procedures that the Board characterized as "extremely rigid, unreasonable and arbitrary." 73-2 BCA at 48,500. Similarly, the Board cases cited in *Galloway* concerned Governmental failures to test or inspect in a reasonable manner. These cases are really about failures by Government personnel to perform obligations arising out of provisions of the contract. A more recent ASBCA decision confirms that there is no general affirmative Governmental duty to assist a contractor in endeavors that do not derive from the Government's responsibilities under the written contract between the parties. *Excel Services, Inc.*, ASBCA No. 30565, 85-3 BCA ¶ 18,369 at 92,159.

BIA did not have any responsibility under the contract to assist appellant in obtaining or retaining a construction yard and sand pit site. The contract provided that Blaze was to furnish all labor, materials, equipment, and services required. *See* Scope of Work. Moreover, under the Permits and Responsibilities clause, Blaze was responsible for obtaining, "without additional expense to the Government," "any necessary licenses and permits, and for complying with any Federal, State and municipal laws, codes and regulations applicable to the performance of the work." The Tribal Taxes, Requirements and/or Restrictions clause called special attention to the Permits and Responsibilities clause and warned that bidders were to contact the tribe or tribal organization involved with regard to tribal requirements and applicable tribal laws. Blaze also was responsible under the Site Investigation and Conditions Affecting the Work clause for investigating and satisfying itself as to the general and local conditions which could affect its work.

When the Government does not owe any contractual duty, there cannot be any contract remedy against it for an alleged breach. *See United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946); *H. F. Allen*

Orchards v. *United States*, 749 F. 2d 1571, 1576 (Fed. Cir. 1984), *cert. denied*, 106 S. Ct. 64 (1985).[6]

[4] Appellant's allegations of delay and interruption to its work under the contract, due to alleged Governmental delays in connection with its initial lease and in processing a replacement lease, similarly fail as a matter of law. Blaze does not cite a particular contract clause. Its complaint, however, concludes with a general reference to recovery pursuant to "Contract provisions." In keeping with our broad construction of Blaze's claims, we have considered the contract's Suspension of Work clause. That clause, though, applies only to unreasonable delays in the contract work caused solely by an order, act, or failure to act of the contracting officer in the administration of the contract. Even if there were Governmental delays in connection with Blaze's leases, they would not be attributable to action by the contracting officer under the contract. Just as BIA had no contractual duty to assist appellant in obtaining or retaining its original lease, it had no contractual duty to secure a replacement lease for Blaze.[7]

Thus, Blaze is precluded, as a matter of law, from recovering on its delay claims.

[5] Blaze's contention that it is entitled to compensation under the contract's Changes clause, because the Indian litigation caused it to relocate its leased construction yard and sand pit, also fails as a matter of law. The Hopi lease's waiver and hold harmless clause does not bar BIA accountability for changes to the contract (or for a differing site condition, discussed below).[8] However, even if we were to assume, for purposes of this motion, that Blaze gave BIA adequate notice of the alleged change, the leased area was not a "Government-furnished" site, within the ambit of the Changes clause. In any case, the record does

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[6] Even if, contrary to our determination, BIA were deemed to have an implied duty under the contract to assist Blaze in defending against the Hopi lease litigation; and we were to accept as true the allegation that BIA breached that duty; nonetheless, as we noted above, Blaze waived its own claims and held the Secretary of the Interior harmless against all claims arising from its use of the leased premises.

[7] Even if, contrary to our determination, BIA were deemed to have an implied duty to assist Blaze in securing a replacement lease; we were to accept as true Blaze's allegation that the Government delayed in doing so; we were to decide that the Hopi lease's waiver and hold harmless clause does not apply to bar liability in connection with a replacement yard and pit; we were to assume proper notice; and we were to assume that the delay was unreasonable and wholly attributable to BIA; Blaze would not prevail. Appellant must demonstrate that the delay caused material damage. *Commerce International Co.*, 338 F.2d at 81, 89 (Ct. Cl. 1964); *Cedar Lumber, Inc.*, 5 Cl. Ct. at 550. Blaze's alleged damages have remained constant in type and amount. None are identified as relating to delay by BIA in processing a new lease. The most significant portion is $22,125 for legal fees incurred in opposing the Hopi litigation. The only conceivably relevant damages are two claims for land rental in the amount of $400 each. This is not material damage. Furthermore, BIA spared the contractor liquidated damages to which the Government otherwise would have been entitled by granting Blaze the 60-day completion extension it sought due to its yard and pit relocation. While waiver of liquidated damages will not cure affirmative wrongful action or failure of the Government to discharge its obligations under a contract, *L. L. Hall Construction Co.* v. *United States*, 379 F.2d 559 (Ct. Cl. 1966), BIA did not have a contractual obligation to assist Blaze in connection with the original or replacement lease, and there is not any suggestion of any affirmative wrongful action by BIA.

[8] The wording of the lease's Statement of Liability clause does not clearly preclude recovery by Blaze under the Changes or Differing Site Conditions clauses of the contract. Even if that had been the intent, certain exculpatory provisions contained *within* a Government contract will not negate the remedial provisions of those clauses. *Foster Construction* v. *United States*, 435 F.2d 873, 888 (Ct. Cl. 1970); *Morrison-Knudsen Co.* v. *United States*, 397 F.2d 826, 829 (Ct. Cl. 1968); *R. A. Heintz Construction Co.*, ENGBCA No. 3380, 74-1 BCA ¶ 10,562. Thus, an exculpatory clause such as the one here, contained in a non-contract document, will not bar any otherwise appropriate recovery for a compensable change or differing site condition.

not reveal any order or determination by the contracting officer concerning that area (except for the grant of Blaze's 60-day contract completion extension), or constituting a related actual or constructive change in the scope of the contract work.

[6] The contractor's allegation that it is entitled to an equitable adjustment under the contract's Differing Site Conditions clause, due to a "Type II" differing site condition, because its leased yard and pit location was part of a secret, sacred Indian religious site, similarly fails as a matter of law. To recover for a Type II differing site condition, the clause provides that the contractor must notify the contracting officer of "(2) unknown physical conditions *at the site*, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character *provide[d] for in the contract.*" (Italics added.) In context, it is apparent that "site" means the contract work site. *See Charles T. Parker Construction Co.* v. *United States*, 433 F.2d 771, 778 (Ct. Cl. 1970) ("What were the recognized and usual physical conditions at the *site of the work*?" (italics added)).[9] The contractor's burden of proof is "relatively heavy" – more so than for a "Type I" condition, where there has been some representation in the contract concerning the condition. *Id.*

Even if we were to assume adequate notice of the alleged differing site condition, the leased area was not a contract site. Appellant recognized the distinction in its January 11, 1989, letter to BIA's Area Director: "The later legal actions, which required us to relocate our yard site, resulted in extra expenses to this company * * * and, as well, in delays and interruptions to our construction operations at the job site" (AF 18-1).

Citing *L. G. Everist, Inc.* v. *United States*, 231 Ct. Cl. 1013, 1020 (1982), *cert. denied*, 461 U.S. 957 (1983), Blaze urges in its opposition to the Government's dispositive motion that its yard and pit should be considered part of the contract site because they were "necessarily so bound up with the contractor's performance that the Government should be responsible for [the] conditions" (Opp. at 9). The Court of Claims in *L. G. Everist* stated that the Government cannot always disclaim all responsibility for conditions nominally not part of a contract's terms, but which are essential to the contractor's performance. 231 Ct. Cl. at 1020. However, the Court denied recovery to the contractor under the Differing Site Conditions clause, noting that the cases holding the Government responsible for differing conditions at off-job-site locations involved contracts in which the Government had designated the specific quarry or borrow sites at issue, and had represented that those sites would provide adequate material for the jobs at hand, which proved incorrect. 231 Ct. Cl. at 1020-22. This clearly is not our case.[10]

[9] The court was considering the formerly standard Changed Conditions article, but its analysis applies as well to the successor Differing Site Conditions clause.

[10] Also, it is apparent that the particular initial yard and pit sites selected were not essential to Blaze's performance. Blaze was able to obtain new sites and to complete the contract.

Blaze also alleges that the Government can be held responsible for a differing site condition by virtue of its approval of an off-job-site location. The contractor relies upon *R. A. Heinz Construction Co., supra.* Once more, in *Heinz*, the contract had designated the borrow pit in question. Here, the contract did not specify yard and pit sites. The contract's Site Investigation and Conditions Affecting the Work clause states that the Government does not assume responsibility for any representation made by any of its agents before contract execution unless the representation is expressly stated in the contract. Far from making any representation of Governmental responsibility concerning Blaze's yard and pit, the contract, through the Scope of Work, Site Investigation and Conditions Affecting the Work, Permits and Responsibilities, and Tribal Taxes, Requirements and/or Restrictions clauses, affirmatively places the burden upon the contractor to provide its own yard and pit and to ensure that it complied with applicable laws and ordinances concerning them.

Thus, BIA's approval of the yard and pit lease is irrelevant. It was not part of BIA's contractual responsibilities to Blaze. It was a sovereign act. That act did not make the yard and pit a contract site and BIA cannot be held responsible in contract damages by virtue of it. *See Horowitz* v. *United States*, 267 U.S. 458, 461 (1925).[11]

[7] Blaze claims that it is entitled to an equitable adjustment based upon what it describes as "proportional risk allocation" (Opp. at 11). It relies upon *National Presto Industries, Inc.* v. *United States*, 338 F.2d 99 (Ct. Cl. 1964). Under the unique facts of that case, which do not remotely resemble ours, the Court found that the parties had contracted based upon a mutual mistake of fact and structured its remedy accordingly. A party seeking equitable contract reformation based upon mutual mistake must allege that: (1) the contracting parties were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material affect upon the bargain; and (4) the contract did not put the risk of the mistake upon the party seeking reformation. *Atlas Corp.* v. *United States*, 895 F.2d 745, 750 (Fed. Cir. 1990).

Blaze cannot satisfy any of the prerequisites to a finding of mutual mistake, even if we were to deem that they had been adequately alleged. While we have accepted appellant's allegation that neither BIA nor Blaze was aware that its leased yard and pit site impinged

[11] Because we have found that the yard and pit area was not a contract site, we need not, and do not, decide whether there was any physical condition which prevented Blaze from using it. We note, though, that Blaze does not claim that the physical presence of snakes precluded it from using the yard or pit. Blaze's complaint alleges that it used the area for 4 months prior to the lawsuit. *See also* AF 18-2 and Hopi complaint. Rather, appellant alleges that the status of its yard and pit location (or a portion thereof) as sacred Indian land "runs with the land" (Opp. at 10). Directly, it was the Hopi litigation that interfered with appellant's use. The litigation encompassed religious concerns about the status of the land, but also stressed statutory, lease, and local law compliance issues. At least the latter allegations do not involve physical conditions. *See Hallman* v. *United States*, 68 F. Supp. 204 (Ct. Cl. 1946); *Cross Construction Co.*, ENGBCA No. 3676, 79-1 BCA ¶ 13,707 at 67,234.

upon sacred Indian land, this does not constitute a mutual mistake under the contract. The leased area was not part of the contract, as we have established.[12]

[8] Summary judgment is a salutary method of disposition to effect the speedy, just and inexpensive resolution of a case when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Although the burden is upon the movant, when it has supported its motion with evidence which would establish its right to judgment, the non-movant must proffer countering evidence sufficient to create a genuine factual dispute. *Sweats Fashions, Inc.* v. *Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). Even if there is a genuine dispute as to fact, the disputed fact is only material if it would make a difference in the result of a case. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Appellant has had ample opportunity to supplement the appeal file or to seek discovery regarding any fact or issue it deemed material to its opposition to the motion. It has not elected to do so. We are not suggesting, however, that any further supplementation to the record was necessary or that it would have been helpful. To the contrary, the various issues we have decided ultimately are matters of law, all based upon the terms of appellant's contract with BIA.

Decision

For the reasons articulated above, we dismiss appellant's claims against BIA allegedly arising under Blaze's lease with the Hopi Indian Tribe and Village of Sipaulovi because we do not possess jurisdiction to entertain them. As to Blaze's other claims, we grant summary judgment in favor of the Government as a matter of law. Each party shall bear its own costs and fees.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

[12] Even if the yard and pit had been part of the contract, and we were to assume that Blaze conducted the fullest investigation reasonable under the Site Investigation and Conditions Affecting the Work clause, Blaze none-the-less bore the risk of mistake under the Permits and Responsibilities and Tribal Taxes, Requirements and/or Restrictions clauses. *See Emerald Maintenance, Inc.* v. *United States*, 925 F.2d 1425, 1429 (Fed. Cir. 1991).

July 3, 1991

PAUL F. KUHN

120 IBLA 1 Decided: *July 3, 1991*

Appeal from the decision of the Director, Office of Surface Mining Reclamation and Reinforcement, declining to conduct a Federal inspection pertaining to 10-day Notice No. 89-07-117-003 in response to appellant's citizen complaint.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

If a citizen files a complaint with the Office of Surface Mining Reclamation and Enforcement alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, the Office of Surface Mining Reclamation and Enforcement has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

2. Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Permit." A permit is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority. Under the Surface Mining Control and Reclamation Act of 1977, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowable.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

Pursuant to the Surface Mining Control and Reclamation Act of 1977, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--

Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Under the Surface Mining Control and Reclamation Act of 1977, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, 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," and the state authority shall take "appropriate action."

5. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine whether the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)), and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)), of the Surface Mining Control and Reclamation Act of 1977 to take any "appropriate action" short of adjudication of property title disputes.

6. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

7. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may issue a NOV to the operator or CO, fixing a reasonable time for abatement.

July 3, 1991

8. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

Under sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1988), a permittee of a minesite was properly cited for a violation of the Act notwithstanding the fact that the surface mining or related activity was performed by a third party.

APPEARANCES: Paul F. Kuhn, Harrison, Ohio, *pro se.*

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Paul F. Kuhn appeals a letter decision dated June 21, 1989, issued by the Director, Office of Surface Mining Reclamation and Enforcement (OSM). The decision notified Kuhn that OSM would not take enforcement action on his appeal, dated May 17, 1989, from a decision by the Columbus Field Office (CFO), OSM. CFO's decision declined to conduct a Federal inspection of a mining site under permit D-217-2 to Empire Coal Co. (Empire), located adjacent to Kuhn's property in Clay and Salem Townships, Tuscarawas County, Ohio.

On March 23, 1989, Kuhn filed a citizen's complaint with CFO, pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1988),[1] alleging that Empire had committed four infractions against him. Kuhn alleged that in June 1988, Empire had committed a surface disturbance on his property when it bulldozed across a property line onto a strip of his property; that it had committed a mining encroachment and removed coal by auger from his property; that a gas pipeline had been laid across his property in furtherance of Empire's mining operations without his permission; and that trees were cut and his property damaged as a result.[2] He also alleged that the Ohio Department of Natural Resources, Division of Reclamation (DOR) had improperly approved permit D-217-2 to include part of his land within the permit boundaries.

On March 27, 1989, OSM issued a 10-day notice to DOR, informing DOR that a citizen's complaint had been received alleging removal of overburden and coal by augering beyond permit limits onto Kuhn's property. On March 29, 1989, DOR conducted an onsite investigation

[1] 30 U.S.C. § 1271(a)(1) (1988), provides, in pertinent part:

"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 * * * 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 * * *. 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."

[2] The record establishes that "the stakes placed by [Empire's surveyor] * * * delineating the mining permit area in Salem Township were incorrect, encroaching onto Mr. Kuhn's property approximately 80 feet at the northeasterly corner and approximately 30 feet at the southeasterly corner of Mr. Kuhn's 36.25 acre tract in Salem Township" (Letter of David A. Miskimen, P.E., P.S., dated Mar. 27, 1989). Although somewhat ambiguous as to location, the record also establishes an encroachment upon Kuhn's property in an area not affected by the disputed survey.

of the portion of Empire's permit D-217-2 abutting appellant's property. At that time DOR issued two notices of violation (NOVs) to Empire. Both NOVs alleged violations by Empire of Ohio Revised Code (ORC) 1513.16(a)(20) and 1513.17(a). NOV 18414 alleged that Empire had "removed vegetation beyond the western limits of the permit during construction of pond number 013, on the property of Franklin Horsfall and Wilma Kuhn"; NOV 18415 alleged that "the permittee has augered coal beyond the western limits of the permit on the Franklin Horsfall property and the Wilma Kuhn property." Both NOVs required Empire to "immediately cease all mining beyond the permit limits," and to reclaim the areas pursuant to standards in section 1513, ORC. DOR did not require Empire to suspend mining on the disputed land within the permit area, nor was relocation of the gas line across Kuhn's property determined to be violative of any Ohio statutory or regulatory provisions.

DOR reinspected the site on March 30, the day following the initial inspection. Finding the land to have been satisfactorily reclaimed, DOR terminated both NOVs owing to Empire's prompt reclamation efforts. While minor assessments were calculated for the two NOVs, they were deleted pursuant to provisions within the Ohio State plan which permit discretionary deletion of penalty assessments less than $500 per violation. On April 4, 1989, Kuhn visited CFO and objected to DOR's determination that assessments should not be levied and the NOVs terminated.

On April 5, CFO issued a notification of inappropriate response to DOR. CFO found that the issuance of NOVs 18414 and 18415 did not comply with the program requirements of Ohio Administrative Code (OAC) 1501:13-14-02(A)(2), which requires issuance of a cessation order (CO) where mining off the permit has occurred, as follows:

> Coal mining and reclamation operations conducted by any person without a valid permit issued pursuant to these rules constitute a condition or practice which causes or can reasonably be expected to cause significant environmental harm to land, air or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations.

(Letter Decision (Apr. 5, 1989) at 1).

With respect to the permit boundary dispute, CFO stated that, while the information available to DOR at the time the permit was issued supported the initial decision, Kuhn's documentation provided DOR with reason to believe that the permit may have been issued in error. CFO found DOR's refusal to suspend mining in the disputed permit area pending resolution of the dispute to be arbitrary and capricious action, and therefore found DOR's failure to suspend mining on the disputed area within the permit boundaries to be inappropriate action.

CFO found DOR's resolution of the gas pipeline in favor of Empire to be appropriate, stating:

> [DOR's] * * * response to this allegation is considered appropriate since no surface area was affected, ie. [no] disturbance to the actual gound surface has occurred. It is our

understanding that the gas line is a plastic line laid across the surface of the ground and could not be construed as a surface coal mining operation activity.

Id. at 2.

Pursuant to 30 CFR 842.11(b)(1)(iii), on April 10, 1989, DOR requested the Assistant Director, OSM, to conduct an informal review of CFO's determination. DOR alleged that it was reasonable to issue an NOV for "incidental off-permit affectment" and that its decision not to suspend mining within the disputed area of the permit was not arbitrary.

With respect to the disputed boundary, DOR stated:

> What is characterized in the field office's inappropriate determination as an "improper location of a permit boundary" based on a "property line error" essentially mischaracterizes what is clearly a property dispute. The Division has, in its investigation, ascertained that the basis of the Kuhn/Empire dispute is not simply due to a surveyor's measuring error, but is due to a disagreement on appropriate surveying reference points. The Division has requested that Empire review its original survey, and in that way may attempt to facilitate a voluntary resolution of this property dispute. However, unless one party or the other recognizes or agrees to an error, the Division is powerless to resolve this dispute. See attached Ohio Revised Code 1513.07(B)(2)(i) which clearly states that the Chief has no authority to adjudicate property title disputes.

Id. at 3. DOR disputed CFO's determination that mining operations should have been suspended, stating: "After careful review, it is the Division's opinion that it has no authority to [order the permitted to] cease operations in the disputed and unaffected area; further, the authority cited in the April 5, 1989 letter * * * does not support the contention that the Division does have such authority." *Id.* at 3-4. According to DOR, at the time of its inspection, "Empire * * * [was] not affecting any of the disputed area 80 feet east from its permit boundary running along the Paul and Jean Kuhn property; * * * [nor did] Empire * * * propose to affect such disputed area." *Id.* at 4.

On April 28, 1989, Brent Walquist, OSM Assistant Director for Program Policy, issued a decision upholding CFO's determination that DOR's response concerning the failure to issue imminent harm COs for mining outside permit limits was inappropriate, and reversing CFO's determination that DOR should have taken action to prohibit mining within areas of the permit allegedly encroaching upon appellant's property. Concerning DOR's responsibility to issue a CO for mining off the permit site, the Assistant Director stated pertinently:

> [ORC 1501.13-14-02(A)] clearly requires a cessation order for surface mining and reclamation operations conducted without a valid permit regardless of the extent of the disturbance *unless* such operations are an integral, uninterrupted extension of previously permitted operations *and* the person conducting such operations has filed a timely and complete application for a permit for such operations. * * * In this case, there is no practical difference between issuing a notice of violation and issuing a cessation order, except that a cessation order required a mandatory assessment. [Italics in original.]

(Letter Decision (Apr. 28, 1989) at 2). As a result of this letter decision, and prior to any entry on the site by OSM, DOR issued COs No. I-098

and I-099 on May 2, 1989.[3] Concerning the disputed permit boundary, the Assistant Director stated:

> While I agree that * * * [DOR] does not adjudicate property disputes, it is appropriate for your agency under program provisions such as ORC 1513.09(B)(1)(e) to notify the permittee that his right to enter is subject to dispute and to require reasonable and necessary information to ensure that the permittees' basis for right of entry remains consistent with program requirements. In this regard, the record indicates that your agency has taken such action. Although the Ohio program may authorize a range of actions short of adjudicating a property dispute which could serve as a basis to restrict mining operations on the dispute area until there is a resolution, such actions are not mandatory.

(Letter Decision (Apr. 28, 1989) at 1). The Assistant Director therefore reversed the determination that DOR's failure to suspend mining was inappropriate action.

On May 9, 1989, CFO notified Kuhn of the Assistant Director's decision of April 28, 1989, and of the finding that the gas pipeline relocation onto Kuhn's property was not within the purview of SMCRA. Pursuant to 30 CFR 842.15, Kuhn then appealed OSM's decision not to take Federal action by letter dated May 17, 1989. On June 21, 1989, the Director issued a letter decision in response to Kuhn's appeal, upholding OSM's decision not to inspect or enforce. Kuhn's appeal of the Director's June 21, 1989, decision was filed with this Board on July 13, 1989.

In his statement of reasons (SOR) on appeal,[4] Kuhn alleges that two issues concerning the response of DOR to 10-day notice No. 89-07-117-003 remain unresolved to his satisfaction. With regard to Walquist's findings concerning the disputed permit boundary, Kuhn alleges that DOR should have investigated and confirmed that the "right of entry" information submitted by Empire was correct, and that DOR's failure to verify Empire's documentation of permit boundaries "improperly shifts the burden of demonstrating right-of-entry from the permit applicant to the public" (SOR at 2). Kuhn further contends that, once DOR was aware of his complaint, the appropriate procedure for the State regulatory agency to follow was to suspend mining in the disputed area until the matter was resolved. *Id.* According to Kuhn,

[3] Despite the Assistant Director's finding in his Apr. 28 decision that, "a cessation order requires a mandatory assessment," DOR waived the assessments for CO I-098 and I-099, because they were calculated at less than $500. Twenty days subsequent to DOR's issuance of the CO's, on May 22, 1989, CFO again informed DOR that the Ohio code does not permit waiver of assessments in the case of COs. DOR agreed to revise the initial assessment and to reissue assessments on both COs. On June 9, 1990, Kuhn called CFO to discuss his concerns about when civil penalty assessments would be issued (Telephone Record of Bob Mooney, June 9, 1989). CFO contacted DOR, and DOR issued assessments to Empire on June 12, 1989, 43 days after issuance of the imminent harm CO.

Under the Ohio plan, DOR was required to issue assessments within 30 days of issuance of the CO's. Our review of the record leads us to conclude that CFO had jurisdiction to issue a 10-day notice to DOR on June 2, 1989, and should have done so without prodding from Kuhn; indeed, CFO could have made DOR aware of the ramifications of dragging its feet in the matter. DOR was placed on notice twice of the assessment issue; certainly CFO had continuing jurisdiction to see that appropriate action was taken on Kuhn's complaint, which encompassed the breadth of appropriate enforcement, including assessments. Be that as it may, DOR did eventually take appropriate action by issuing assessments, and the issue is not now before this Board.

OSM's file does not contain documentation of the assessments issued to or paid by Empire for CO I-098 and I-099. In his Nov. 26, 1990, response to Empire's answer, Kuhn has provided the Board with copies of DOR's assessment worksheets for CO I-099 (augering without a permit). These worksheets indicate that on June 12, 1989, Empire was assessed $620 for CO I-098, and was granted a 25-percent reduction in penalty for the good faith demonstrated by its prompt abatement, which reduced the assessment for CO. No. I-098 to $465. An assessment of $1,020 was issued on June 12, 1989, for CO I-099; no good faith reductions were granted.

[4] Kuhn filed his SOR by letter dated Sept. 26, 1989.

"[i]n this case, the coal company obtained a 'negative' incidental boundary revision to delete the acreage that my land surveyor had shown to be within the boundaries of my property, indicating that there was no 'dispute' but rather a trespass on my lands."[5] Kuhn states that "[t]he damage done to my land and removal of coal from beneath my land has not been fully remediated," and demands that this Board "reverse the Ohio Field Office and require appropriate action by the state of Ohio" (SOR at 2-3).

Second, Kuhn alleges that Empire relocated a gas line onto his land, and that such activity was a "surface coal mining activity" within the meaning of section 701(28) of the Act, and should have initially been found to be so by the DOR, and by OSM (SOR at 3). Kuhn requested a hearing and expedited consideration of this appeal. These requests were denied by order dated January 24, reaffirmed on March 14, 1990.

On September 26, 1990, appellant filed additional evidence supporting his appeal in the form of a supplemental SOR. Kuhn alleged that Empire's permit map D-0398, submitted to DOR on September 6, 1989, indicated that the plan for the natural gas line to be removed from the mining pit onto Kuhn's property was submitted by Empire to DOR and approved without Kuhn's notice or approval. Kuhn alleged that "[t]he same map by Empire and approved by the State of Ohio indicated my boundary therefore it was the full intention of Empire Coal Company to steal my land, my coal and my forest." On October 5, 1990, this Board issued an order giving notice to Empire of the new evidence submitted by Kuhn, and granting Empire opportunity to respond. Empire filed a response on November 15, 1990; Kuhn responded to Empire on November 26, 1990.[6]

Empire has admitted that "[i]n June of 1988 Empire's contractor's dozer * * * [trespassed] onto the Kuhn property and disturbed 0.03 acres of brush on the Kuhn side of the Horsfall/Kuhn Property line." According to Empire, "[t]he area was repaired by seeding and mulching the next day." Empire has averred that "[a]n automatic Civil Penalty Assessment of $750.00 was paid to the state as a result of the CESSATION ORDER." Empire has admitted that a second trespass occurred between February 18 to and February 23, 1989, and that "[b]etween the dates of Feb. 18 and February 23, 1989, and that "[b]etween the dates of February 18 to Feb. 23, 1989 Empire augured the #6 seam along the Kuhn property line." Empire explained that:

[5] On Apr. 17, 1989, Empire filed an application with DOR for a Negative Incidental Boundary Revision, which conceded the boundary error alleged by Kuhn. On Apr. 19, DOR approved the boundary revision (*see* letter, May 1, 1989, from Robert Mooney to Sally Rickert).

[6] In his Nov. 26, 1990, response, Kuhn reiterated his plea to this Board to require OSM and DOR "to issue cessation orders to Empire Coal Co. and assess penalties in the amount of $750. per day per cessation order from the date of Empire action to the present" for (1) "[t]repassing on my land with a bulldozer destroying my forest"; (2) "[l]aying of gas line through my forest destroying my trees"; (3) "[f]or the augering of my coal and require Empire to uncover the auger holes on vein number five"; (4) "[f]or trespassing on my property to set stakes with full intention of stealing my land and coal"; and (5) "[r]eclaim all mined areas by Empire Coal Co. in Tuscarawas County State of Ohio."

[D]ue to a lack of detail on an engineering sketch showing the toe of the #6 highwall in relation to the Kuhn property line our auger penetrated a maximum of 8 feet into Kuhn's coal. The sketch showed the highwall as a straight line when in fact the wall bowed toward the Kuhn line.

Empire has conceded that it augered 46.6 tons of appellant's coal and that a second NOV and CO were issued against it by DOR. For the second infringement, Empire states that it paid $750.

Concerning relocation of the Horsfall gas pipeline on Kuhn's property, Empire explained:

On August 28, 1988 Empire Coal Company provided David Horsfall a map showing the needed relocation of a gas line on his mother's property * * *. The purpose of the line was to supply gas for heating from a gas well on the Horsfall property to the new location of the Horsfall house. The Horsfall house was moved from its original location inside the mining area to a new location outside the mining area. The map showed a location for the line to remove it from the area to be affected by mining. The actual relocation of the gas line was the responsibility of the Horsfalls and the work was performed by the Horsfalls. When the auger mining encroachment was determined it was discovered that the gas line cut across the corner of the Kuhn property.

(Empire Response at 1.)

Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), provides that the Secretary of the Interior shall order a Federal inspection of a surface coal mining operation where the Secretary has reason to believe a violation of any requirement of SMCRA or any permit condition has occurred and the State, acting as the regulatory authority, "falls within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure." OSM is required to conduct the inspection and "if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate." 30 CFR 843.12(a)(2).

When a state program is approved, the state concerned assumes responsibility for issuing mining permits and enforcing its regulatory program. *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. *Turner Brothers, Inc.* v. *Office of Surface Mining Reclamation & Enforcement*, No. 86-380-C (E.D. Okla Oct. 5, 1987); *Shamrock Coal Co.* v. *Office of Surface Mining Reclamation & Enforcement*, 81 IBLA 374, 375 (1984), *appeal dismissed*, Civ. No. 84-238 (E.D. Ky May 13, 1987). Effective August 16, 1982, the Ohio State program was conditionally approved by the Secretary of the Interior. *See* 30 CFR 935.10. On that date, DOR became the regulatory authority in Ohio for all surface coal mining and reclamation operations. *Id.* Thus, at the time OSM issued the 10-day notice, the State of Ohio was operating under an approved State program, and the question presented by this appeal is, therefore, whether DOR's response was "appropriate action" within the meaning of section 521(a)(1).

While no definition of the phrase "appropriate action" has been provided by OSM, the preamble to 30 CFR 843.12 states: "The crucial response of a State is to take whatever enforcement action is necessary

to secure abatement of the violation" (47 FR 35627-28 (Aug. 16, 1982)). Later rulemaking has delineated a "standard of review" for "appropriate action" as a "response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion." 30 CFR 842.11(b)(1)(ii)(B)(2). 53 FR 26730 (July 14, 1988). As a practical matter, this standard has been implicit in Board rulings under section 521(a)(1). *See W. E. Carter*, 116 IBLA 262, 267 n.3 (1990).

A state's failure to affirmatively enforce statutory and regulatory requirements under SMCRA by issuance of an NOV or CO subsequent to receipt of a 10-day notice is "inappropriate." *Dora Mining Co.* v. *Office of Surface Mining Reclamation & Enforcement*, 100 IBLA 300 (1987); *Office of Surface Mining Reclamation & Enforcement* v. *Calvert & Marsh Coal Co.*, 95 IBLA 182 (1987); *Bannock Coal Co.* v. *Office of Surface Mining Reclamation & Enforcement*, 93 IBLA 225 (1986). If a state issues an NOV or a CO, but does not enforce abatement or reclamation requirements, OSM may, without notice to the state, reinspect and issue Federal enforcement sanctions. *Peabody Coal Co.* v. *Office of Surface Mining Reclamation & Enforcement*, 95 IBLA 204, 94 I.D. 12 (1987).

Often, however, scrutiny of state actions leads to the conclusion that the state has acted appropriately, and that, therefore, OSM has no jurisdiction to assume enforcement authority. When evidence in a record shows an "ongoing effort" on the part of the state agency to rectify a violation, and that enforcement activities are proceeding "apace," Federal enforcement efforts will be deemed to be unjustified. *Turner Brothers* v. *Office of Surface Mining Reclamation & Enforcement*, 99 IBLA 87, 93 (1987). Where the record does not bear out allegations by a citizen that his land has not been restored to its approximate original contour, and that reclamation efforts left "excessive gullying and inadequate revegetation," a decision by Federal officials not to take enforcement action will be upheld. *Kenneth Marsh*, 82 IBLA 3 (1984).

Kuhn has not challenged the reclamation efforts of Empire insofar as Empire's encroachment upon his property is concerned, although he continues to challenge Empire's failure to reclaim his land in connection with placement of the Horsfall gas pipeline across his property. Kuhn's quarrel with DOR is not that DOR failed to enforce reclamation requirements, but that it did not diligently investigate Empire's permit application, thereby leaving his property at risk from encroachment by permit D-217-2. Kuhn further alleges that even when DOR was put on notice of possible infractions on his property by permit D-217-2, DOR refused to take appropriate action.

Kuhn alleges that DOR should have investigated and confirmed that the "right of entry" information submitted by Empire was correct, and that DOR's failure to verify Empire's documentation of permit boundaries "improperly shifts the burden of demonstrating right-of-

entry from the permit applicant to the public" (SOR at 2). Kuhn further contends that, once DOR was aware of his complaint, the appropriate procedure for the state regulatory agency to follow was to suspend mining in the disputed area until the matter was resolved. *Id.* Last, Kuhn requests that this Board order DOR to "remediate" the damage done to his land and his coal by Empire's trespass. Thus, Kuhn alleges that SMCRA imposes the following duties upon DOR: (1) the duty to ensure accurate permit boundaries prior to permit issuance and to prevent trespass; and (2) the duty to suspend permission to mine where permit boundaries are called into question.

[1, 2] Generally, a permit is "[a] written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority." *Black's Law Dictionary* 1298 (4th ed. 1968) Particularizing this general definition to permits issued under SMCRA, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowed. While many decisions of this Board have addressed allegations that the permittee has expanded surface mining operations beyond permit limits, few cases have addressed allegations that the regulatory authority has issued a permit which erroneously expands upon the legal right to mine; that is, that the boundaries described in the permit encompass more land than the operator has legal authority to mine. While the distinction may seem minute, it is significant. In the first instance, an operator may have obtained legal right to conduct surface coal mining operations from adjacent landowners, but the activity is not allowed because he has not obtained regulatory permission. In the second instance, the regulatory agency has bestowed authority to mine upon the operator, but it allegedly lacks the legal right to do so. *Compare Willowbrook Mining Co.* v. *Office of Surface Mining Reclamation & Enforcement*, 108 IBLA 303 (1989), *and Firchau Mining. Inc.* v. *Office of Surface Mining Reclamation & Enforcement*, 101 IBLA 144 (1988), *and Thomas J. Fitzgerald*, 88 IBLA 24 (1985), *with Samuel M. Mullinex*, 96 IBLA 52 (1987), and *W. E. Carter, supra.*

In *Samuel M. Mullinax* this Board upheld a decision by OSM finding state action to be appropriate where irregularities with respect to the issuance of surface mining permits were alleged, but it was established that the operator and state had complied with relevant provisions of the state's surface mining statute. Of particular relevance to this appeal is the Board's analysis distinguishing permitting issues from reclamation issues under section 521(a)(1):

> It is clear that section 521(a)(1) is primarily designed to address violations of performance standards or permit conditions that would be ascertainable by inspection of the surface coal mining operation. Thus, in *Turner Brothers* * * * [92 IBLA at 320] OSM conducted an investigation of a minesite pursuant to a citizen's complaint and issued a 10-day notice to Oklahoma's regulatory authority citing violations of the State's program. OSM determined, and this Board affirmed, that the State's issuance of a notice of

violation (NOV), given that the State had issued a NOV a year before for the same violation, did not amount to "appropriate action" under section 521(a)(1).

On the other hand, a citizen's complaint which sets forth allegations of irregularities in the issuance of permits by the State regulatory authority may involve different considerations and consequences than one which alleges violation of a performance standard, such as in *Turner Brothers*. * * * [I]n this case the State reviewed the permits * * * and uncovered none of the alleged irregularities. Under the circumstances, OSM acted properly in referring the complaint to the State. Our only other inquiry is whether the State's response was "appropriate * * *."

Id. at 58-59.

In that case at footnote 4, this Board noted that the legislative history of SMCRA indicates an intent by Congress to place primary control of permit issuance within state jurisdiction, even during interim Federal enforcement. Even so, where it is evident that a permit has been issued in violation of the state regulatory requirements, this Board has declared such action inappropriate, and has ordered Federal enforcement. *See W. E. Carter, supra.*

Both Federal and state regulators issue permits within procedures set forth in the Act and accompanying regulations. An operator has a duty to prepare permit applications that are legally sound. *See* 30 CFR 778.15. Opportunity for public scrutiny of permit applications must be provided prior to approval by appropriate state or Federal authorities. *See* 30 CFR 773.13. Under 30 CFR 773.13(a), a permit applicant must "place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least once a week for four consecutive weeks." The advertisement must contain, among other information, "[a] map or description which clearly shows or describes the precise location and boundaries of the proposed permit area and is sufficient to enable local residents to readily identify the proposed permit area." Any citizen having an interest which is or may be adversely affected by the decision on the application may request an informal conference, which, unless otherwise agreed, shall be preserved on electronic or stenographic record. 30 CFR 773.13(c). Pursuant to section 503(a)(4) of SMCRA, Ohio law must provide citizens with similar safeguards. *See* 30 U.S.C. § 1153(a)(4) (1988).

Kuhn has not allleged that these procedural safeguards were not made available to him prior to issuance of permit D-217-2 to Empire. While this Board has jurisdiction under section 521(a)(1) to hear appeals where state action pertaining to permit issuance is inappropriate, no facts are brought before us here to establish that DOR did not follow appropriate procedures in issuing Empire's permit. *See Samuel M. Mullinex, supra* at 59. Kuhn would have us rule, however, that DOR alone is responsible to ensure that mining permits correctly describe the area on which the applicant is authorized to mine. We find no authority for this proposition. Not only does the permitting scheme place significant responsibility on adjacent landowners to diligently defind their boundaries, DOR's position that

it is powerless to adjudicate property title or rights disputes is well-taken. *See* 30 U.S.C. § 1257(b)(9) (1988); 30 CFR 778.15(c).[7]

[3] Kuhn would further have us penalize Empire for actions taken in trespass (*see* note 6). This Board has no authority under SMCRA to award damages for any purpose. While section 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter" (30 U.S.C.§ 1270(f) 1988)), those actions are to be brought in either the state or Federal courts in the jurisdiction in which the "surface coal mining operation complained of is located." *Id. See Haydo v. Amerikohl Mining Co., Inc.*, 830 F.2d 494, 495-498 (3rd Cir. 1987). SMCRA provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988). Indeed, Kuhn has brought an action before the Ohio Court of Common Pleas.[8]

[4-6] Nonetheless, we find that the Assistant Director erred when be reversed CFO's decision that DOR's failure to suspend mining in the dispute area was arbitrary and capricious and therefore was "inappropriate action."[9]Specifically, CFO had ruled that:

> OAC 1501:13-4-03(C) requires that the Chief [of DOR] review information to determine if the operator has the right to enter and to conduct surface mining operations. In this case a landowner has provided evidence * * * that * * * [the Chief's] initial decision may be in error as to whether the operator has the right to enter and mine an area that has been permitted. While the rule expressly states that the Chief does not have the authority to adjudicate property disputes, the Chief has to assure that the right to enter and mine is valid before an area is mined. [DOR's] * * * position that it will not assure that the operator has the right to enter has the *de facto* effect of adjudicating the dispute. The Division must take action to prevent surface coal mining operations from occurring on the questioned area until it is assured that the permit is correct or that the permit is corrected if necessary.

(CFO Decision dated Apr. 5, 1989, at 3).

CFO further supported the conclusion that DOR should have suspended mining on disputed land within the permit boundaries by citing two additional provisions of the Ohio Codes. CFO quoted OAC 1501:13-5-01(F)(1), which provides that "except to the extent that the Chief *otherwise directs in the permit that specific actions be taken*, the

[7] 30 CFR 778.15(c), stating regulatory requirements for right-of-entry information, provides: "Nothing in this section shall be construed to provide the regulatory authority with authority to adjudicate property rights disputes."

Sec. 507(b)(9) of the Act, 30 U.S.C. § 1257(b)(9) (1988), provides:

"[T]he applicant shall file with the regulatory authority on an accurate map or plan, to an appropriate scale, clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and shall provide to the regulatory authority a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: *Provided*, That nothing in this chapter shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes."

[8] According to Empire's response dated Nov. 15, 1990, this action was then still pending in the Court of Common Pleas.

[9] Although neither OSM nor Empire has raised the question, it might be argued that the issue whether OSM should have suspended mining in the disputed permit area pending resolution of the boundary dispute is now moot, because Empire has conceded that its permit boundaries were in error and DOR has approved Empire's request for Negative Incidental Boundary Revision. We decline to dismiss this issue as moot, however, because we find it presents an issue "which is capable of repetition, yet evading review." *See Southern Utah Wilderness Alliance* 114 IBLA 326, 329-30 (1990); *Southern Utah Wilderness Alliance, 111 IBLA 207, 208-10 (1989).*

permittee shall conduct all coal mining and reclamation operations as described in the complete application (italics added)"; and ORC 1513.09(B)(1)(e), which provides:

For the purpose of administration and enforcement of any requirement of this chapter or in the administration and enforcement of any permit under this chapter or of determining whether any person is in violation of any requirement of this chapter. (1) The Chief shall require any permittee or operator to: * * * (e) Provide such other information relative to coal mining and reclamation operations as the chief considers reasonable and necessary.

Id. CFO concluded that

These program requirements give the Chief authority to specifically direct that the permit be conditioned or suspended in question until the Chief is assured that the operator has the right to enter and operate. It also gives the Chief authority to require the permittee to provide information to demonstrate that the permit map is accurate.

The Division's rationale used in the response to this issue abuses the discretion provided to the Chief by the program and its interpretation of the program requirements is arbitrary and capricious as it applies to the concerns of the complainant. OSM[RE], therefore, has determined that the response to the TDN is inappropriate.

Id. at 3, 4. Reversing CFO, the Assistant Director, OSM, stated:

While I agree that your agency does not adjudicate property disputes, it is appropriate for your agency under program provisions such as ORC 1513.09(B)(1)(e) to notify the permittee that his right to enter is subject to dispute and to require reasonable and necessary information to ensure that the permittees' basis for right of entry remains consistent with program requirements. In this regard, the record indicates that your agency has taken such action. Although the Ohio program may authorize a range of actions short of adjudicating a property dispute which could serve as a basis to restrict mining operations on the disputed area until there is a resolution, such actions are not mandatory. Therefore, I find that your agency's response does not constitute an abuse of discretion under the approved program and I hereby reverse the written determination of the Columbus Field Office Director.

(Decision at 1.)

The decision of the Assistant Director was sustained by the Director on appeal by Kuhn. We are not able to uphold this determination. Under SMCRA, a permit applicant is required to file legal documentation of the right to mine an area under consideration and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within section 521(a)(1) of the Act, which provides that,

[w]henever, 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 * * * [italics in original] [,]

and the State authority shall take "appropriate action." When a citizen alleges that the boundaries of an adjacent permit are inaccurate, a state is required by section 521(a)(1) to take any

"appropriate action" short of adjudication of property rights disputes. *See W. E. Carter, supra.*

DOR eventually approved Empire's application for a Negative Incidental Boundary Revision which conceded the boundary error alleged by Kuhn. Consequently, DOR's failure to suspend mining in the disputed area within the permit boundaries until resolution of the matter was arbitrary, and fell short of "appropriate action." While DOR alleged that, at the time of its inspection, "Empire * * * [was] not affecting any of the disputed area 80 feet east from its permit boundary running along the Paul and Jean Kuhn property; * * * [nor did] Empire proposed to affect such disputed area," CFO correctly determined that "where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the right to enter and mine is valid before the area is mined." *See* 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C.§ 1271(a)(1) (1988).

Of particular interest here is CFO's written summary of a telephone conference held on April 4, 1989, between CFO and DOR officials regarding DOR's 10-day notice response, in which CFO stated

> It is the CFO's position that the DOR must require that all mining on the disputed area be postponed until it can be accurately determined whether the permit has or has not been approved to include a portion of Mr. Kuhn's property. The DOR disagreed with the CFO's position and opted not to initiate any action to prevent mining on the area in question. DOR felt they have no authority to do so. [C]FO suggested possible suspension or permit condition be imposed on the area in question. DOR felt they have no authority to do so. [C]FO suggested possible suspension or permit condition be imposed on the area in question. DOR indicated that there is no immediate threat to the questioned area since mining is not expected to progress into the area at least for a couple weeks. [C]FO indicated that Kuhn had indicated otherwise and he felt they in the area at this time [sic]. DOR felt he is protected by the court order he obtained, [C]FO indicated that the order according to Kuhn only required that he have a representative present during augering and did not prevent mining on the area. [C]FO has requested a copy of the order from Kuhn[.]

Under the circumstances, it was reasonable that CFO would question DOR's assumption that a 2-week hiatus in Empire's mining schedule would not constitute an "immediate threat to the questioned area," and would determine DOR's conduct to be inappropriate. So long as the operator retained full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act stated in section 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" was jeopardized.

[7, 8] Kuhn's allegations regarding a natural gas pipeline allegedly laid across his land in furtherance of Empire's surface coal mining operations remains to be considered. In his complaint filed with CFO on March 23, 1989, Kuhn alleged:

> During the time from 6/6/88 to the present Empire had the adjacent home and outbuilding relocated from the mining area to a bottom adjacent field. They relocated the

natural gas line through my woods and out of their mining area. No request was made to me to go on my property by Empire nor was any permission granted.

DOR declined to investigate Kuhn's complaint regarding the gas pipeline, finding that "[t]he Division does not regulate private gas line relocation by a neighboring landowner. This is a private contractual matter between the parties involved" ([DOR] Addendum to 10-day Notice 89-07-117-003 Response). In an April 4, 1989, visit to CFO, Kuhn disputed the finding by DOR, claiming that "the gas line had been removed from the area of the permit and placed on his property to facilitate the mining operation" (CFO Telephone Record dated Apr. 4, 1989). Nevertheless, CFO found DOR's response to this allegation appropriate, "since no surface area was affected, ie. disturbance to the actual ground surface" (Apr. 5 Decision at 2.) CFO further stated: "It is our understanding that the gas line is a plastic line laid across the surface of the ground and could not be construed as a surface coal mining operation activity." *Id.*

In a personal communication with CFO officials on April 12, 1989, Kuhn "noted that the gas line placed on his property had resulted in the company cutting trees on his land in order to route the line around the mining operation" (CFO Telephone Record dated Apr. 12, 1989). According to this record, "[p]ictures were taken by Mr. Kuhn of the cut trees. Because of this disturbance he believes routing the gas line through his property is an operation to facilitate the mining and warrants a violation." The record notes, parenthetically: "(This information had not previously been provided to the CFO)." According to an OSM call-visit record dated April 14, 1989,

> Kuhn said the company's representative had testified that they had moved the gas line to * * * mine the coal. He [Kuhn] was going to send the transcript so that we could see that the movement of the gas line was part of the mining operation. I told him that I would review it.

The record indicates that the transcript of the preliminary injunction proceeding was probably received by CFO on or about April 17, 1989,[10] but no follow-up on Kuhn's allegations occurred until CFO's May 9, 1989, letter to Kuhn, which stated:

> The relocation of a gas line is not considered as a surface coal mining operation, even though the line was moved to facilitate the removal of coal on the permit. The definition of a coal mining operation (Ohio regulation OAC 1501:13-1-01 S) specifies the activities which are to be regulated. The placement or relocation of a gas line is not specified as an activity to be regulated.
>
> Your concerns about a gas line being placed on your property without your permission, and the resultant loss of trees are appreciated. However, this is an issue that is not within our purview, regardless of who the responsible party may be.

[10] On Mar. 27, 1989, at the hearing on Kuhn's motion for preliminary injunction in the Tuscarawas County Court of Common Pleas, Empire's chief engineer admitted that the relocation of the natural gas pipeline onto the Kuhn property furthered its coal mining activity. OSM's copy of this partial transcript of proceedings is not date-stamped as to receipt; it is therefore hard to tell when this transcript was received, or the source of its transmittal. The copy of the transcript appears to have been attached with a copy of the Miskimen letter, noted as received by CFO on Apr. 17, 1989.

Id. at 2.

Pursuant to 30 CFR 842.15, Kuhn appealed this decision to the Assistant Director by letter dated May 17, 1989. On June 21, 1989, the Director issued a letter decision in response to Kuhn's allegation in his appeal that "*Empire Coal Company in November of 1988 removed a natural gas line from their pit and ran it through my wood * * * destroying my forest* (italics in original), stating the following:

OSMRE shared this information with DOR. DOR determined that relocation of this pipeline by a neighboring landowner was not incidental to a surface mining operation. This is neither an arbitrary or capricious decision nor an abuse of discretion under the Ohio State program. The evidence attached to your May 5, 1989 letter to Tim Dieringer, Chief of DOR, indicates that the pipeline was relocated onto your property by your neighbor, Frank Horsfall, not relocated by Empire Coal. Therefore, I have no reason to order a Federal inspection.

Id. at 2.

In response, Kuhn alleged that Empire's permit map D-0398, submitted to DOR on September 6, 1989, indicated that the plan for the natural gas line to be removed from the mining pit onto Kuhn's property was submitted by Empire to DOR and approved without Kuhn's notice or approval. On November 9, 1990, Empire responded in pertinent part to Kuhn's allegations as follows:

On August 28, 1988 Empire Coal Company provided David Horsfall a map showing the needed relocation of a gas line on his mother's property * * *. The purpose of the line was to supply gas for heating from a gas well on the Horsfall property to the new location of the Horsfall house. *The Horsfall house was moved from its original location inside the mining area to a new location outside the mining area. The map showed a location for the line to remove it from the area to be affected by mining.* The actual relocation of the gas line was the responsibility of the Horsfalls and the work was performed by the Horsfalls. When the auger mining encroachment was determined it was discovered that the gas line cut across the corner of the Kuhn property. I informed David Horsfall of their error in locating the line and he had the line moved shortly thereafter. [Italics supplied.]

Section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1988), provides, in pertinent part:

"[S]urface coal mining operations" means--

(A) activities conducted on the surface of lands in connection with a surface coal mine * * *

(B) the areas upon which activities occur * * *. Such areas shall also include any adjacent land the use of which is incidental to any such activities, * * * *and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities* * * *. [Italics supplied.]

Pursuant to section 503(a)(1) of SMCRA, Ohio law must provide "a State law which provides for the * * * regulations of surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. § 1253(a)(4) (1988). Indeed, the pertinent language in the Ohio statute is nearly identical. *See* ORC 1513:01(G); *see also* OAC 1501:13-1-01 S, which states pertinently:

(S) Coal mining operation means: (1) [a]ctivities conducted on the surface of lands in connection with a coal mine, * * * and (2) [t]he areas upon which such activities occur or where such activities disturb the natural land surface. *Such areas include any*

adjacent land, the use of which is incidental to any such activities * * *. [Italics supplied.]

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity and therefore finds no permit is required, and the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. When, after inspection, OSM determines that the activity is in violation of any requirement of SMCRA, OSM may issue a NOV or CO order, as appropriate, to the operator, fixing a reasonable time for abatement. *See Willowbrook Mining Co.* v. *Office of Surface Mining Reclamation & Enforcement, supra* at 310-11.

Empire has admitted that "[t]he Horsfall house was moved from its original location inside the mining area to a new location outside the mining area"; and that "[t]he map showed a location for the line to remove it from the area to be affected by mining." There is no question but that this activity falls within the definition of "surface coal mining operations" set forth in section 701(28) of SMCRA, and companion Ohio law and regulations. The crucial factor is not who agreed to move the pipeline, but that the pipeline was ultimately moved into Kuhn's property incidental to and in furtherance of Empire's surface coal mining activities. Under section 521(a) of SMCRA, a permittee of a minesite is a proper party to be cited for a violation of the Act notwithstanding the fact that the surface mining activity is conducted by a third party. *See Clark Coal Co.* v. *Office of Surface Mining Reclamation & Enforcement*, 102 IBLA 93 (1988); *Wilson Farms Coal Co.*, 2 IBSMA 118, 87 I.D. 245 (1980).

Ultimately, OSM's review of DOR's course of action pertaining to Kuhn's allegation that a gas pipeline was relocated upon his property in furtherance of Empire's surface mining activities and without a valid permit should have proceeded in the same course as the review of DOR's action with respect to Kuhn's allegations that Empire was encroaching on his property. Appropriate action by DOR should have encompassed an inspection to determine whether there was a nexus between removal of the gas pipeline onto Kuhn's property and Empire's surface mining activities, whether Empire had obtained a valid permit to conduct such activities upon Kuhn's property and "whether the area upon which such activities occurred disturbed the natural land surface," and, if so, whether the affected lands were reclaimed. We therefore reverse OSM's determination that DOR acted appropriately with respect to its refusal to inspect the relocation of the gas pipeline,

and remand this issue to OSM for further action consistent with this opinion and the requirements of section 521(a)(1) of the Act.

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 Assistant Director, OSM, is reversed and remanded.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

FOREST OIL CORP.

9 OHA 68 Decided: *July 10, 1991*

Petition for review by the Director, Office of Hearings and Appeals, of a decision of the Interior Board of Land Appeals in *Forest Oil Corp. (On Reconsideration)*, 116 IBLA 176, 97 I.D. 239 (1990), *reaffirming Forest Oil Corp.*, 113 IBLA 30, 97 I.D. 11 (1990), to the extent that the Board set aside and remanded decisions by the Director, Minerals Management Service, affirming assessment of additional royalty and late payment charges. MMS-85-0326-OCS and MMS-86-0096-OCS.

Petition granted; reversed in part.

1. Administrative Authority: Estoppel--Administrative Procedure: Generally--Appeals: Generally--Public Lands: Jurisdiction Over--Res Judicata--Rules of Practice: Generally--Secretary of the Interior

The Secretary of the Interior has continuing jurisdiction with respect to public lands until a patent is issued, 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. Regulations concerning the jurisdiction and time limitations on filing documents with the Appeals Boards of the Office of Hearings and Appeals are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary.

2. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

A lessee may offset overpayments found on a lease during an audit against underpayments discovered on that same lease during the same audit period where the overpayments and underpayments were not related. But where a payor intentionally creates an underpayment by taking a credit adjustment to recoup an overpayment made in a previous month, an offset is not authorized because the payor would have effected a refund without satisfying the preconditions established by 43 U.S.C. § 1339 (1988).

APPEARANCES: Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor,

July 10, 1991

U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service; Douglas B. Glass, Esq., Houston, Texas, for Forest Oil Corp.

OPINION BY ROGER E. MIDDLETON, DIRECTOR

OFFICE OF HEARINGS AND APPEALS

On December 31, 1990, the Minerals Management Service (MMS) filed a motion pursuant to 43 CFR 4.5(b) requesting that the Director, Office of Hearings and Appeals (OHA), review a case decided by the Interior Board of Land Appeals, *Forest Oil Corp. (On Reconsideration)*, 116 IBLA 176, 97 I.D. 239 (1990), *reaffirming Forest Oil Corp.*, 113 IBLA 30, 97 I.D. 11 (1990). These decisions involved the assessment of additional royalties and late payment charges on production from offshore oil and gas leases disclosed during an MMS audit of Forest's royalty payments on production from these leases from January 1977 through December 1983. That audit identified a number of items resulting in the assessment of additional royalties and late payment charges which the Board affirmed. The audit also disclosed that Forest had made overpayments of royalty in several months which were offset by underpayments in other months. The Director, MMS, held that Forest could not recover overpayments in such a manner but was required to apply for a refund within 2 years after making the overpayment as provided in 43 U.S.C. § 1339 (1988). Ruling that Forest had failed to apply for the refunds, the Director required Forest to repay those overpayments plus late payment charges. The Board set aside this ruling and held that the overpayments may be credited against underpayments for the same lease because the overpayments and underpayments were disclosed during the same audit. MMS petitioned the Board for reconsideration. Although MMS generally agreed that offsetting overpayments against underpayments on a lease during an audit period may be justified under 43 U.S.C. § 1339 (1988), MMS contended that allowing a payor to intentionally create underpayments by taking credit adjustments and then to allow offsetting of the very overpayments that were recouped would render the statutory refund provision ineffective. Nevertheless, the Board reaffirmed its previous decision.

An appeal by Mesa Operating Limited Partnership pending before the Director, MMS, also involved the recoupment of overpayments by making intentional underpayments. Pursuant to 43 CFR 4.5, the Secretary assumed jurisdiction of that appeal and issued a decision on November 30, 1990, that affirmed the MMS order requiring Mesa to pay for the overpayments and expressly overruled the Board's *Forest Oil* decisions. *Mesa Operating Limited Partnership*, MMS-88-0182-OCS, 98 I.D. 193 (1990). The instant petition from MMS requests that I review the Board's *Forest Oil* decisions pursuant to 43 CFR 4.5 and

decide that case in a manner consistent with the Secretary's *Mesa* decision.

[1] Forest Oil's response to MMS' motion asserts that the Department has no jurisdiction to entertain the motion. Forest construes language in 43 CFR 4.5(a)(1) authorizing the Secretary or Director to take jurisdiction "at any stage of the case" as precluding them from doing so in a case which is no longer pending. Citing 43 CFR 4.1, Forest asserts that the Secretary has delegated his final decisionmaking authority to the Board whose decisions are final under 43 CFR 4.21(c) and not subject to reconsideration after 60 days pursuant to 43 CFR 4.403. Forest overlooks other provisions of 43 CFR 4.5 that specifically refute its contentions. The subsection pertaining to review by the Director, OHA, expressly authorizes him not only to "assume jurisdiction of any case before any board" but to "review any decision by any board of the Office." 43 CFR 4.5(b). Furthermore, 43 CFR 4.5(a) contains a provision that governs the construction of all of the regulations cited by Forest: "Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law." That power has been described as follows:

> [I]t has long been recognized that the Secretary of [the] Interior has broad plenary powers over the disposition of public lands. *Cameron* v.*United States*, 252 U.S. 450, 459-64, 40 S.Ct. 410, 64 L.Ed. 659 (1920); *Knight* v. *United States Land Association*, 142 U.S. 161, 177, 12 S.Ct. 258, 35 L.Ed. 974 (1891); *United States* v. *Williamson*, 75 I.D. 338, 342 (1968). 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. *United States* v. *United States Borax Co.*, 58 I.D. 426, 430 (1943).

Ideal Basic Industries, Inc. v. *Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976); *see also West* v. *Standard Oil Co.*, 278 U.S. 200 (1927); *Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37, 40-41 (D.C. Cir.), *cert. denied*, 375 U.S. 822 (1963); *United States* v. *State of California (On Rehearing)*, 55 I.D. 532, 542-46 (1936). When the Department promulgated 43 CFR 4.403 to establish a 60-day limit on the filing of petitions for reconsideration for the Board of Land Appeals, the Department made it clear that no such limitation was established for the exercise of authority under 43 CFR 4.5. 52 FR 21308 (June 5, 1987). The rules cited by Forest are properly regarded as "designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary." *See Knight* v. *United States Land Ass'n, supra* at 178.

Forest next refers to the 90-day limit established by 30 U.S.C. § 226-2 (1988), for filing actions in Federal Court contesting a decision of the Secretary involving any oil and gas lease and asserts that if the Department retains jurisdiction for more than 60 days, "a party would never be assured that it could appeal to a Federal Court without the possibility of a remand to the Department" (Response at 13). Departmental regulation 43 CFR 4.21(a) has defined when a decision becomes final for purposes of seeking judicial review and many

litigants over the years have sought judicial review of the Department's decisions notwithstanding the fact that the Secretary may have continuing jurisdiction over a matter. Furthermore, that statute of limitation does not provide guidance to the exercise of Secretarial review authority because it pertains only to the initiation of action in Federal Court and contains no provision affecting other proceedings. Statutes of limitation are generally regarded not as substantive rules of law but as rules of procedure that are required to be observed only in the forum which they govern. *See Sun Oil Co.* v. *Wortman*, 486 U.S. 717 (1988). Nothing in 30 U.S.C. § 226-2 (1988), precludes the Secretary from exercising his supervisory authority.

Forest next contends that granting the petition filed after 60 days would be arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. In *Gabbs Exploration Co.* v. *Udall, supra*, the court considered whether the Secretary was *required* to exercise his authority to reopen a proceeding that had been decided 27 years before the plaintiff's efforts to reopen it. In holding that the plaintiff's own delay excused the Secretary from reopening the matter, the court referred to cases in which 3 years had elapsed before they were reopened. *Id.* at 41. MMS' petition falls well within this range.

It would be improper to characterize further review of this case as involving the retroactive application of a new rule. The Secretary did not make his decision in *Mesa* prospective only. Rather, he held that the intentional use of underpayments to offset royalty overpayments constituted an unlawful circumvention of an existing statutory requirement. To the extent that the relevant facts of the *Mesa* and *Forest* cases are essentially similar, fairness is best achieved by reaching similar results in similar cases.

[2] Appellant believes that its appeal is distinguishable from the Secretary's decision in *Mesa*. Forest asserts that most of its adjustments were taken within 2 years of the original overpayments while the majority of Mesa's greater adjustments were taken more than 2 years after the initial overpayment. This argument misses the point of the Secretary's decision. The Secretary concluded that it was the intentional nature of the underpayment to effect a refund of a prior overpayment that made the practice unlawful, not the fact that it was outside the 2-year period:

> However, in situations where a payor, like Mesa, intentionally creates an underpayment by taking a credit adjustment to recoup an overpayment made in a previous month, the overpayment always will completely offset the corresponding underpayment. Thus, the payor will have effected a refund without satisfying the statutory preconditions to receiving a refund.

(*Mesa* at 11). Thus, the Secretary disallowed crediting of any underpayment created to recoup prior overpayments, without regard to whether they were within the 2-year period or outside of it.

Alternatively, Forest asserts that it is entitled to relief, even under the *Mesa* rationale. Although *Mesa* holds that *related* overpayments and underpayments may not be offset against one another, the decision states that *unrelated* overpayments and underpayments may be offset against one another. Forest notes that while the $1,273,254.73 may be related to what MMS characterizes as unauthorized recoupments of overpayments of the same amounts, MMS is still charging Forest $1,470,904.90 for other underpayments that are not related to those overpayments. Because there are some underpayments to which the overpayments are not related, Forest believes that they should offset one another. Forest again has missed the point of the Secretary's decision. These particular overpayments cannot be used as offsets because they were related to attempts to recover them without complying with the procedures required by 43 U.S.C. § 1339 (1988).

Therefore, pursuant to the authority delegated to the Director, Office of Hearings and Appeals, by the Secretary of the Interior, 43 CFR 4.1, 4.5, the decisions of the Board in *Forest Oil Corp. (On Reconsideration), supra*, and *Forest Oil Corp., supra*, are reversed in part and the decision of the Director, Minerals Management Service, is affirmed.

ROGER E. MIDDLETON
Director

APPEAL OF MARTY INDIAN SCHOOL (ORDER)

Re: IBCA-2783 - 2785, 98 I.D. 1 *August 12, 1991*

Contract Nos. AOOC 1420-2341, -2342, & -2457, Bureau of Indian Affairs.

Order dismissing appeals with prejudice for failure to prosecute them.

APPEARANCES: John M. Peebles, Esq., Domina, Gerrard, Copple & Stratton, Omaha, Nebraska, for Appellant; Jean W. Sutton, Esq., Department Counsel, Twin Cities, Minnesota, for the Government.

ORDER

On January 17, 1991, the Board issued its decision in IBCA-2563 - 2567, 27 IBCA 303, 91-1 BCA ___, dismissing certain previous appeals with prejudice because of appellant's failure to prosecute them, and dismissing the above-captioned appeals without prejudice for the same reason, but subject to reinstatement if certain conditions were met on or before June 30, 1991. Nothing was subsequently received from the parties.

Therefore, on July 10, 1991, appellant was ordered to show cause, on or before July 31, 1991, why the above-captioned appeals should not be dismissed *with prejudice* for its failure to prosecute them.

As of this date, however, the Board has heard nothing further from either party to these appeals.

Accordingly, the above-captioned appeals are hereby dismissed *with prejudice* because of appellant's failure to prosecute them.

The appeals are hereby reinstated to the Board's active docket for the purpose of this order.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEALS OF J. C. EQUIPMENT CORP.

IBCA-2885-89 Decided: *August 19, 1991*

Contract No. H50C142202868, Bureau of Indian Affairs.

Motion To Dismiss Denied.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

3. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period

expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

APPEARANCES: Samuel A. Anderson, Kevin J. O'Brien, Constantine & Anderson, P.C., Attorneys at Law, Englewood, Colorado, for Appellant; Wayne C. Nordwall, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

The Government again has moved to dismiss these appeals, alleging that we do not possess jurisdiction to entertain them. On May 31, 1991, we denied its motion to dismiss, made on the ground that the appeals had not been filed within 3 years of our dismissal without prejudice of virtually identical appeals for lack of claim certification. *Appeals of J. C. Equipment Corp.*, IBCA Nos. 2885-89, decided May 31, 1991 (WESTLAW 107266).

Currently, the Government claims that the appeals are untimely because appellant telefaxed them to the Board on the last day of the filing period prescribed by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, but the Board did not receive the original hard copy of the appeals until the day after the filing period expired.

[1] The CDA provides: "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum * * * unless an appeal or suit is timely commenced as authorized by this chapter." 41 U.S.C. § 605(b). "Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title." 41 U.S.C. § 606. Section 607 of the CDA does not impose any limitations upon the method of appeal. Section 607(e) stresses that boards are to provide, to the fullest extent practicable, *informal* and expeditious resolution of disputes.

The Board's rule 4.102(a) (43 CFR 4.102(a)) provides:

Notice of appeal. Notice of an appeal must be in writing * * *. The original, together with two copies, *may* be filed with the Board or the contracting officer from whose decision the appeal is taken. *The* notice of appeal must be mailed *or otherwise filed* within 90 days from the date of receipt of the contracting officer's decision, if the appeal is subject to the [CDA]. [Italics added.]

The 90-day appeal period established by the CDA is a statutory limitation upon jurisdiction and cannot be waived by the Board. *Cosmic Construction Co.* v. *United States*, 697 F.2d 1389 (Fed. Cir. 1982). In calculating the 90-day period, the date of receipt of the contracting officer's decision is excluded and the date of filing the appeal is included. *Appeal of Wadman Corp.*, ASBCA No. 41603, 91-1 BCA ¶ 23,547. It is undisputed that appellant received the contracting officer's decision on September 4, 1990, and that its appeal was due within 90 days thereafter, that is, on or before December 3, 1990.

The appeals were received in full by telefax at 1:16 p.m. EST on December 3, 1990, and file-stamped by the Recorder of the Board as received on that date. Appellant sent the original hard copy of the appeals to the Board on December 3, 1990, by Federal Express. The Board received them the next day. Appellant also telefaxed the appeals to the contracting officer on December 3, 1990.

The only requirement imposed by the CDA is that an appellant appeal within 90 days of receipt of the contracting officer's decision. In the area of timeliness of a contractor's appeal, that is the only *jurisdictional* limitation upon our ability to accept appeals.

[2] Our rule 4.102(a) provides that a contractor "may" submit an original and two copies of its notice of appeal but that "the" notice of appeal "must" be mailed "or otherwise filed" within 90 days from receipt of the contracting officer's decision. Regardless of the intended import of the juxtaposition of "may" and "must," if any, the fact remains that the CDA does not impose any requirement concerning the nature or number of copies of a notice of appeal.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. Accordingly, it is always within our discretion to relax or modify that part of the rule in the interests of justice. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 537, 539 (1970).[1]

[3] Concerning the jurisdictional filing limitation, our rule 4.102(a) provides that an appeal must be mailed, or "otherwise filed" within the 90-day time limit. Consistent with the various boards of contract appeals, we follow the longstanding caselaw that, unless an appeal is placed in the United States mails (when the postmarked date of mailing is accepted as the filing date), a notice of appeal must be *received* by the Board before the expiration of the filing period in order to be deemed "filed." Delivery to a commercial carrier is not the equivalent of filing with the Board. *See, for example, Appeal of C.R. Lewis Co.*, ASBCA No. 37200, 90-3 BCA ¶ 23,152; *Appeal of Tyger Construction Co.*, ASBCA Nos. 36100, 36101, 88-3 BCA ¶ 21,149.

In its attempt to persuade us that appellant's appeals should be rejected, the Government cites *Protest of Integrated Systems Group, Inc.*, GSBCA No. 11075-P, 91-2 BCA ¶ 23,790. There, the General Services Administration Board of Contract Appeals (GSBCA) found a protest received by telefax to be untimely. The telefaxed transmission began before the closing time for filing, but certain pages of the facsimile were received after the deadline. Although *Integrated Systems* is not a CDA case, the GSBCA's holding actually supports the use of facsimile as an acceptable means of filing: "The Board concludes that

[1] Moreover, in practice, although we expect those who litigate in our forum to inform themselves about our rules, as long as a particular submission obviously is intended as a notice of appeal, this Board will not reject it, regardless of format or the number of copies, if it is timely.

filing occurs when a facsimile submission is completed -- that is, when the Board possesses a hard copy of the entire submission." 91-2 BCA at 119,149.

The Government also states that, in *Tyger, supra*, the Armed Services Board of Contract Appeals (ASBCA) acknowledged that it does not accept telefaxed appeals.[2] It is our understanding that while the ASBCA, the Corps of Engineers Board of Contract Appeals, and the Department of Transportation Board of Contract Appeals do not accept such appeals, the other eight boards of contract appeals do accept them. Some require that the original hard copy be filed within the 90-day time limit; some require only that the original hard copy be received within a reasonable time, even if after the 90-day appeal period; and some do not require the original hard copy at all.[3]

Moreover, citing the CDA's language requiring only that the contracting officer "mail or otherwise furnish a copy" of his decision to the contractor, 41 U.S.C. § 605(a), the ASBCA in *Tyger* held that the contractor's period for appealing under the CDA commenced when it received the facsimile copy of the contracting officer's decision, despite the fact that the contractor did not receive the original hardcopy until one week later. The Board disposed of some of the same concerns raised by the Government here concerning telefaxed transmissions:

> Appellant argues that telecopies should not be acceptable as sufficient legal notices because the machines often go unattended and facsimiles may be blurred, incomplete or not received at all.
>
> * * * * * * *
>
> With respect to the alleged unreliability of telecopiers, * * * Appellant does not deny receipt was confirmed, nor does it claim the telecopy differed in any respect from the copy of the contracting officer's decision it received in the mail. Appellant received a complete facsimile of the contracting officer's decision. Thus, in this case, no telecopying error occurred.
>
> * * * The only relevant fact is that the Government has proved it delivered a copy of the contracting officer's decision, whose contents complied with law and regulation, to appellant. The means of delivery it used is immaterial.

88-3 BCA at 106,779.

Neither the CDA nor our rule 4.102(a) precludes telefaxing as an acceptable form of filing. As noted, the CDA stresses that boards are to resolve disputes informally to the extent practicable.[4] In this case, the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the 90-day filing period prescribed by the CDA. We received the identical original hard copy the next day.

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[2] In *Tyger* it was noted that the ASBCA does not have the "capability of receiving" telecopied materials. Although our Board is not equipped to receive massive transmissions by telefax, we are able to receive notices of appeal by telefax.

[3] Board rules and practice may change. Appellants should not rely upon our information, but should familiarize themselves with a particular Board's requirements.

[4] Facsimile transmissions are common in the 1990's. In fact, although we are making no ruling on this issue, a telefaxed notice of appeal may qualify as a Federal record:

"Facsimile transmissions have the same potential to be Federal records as any other documentary materials received in Federal offices. They are Federal records when (1) they are received in connection with agency business *and* (2) they are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain." (Italics in original). Nat'l Archives & Records Admin. (NARA) June 26, 1991, Bulletin No. 91-6 to the Heads of Federal agencies.

Although there is no statutory requirement that a contractor send the appeals to the contracting officer, appellant also sent them to the contracting officer by telefax within the filing period. There is no conceivable prejudice to the Government arising from the fact that the appeals were telefaxed.

We hold that, although we do not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the CDA's 90-day filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Accordingly, the Government's motion to dismiss is denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

APPEAL OF SERVICES ETCETERA

IBCA-2941 Decided: *August 22, 1991*

Contract No. BP 4870-1-0016, National Park Service.

Decision Approving ADR Settlement.

APPEARANCES: Kimberly A. & Robert G. Martin, Services Etcetera,West Hazelton, Pennsylvania, for Appeallant; James E. Epstein, Esq., Department Counsel, Newton Corner, Massachusetts, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal was docketed by the Board on July 8, 1991. Services Etcetera (contractor or appellant) had entered into a one-year cleaning services contract (BP 4870-1-0016) with the National Park Service (NPS) for cleaning three buildings owned by NPS at its Upper Delaware Scenic Recreational River site. The contract term was October 1, 1990, through September 30, 1991. The cleaning was to be done during non-business hours.

Soon after performance under the contract commenced, however, the parties began to disagree over the adequacy of the contractor's weekend cleaning. Different NPS inspectors gave different evaluations of appellant's services, and one in particular gave it consistently poor

marks; but appellant's owner argued that the buildings involved were often used during weekends *after* its cleaning had been performed; whereas, the inspections were not made until the following workday. The parties finally agreed to disagree, and on April 11, 1991, the contracting officer (CO) gave appellant notice of termination for default.

The contractor protested, and the CO relented, agreeing to change the default termination to a termination for the convenience of the Government and to pay the amount the contractor would have earned during the notice period, provided that the contractor would sign the standard claim release form.

However, the contractor refused to sign the form, and it further objected that it had nothing in writing to show that the termination had been changed from one for default to one for Government convenience. It initially also alleged that it should be paid for the entire contract period, and not merely for the period prior to the effective date of the termination. The CO refused any further relief, and the contractor appealed to the Board, expressing a willingness to submit to a summary trial with binding decision.

Government counsel initially objected to the use of ADR procedures, so the Board on its own initiative carefully reviewed the appeal (rule 4) file as soon as it had been received, in order to learn the details of the case. As a result of this review, the Board on July 23, 1991, sent a letter to the parties (Appendix A), setting out its understanding of the facts and the law involved and requesting the parties' comments within 30 days of their receipt of the letter. Specifically, the Board asked why the convenience termination then being proposed by NPS did not resolve the problem.

Appellant responded on July 26, 1991, stating that NPS had not anywhere made clear that it was changing the original default termination to one for convenience and that, until that was done, the default termination was still an issue. The Board at that point requested a conference call with the parties.

A conference call was held on August 6, 1991. During the call, the Board and Government counsel agreed that appellant's request for a clear statement of the nature of the termination was reasonable, and Government counsel agreed to provide appellant with a letter on behalf of the CO that the termination was specifically one for convenience, and that no allegations of default were any longer outstanding. The parties also agreed that, once the letter had been received by appellant, further Board involvement would not be necessary.

On August 13, 1991, the Board received a copy of a letter sent by Government counsel to appellant, dated August 7, which appeared to fulfill the conditions agreed upon during the conference call, and which also requested on behalf of both parties that the appeal be dismissed with prejudice subject to the terms of the letter (Appendix B). No objection has been received from appellant.

August 22, 1991

Accordingly, the settlement is approved as requested, and the appeal is hereby dismissed with prejudice, subject only to the terms and conditions of the settlement being carried out.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPENDIX A

CERTIFIED--RETURN RECEIPT REQUESTED

July 23, 1991

Mrs. Kimberly Martin, Owner
Services Etcetera
10 Deer Run Road
West Hazelton, PA 18201

James E. Epstein, Esq.
Department Counsel
Interior Department
Newton Corner, MA 02158

Re: IBCA 2941, Appeal of Services Etcetera

Dear Appellant and Counsel:

The appeal file pertaining to the above-captioned case arrived yesterday, and in view of appellant's specific request for the use of a summary trial with binding decision, I have taken time to read it in its entirety.

Although neither side need submit to ADR procedures without its consent, there are aspects to this appeal worth calling to your attention immediately in order to save both sides time and money in prosecuting the appeal, assuming that I understand the posture of the case correctly. If I do not, please so inform me either by letter or by conference call.

It is my understanding from the appeal file (Tab 26) that the Park Service on June 20 agreed to appellant's demand that it be paid $183.27 for the full 30-day notice period and that any reference to a default termination be stricken from the record. However, Tabs 24 and 25 indicate that appellant has refused to sign a release, and Tab 25 contains a note to the file that appellant stated on June 17 that it now wants to be paid for the entire one-year term of the contract.

Without in any way deciding in advance either the factual or legal issues involved in this appeal, the Board would like to call the parties' attention to the following:

1) The Federal Acquisition Regulation (FAR) at 48 CFR 49.502(c) and 52.249 requires Federal procurement contracts to contain a provision permitting the Government to terminate contracts for its own convenience, regardless of the term of the contract. In such cases, the appellant is normally entitled to receive payment of any "substantial" unrecovered and provable costs that it may have incurred in preparing for and carrying out the contract.

2) Although the contract in this case appears not to contain the clause, the Court of Claims in the well-known *Christian* case, 160 Ct. Cl. 1, 312 F.2d 418 (1963), held that a convenience termination clause, if required by regulation, *should be read into* a Government contract even where it has been omitted. In this appeal, the form of the clause that the contract arguably should have contained is set forth at 48 CFR 52.249-4, which deals with service contracts and provides that "If this contract is terminated, the Government shall be liable *only* for payment under the payment provisions of this contract *for services rendered before the effective date*

of termination." Thus, what are known as "anticipatory profits" are generally not payable where a service contract has been terminated for the Government's convenience: The contractor is entitled to payment only for services actually performed.

3) The foregoing language would not appear to affect payment for services during the 30-day notice period, but it would appear to preclude any payment for services (that were not performed) after that time.

4) It is routine and, in fact, normally required for a contracting officer to require a release of claims at the time of a final contract payment. Thus, the release of claims requested by the contracting officer at page 26-4 of the appeal file appears to be a standard form and is not in any way unusual in connection with a final contract payment.

If the parties to this appeal are in agreement with the above statements of the law that appears to be applicable to this appeal, then it would appear to be in order for them to settle this matter on the basis of the Park Service's June 20 letter, rather than continue the appeal before the Board. If, however, they do not agree with the propositions set forth, then it would appear appropriate for them to write to the Board and tell us why its initial view of the matter is incorrect. That will obviate the need for further formal pleadings and motions, and presumably the need for a hearing as well.

Please provide me with the benefit of your views, in whatever form you choose, within 30 days of your receipt of this letter.

Thank you for your cooperation in this effort to expedite the resolution of your dispute.

SINCERELY,
(signed)Bernard V. Parette
Bernard V. Parrette
Administrative Judge

APPENDIX B

91-798; NPS.NE2834

August 7, 1991

Robert Martin & Kimberly Martin
Services Etcetera
10 Deer Run Road
West Hazelton, Pennsylvania 18201

Interior Board of Contract Appeals
Office of Hearings and Appeals
U.S. Department of the Interior
4015 Wilson Boulevard
Arlington, Virginia 22203

Re: Contract No. BP4870-1-0016, Cleaning Services,
Upper Delaware Scenic Recreational River
(IBCA-2941)

Dear Sirs/Madams:

By authority of the Contracting Officer and in accordance with discussions between the Government and Services Etcetera, this will confirm that: 1) the above referenced contract is deemed terminated for the Convenience of the Government, 2) the amount $183.27 has been paid by the Government and received by Services Etcetera as complete and final payment of all costs and claims in connection with the said termination, 3) any and all references to a default termination in connection with the said contract are deleted, and 4) the said contract is deemed modified by this letter which is to be deemed a part of the said contract.

By copy of this letter to the Interior Board of Contract Appeals, the parties notify the Board that IBCA-2941 has been settled and do request that said appeal be dismissed with prejudice subject to the terms of this letter.

SINCERELY,
(signed) James E. Epstein
JAMES E. EPSTEIN
Deputy Regional Solicitor, Northeast
and Department Counsel

September 4, 1991

APPEALS OF MARC INDUSTRIES

IBCA-2905 & -2906 Decided: *September 4, 1991*

Contract Nos. F950-C1-0004 & 0005, Bureau of Land Management.

Denied.

Contracts: Construction and Operation: Contracting Officer--Contracts: Construction and Operation: Labor Laws--Contracts: Disputes and Remedies: Burden of Proof

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

APPEARANCES: Nancy Holton, Owner, Marc Industries, Las Vegas, Nevada, for Appellant; Stephen R. Palmer, Esq.,nia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Background

On October 1, 1990, the Bureau of Land Management (BLM) entered into two 1-year negotiated contracts with Marc Industries of Las Vegas, Nevada (contractor/appellant), a small business contractor, for janitorial services at its Tonopah Resource Area (Contract No. F950-C1-0004, IBCA-2905) and its Winnemucca District Office (Contract No. 950-C1-0005, IBCA-2906).

The contracts were subject to the Service Contract Act. Neither contained any breakdown of costs; rather, each was bid simply at a specified price per month of services. Since both work locations were a considerable distance from both the contractor's and the contracting officer's (CO's) offices in Las Vegas and Reno, Nevada, respectively, the contracts provided that the COR and/or PI would be the contractor's primary contacts.

The contractor, a woman-owned sole proprietorship, had 9 years' previous experience in providing janitorial services under Government contracts, allegedly without problems, and initially all went well at the job sites. However, shortly before the contracts were let, the owner went under a doctor's care and was advised to curtail some of her activities, so her husband had to fill in for her in various capacities. BLM was informed at the time that the husband had legal authority

to act for her only in connection with BLM's prework conference. Otherwise, the owner herself was still in charge.

Unknown to appellant, however, her husband apparently acquiesced in informal arrangements with the onsite Spanish-speaking employees involved whereby they were permitted to bring in relatives in order to help them perform their janitorial tasks more quickly, but subject to the same hourly rate multiplied by the same number of hours that had been originally estimated for their cleaning services. However, the employees and their "assistants" apparently began putting in as many hours at the job locations as the employees alone would have done if they had performed their cleaning tasks unassisted.

When one of the cleaning persons at the Winnemucca site brought to the attention of the contracting officer's representative (COR) the fact that she was receiving less than the minimum hourly rate specified in the contracts, and further alleged that wages were not being timely paid, the CO in early November 1990 called the U.S. Department of Labor (DOL) to inquire what to do, particularly in light of the fact that some of the additional "employees" did not even possess a green card establishing their status as immigrants. DOL's compliance officer nevertheless advised that everyone who actually performed work under the contract was entitled to the minimum Service Contract Act wage; so the CO asked the COR to document the unpaid hours that had been worked. The report was written and cosigned by the COR on November 26. Meanwhile, however, the CO had already made an official referral of the Winnemucca complaint to DOL on November 13.

On November 28, 1990, the CO called the contractor and pointed out that an employee's cousin was apparently working the same hours as the employee but was not being paid. The contractor responded that the cousin was only helping out and was not an employee. The contractor then wrote to the employee the same day telling her that only 6 hours of work per night would be paid for, regardless of whether the employee personally worked those hours, or she and her cousin worked 3 hours each, since the use of a helper was solely for the employee's own convenience.

When another labor problem allegedly arose at the Tonopah site, the CO on January 7, 1991, formally referred to DOL another possible violation of the Service Contract Act at that site. Appellant alleges that as a result of the CO's interference, she had to pay to DOL total additional wages (pursuant to a settlement) in the amounts of $1,051.96 (Winnemucca) and $572.65 (Tonopah), for which BLM should be liable, because, according to information provided to her by the contractor's employees, BLM's employees (specifically, the CORs) continually told the contractor's employees that they should take all the time they needed to perform the contract work inasmuch as the contractor was required to pay them for whatever time they put in. Thus, the employees (and their assistants) allegedly put in unnecessary

additional hours at both sites so that they could be paid more. The appeals were submitted for decision on the record.

In affidavits, the CO and the COR's deny that they interfered in any way with either of the two contracts. The CO states that she sent her November 13 letter to DOL because she had received a complaint about wage noncompliance at the Winnemucca site, and that her experience with that contract prompted her to request that the COR ask the contractor's employee at the Tonopah site about her hours and wages. When the sole employee responded that she also was not being properly compensated for the work done, the CO again wrote to DOL. But both the CO and the COR's deny ever having told the contractor's employees to inflate their hours.

Appellant's submission consists of a four-page letter alleging that the CO was prejudiced against the contractor because of a recent bid protest to the General Accounting Office (GAO), which was enclosed; that the COR's were inexperienced and that they thus improperly encouraged the contractor's employees to falsify their hours; and that the CO did nothing to mitigate the alleged employee wage problems once they were known. Appellant urges the Board to interview each of the six contracting officers it has dealt with during its 9 previous years of operation, and it encloses an unsworn statement from its replacement employee at the Tonopah site stating that if it takes anyone longer than 2 hours to clean the two buildings involved, the cleaning person "must be dragging their feet on purpose."

The appeal file contains numerous photocopies of contemporaneous documents and memoranda pertaining to the performance of the contract at the two sites. It also contains an undated letter from the DOL Compliance Officer to the Director of BLM's Contracting Division expressing DOL's gratitude for all the assistance and help it received from the CO in this case.

Discussion

Much as it may share appellant's suspicions about the CO's and the CORs' unwise handling of the contractor's employees at the two sites, the Board concludes that it cannot grant the relief that appellant seeks--namely, reimbursement from BLM for the $1,624.61 in additional wages it had to pay in order to resolve the wage dispute with DOL.

The problems are primarily two: First, appellant, while providing reasonably credible allegations about how the problem arose, fails to supply the degree of proof necessary to overcome BLM's sworn denials and its contemporary working logs. In the Board's order settling the record, we admonished:

> The parties are reminded that this appeal appears to involve contested facts. Thus, it may be important to the parties' interests to provide the Board with specific proof of their various allegations, *such as affidavits from employees (including narrative accounts*

from the principals involved), copies of telephone logs and memoranda to the files, and any relevant correspondence not already included in the appeal file * *. [Italics added.]

Unlike GAO and DOL's Compliance Officer, the Board does not have investigative facilities, and its resolution of an appeal on the record is based entirely upon evidence supplied by the parties and the contracting officer involved. Mere allegations without proof, and evidence of good past contract performance, are not sufficient to overcome contemporary records and affidavits relating to the specific case before us. Indeed, strictly speaking, evidence relating to appellant's performance under previous similar contracts is not even relevant to the issues in the case before us. Hence, the appeal must be denied on the basis of a failure of sufficient proof of appellant's allegations.

Second, and equally important, however, is the fact that, as every experienced contractor recognizes and as appellant in this case in effect asserts, it is the contractor and not the CO or the COR who is responsible for the control and supervision of its own employees.

Thus, even if appellant here had supplied us with more probative evidence of actual attempts by the Government to interfere with the duties of, or the hours worked by, the contractor's employees at these sites, appellant would still have the burden of proving that any alleged changes were ordered or directed by the Government, and that they were beyond the scope of the contract.

Clearly, the COR's had a legitimate interest in monitoring the performance of the contracts at the two sites; and only if their monitoring expanded into actual supervision of the contractor's workers, as opposed to comments on the quality and adequacy of their cleaning efforts, would BLM likely be responsible for any extra hours involved. For, as appellant has noted, it was the employees' duty to report to, and to satisfy, their employer; and it was up to the employer to ensure that BLM was satisfied.

We are aware that the provision of janitorial services at distant sites is a difficult business to manage, but that cannot and should not change the nature of the employment relationship. If appellant's workers were putting in more hours than they were instructed by their employer, and/or more hours than were the basis of appellant's bid, that is something that the contractor, rather than the Government, must monitor and correct.

If problems arise that are known to the Government but unknown to the contractor, then the Government, in accordance with its duty of cooperation, should promptly so inform the contractor (as was done here). But if the matter involves wage and hour problems, and the CO believes that the contractor is not taking sufficient steps to resolve the issues expeditiously, then the CO cannot be regarded as at fault for reporting them to the Government agency that is responsible for enforcing the laws involved--namely, DOL. That appears to be what happened here.

The facts that the CO may have been biased against the contractor, if true, and that the contractor at the time was under a doctor's care, are essentially irrelevant. The duties involved on both sides are defined without regard to such extraneous factors. And here, it was up to the contractor, not the CO or the COR's, to determine how many hours its employees should work, and to see that they did not exceed that number.

In summary, we conclude that for the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

Decision

Accordingly, the appeals are denied in their entirety.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE

121 IBLA 1 Decided *October 4, 1991*

Appeal from a decision of the Deputy State Director, Utah State Office, Bureau of Land Management, affirming a Record of Decision and Finding of No Significant Impact issued by the Area Manager, San Juan Resource Area, approving six Applications for Permits to Drill. U-51619 *et al.*

BLM decision suspended pursuant to 43 CFR 4.21(a) pending decision on appeal.

1. Appeals: Generally--Appeals: Jurisdiction--Board of Land Appeals--Bureau of Land Management--Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Drilling

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals

suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Animal Protection Institute of America, 79 IBLA 94, 91 I.D. 115 (1984); *Utah Wilderness Ass'n* 91 IBLA 124 (1986); *Southern Utah Wilderness Alliance*, 100 IBLA 63 (1987), *overruled to the extent inconsistent.*

APPEARANCES: Scott Groene, Esq., Moab, Utah, for Southern Utah Wilderness Alliance; Christine Osborne, Salt Lake City, Utah, for Utah Chapter of The Sierra Club; A. Scott Loveless, 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

The Southern Utah Wilderness Alliance and the Utah Chapter of the Sierra Club have appealed the May 23, 1991, decision of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management (BLM), affirming the April 4, 1991, Decision Record and Finding of No Significant Impact issued by the Area Manager, San Juan Resource Area, approving six Applications for Permits to Drill (APD's) exploratory wells in the White Canyon area of San Juan County, Utah.

On June 6, 1991, appellants filed a request for a stay of the April 4, 1991, decision.[1] In their request for a stay appellants argue that a stay of BLM's decision pending our review "will protect the status quo." Appellants continue:

> This is not a matter where an oil and gas operator requests the suspension of a compliance order so that a company can proceed with drilling activity. No ground disturbance will occur if this decision is suspended. None of the resources which the BLM is mandated by FLPMA to protect, such as watershed, wildlife and fish, natural scenic, scientific and historical values[,] will be damaged if this decision is suspended. The BLM's ability to manage these lands for oil and gas development will not be affected should the San Juan Resource Area Manager's decision upon review ultimately be found to be in accordance with law. There will be no irretrievable commitment of resources should the decision be suspended.
>
> Rather, Appellants seek a delay in the [BLM's] ability to implement a decision which will damage natural resources. This delay merely preserves the status quo for a modest amount of time, until the matter can be heard more fully by this Board.
>
> Suspending this decision will not be detrimental to the interest of BLM. Rather, suspension of the decision will ensure that interests the agency is required to protect under the FLPMA and the NEPA will be protected until this Board has made a determination on Appellants' appeal.

(Request for Expedited Review and Stay at 4).

In our August 12, 1991, order granting BLM's request for an extension of time to file its answer, we noted that 43 CFR 3165.4(c) provides that the filing of an appeal "shall not result in a suspension

[1] In their notice of appeal of the Feb. 1990 decision of the San Juan Resource Area Manager appellants stated that its filing "shall stay the captioned action until the Interior Board of Land Appeals renders a decision," in accordance with 43 CFR 4.21(a). *Utah Chapter Sierra Club*, 114 IBLA 172, 174 (1990).

of the requirement for compliance with the order or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the order or decision will not be detrimental to the interests of the lessor." We directed BLM to include in its answer a response to appellants' request for a stay, including any criteria BLM believes should be considered in determining whether granting a stay would be detrimental to the interests of the lessor. *Cf. Marathon Oil Co.*, 90 IBLA 236, 244-47, 93 I.D. 6, 11-13 (1986).

BLM filed its answer on August 30, 1991, and Errata on September 3, 1991. It included a response to appellants' request for a stay. It argues:

> In *Utah Chapter Sierra Club*, 114 IBLA 172, issued April 20, 1990, the Board held that the State Director review provided for in 43 C.F.R. § 3165.3(b) is mandatory before an appeal may be taken to the Board under 43 C.F.R. § 3165.4(a), whereas BLM had previously considered the two routes as alternative in nature, as the previous iteration of this regulation was under the former 43 C.F.R. §§ 3165.3 and 3165.4. The regulations at 43 C.F.R. § 3165.4(c) only deal with the effect of an appeal on compliance requirements, i.e. orders by the authorized officer enforcing or specifying conditions that must be met by an operator, etc. The present appeal is not an appeal of compliance requirements, and the BLM accordingly submits that § 3165.4(c) is not the appropriate authority under which to consider whether the proposed action should be stayed. Should the Board deem otherwise, the BLM submits the its (lessor's) interests are fully protected by the stipulations in the leases and APDs and that no stay is needed.[4]
>
> * * * * * * *
>
> BLM therefore submits that the appropriate criteria for considering a stay would be the same as for a preliminary injunction in Federal District Court: likelihood of success on the merits, relative harm to the parties, and public interest issues. * * *
>
> These criteria would allow for an immediate summary review of the NEPA compliance record, the likely effects on both parties and likely effects on the public interest. BLM suggests that the Board adopt this standard now, by decision, and then implement it more formally by promulgating regulations.

[4]The language of the regulation emphasize[s] that § 3165.4(c) was written in anticipation of a *Lessee* appealing the propriety of given lease stipulations. It is illogical for a third party to cite this regulation as authority to stay action, purporting to protect the interests of its opponent in the appeal. It does make sense for BLM to seek a stay, in a challenge by a lessee to lease stipulations, because the stipulations were presumably imposed to protect other of the resources BLM is obligated to protect. [2]

(Answer at 22).

On September 20, 1991, appellants filed a reply, stating in part:

> Appellants do agree with the BLM it is illogical for the provisions of 43 CFR 3165.4(c) to be applied to Appellants' appeal at all. As BLM points out, that regulation appears to apply only where compliance orders are challenged by a lessee. The stay provisions of 43 CFR 4.21(a) should accordingly control the effect of decisions to approve APDs.

(Reply at 13).

[2]Of course, if the lessee or operator appeals the denial of an APD or the imposition of conditions on an approval he believes are too stringent, 43 CFR 4.21(a) does not mean he may proceed to drill or to ignore the conditions; rather, the APD remains pending until a decision on the denial or conditions is rendered. BLM would therefore not be required to seek a stay in these circumstances, as it suggests.

The parties' pleadings have caused us to reexamine the regulations dealing with appeals of orders and decisions under the oil and gas operations regulations and our decisions applying those provisions.

The Oil and Gas Operating Regulations Applicable to Lands of the United States and to All Restricted Tribal and Allotted Indian Land (Except Osage Indian Reservation), effective November 1, 1936, authorized a supervisor of the Geological Survey (GS)

> to require compliance with lease terms, with these regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil and gas with minimum waste.

56 I.D. 415, 416-17 (1936). A supervisor was authorized to "[r]equire, by written notice or otherwise, immediate suspension of any operation or practice contrary to the requirements of these regulations or to the written orders of the supervisor," and to "[r]eceive and transmit promptly for review all appeals from his written orders, together with his report." Section 1(k), (l), *id.* at 418-19. Section 6 gave the lessee a right of appeal to the Secretary "*after complying with any order* intended to carry out the terms and spirit of these regulations." *Id.* at 436 (italics added).

The 1936 regulations were superseded by the oil and gas operating regulations adopted effective June 1, 1942. Those regulations also authorized a GS supervisor "to require compliance with lease terms, with the regulations in this part, and with all other applicable regulations," 30 CFR 221.4 (1949), as well as the responsibility to "enforce these oil and gas operating regulations, and his orders issued pursuant thereto by action provided for in Secs. [30 CFR] 221.53 and 221.54." 30 CFR 221.16 (1949). 30 CFR 221.66 (1949) contained the original language from which the current regulation -- 43 CFR 3165.4(c) -- was derived:

> *Appeals.* An appeal from *any order* issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. *Compliance with any such order shall not be suspended by reason of an appeal having been taken* unless such suspension is authorized in writing by the Director, or the Secretary (dependent upon the officer with whom the appeal is pending), and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. [Italics supplied.]

In 1973, the Department added 30 CFR Part 290 consolidating procedures for appeals to the Director of GS. GS explained:

> The former regulations in title 30 provided for appeals to the Director, Geological Survey, and the Commissioner of Indian Affairs only from decisions or orders of Oil and Gas Supervisors and Mining Supervisors. New part 290 expands the right of appeal also to include appeals from decisions or orders which may be issued by other officials of the Conservation Division under the revised organization of that Division. * * * A change effected by part 290 is to enlarge the time for taking an appeal from an order or decision of an Oil and Gas Supervisor from 20 days to 30 days from receipt of the order or decision. This change is made to obtain uniformity with other appeals procedures in the Department applicable to public lands cases generally.

38 FR 10000 (Apr. 23, 1973). "Order" in 30 CFR 221.66 was expanded to "orders or decisions" in order to make this rule consistent with the language of the regulations providing for appeals from decisions or orders of mining supervisors. *See, e.g.*, 25 CFR 177.11 (1972), 43 CFR 23.12(a) (1972). Before this change in 1973, the only mention of a "decision" by a supervisor in the oil and gas operating regulations referred to decisions "presented for reconsideration pursuant to § 221.66." 30 CFR 221.17 (1972). The language of § 221.66 about "regulations in this part" and "compliance * * * shall not be suspended" remained unchanged. 38 FR 10002 (Apr. 23, 1973). As a result of the 1973 amendment, 30 CFR 221.66 provided:

> Orders or decisions issued under the regulations in this part may be appealed from as provided in part 290 of this chapter. Compliance with any such order or decision shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director or the Board of Land Appeals (depending upon the official before whom the appeal is pending) and then only upon a determination that such suspension will not be detrimental to the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

Under the 1942 regulations, a lessee intending to commence drilling gave notice in advance and could not begin before approval by the GS Supervisor. 30 CFR 221.58 (1972). The notice was to be provided "in ample time for proper consideration and action" by submitting a Form 9-331A or 9-331B in triplicate; in an emergency it could be given "orally or by wire." *Id.* If approval was obtained in an emergency, the "transaction [was to] be confirmed in writing as a matter of record." *Id.* Under normal circumstances, approval was granted when the Supervisor returned a signed copy of Form 9-331A to the lessee; no order or decision was issued.

In 1975, as a result of the enactment of the National Environmental Policy Act of 1969, GS proposed NTL-6, Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases, "to formalize its procedures for approval of all applications for permits to conduct operational or construction activities on onshore Federal and Indian oil and gas leases." 40 FR 52637 (Nov. 11, 1975). Before adopting NTL-6, GS added provisions "to guarantee U.S. Geological Survey action prior to lease expiration or within 30 days, whichever occurs first, or otherwise to advise lessees and operators concerning the delay." 41 FR 18116 (Apr. 30, 1976). The NTL established the requirement for filing an APD on Form 9-331C, with specified information, for approval by the GS District Engineer prior to the commencement of drilling operations. Approval was granted when the lessee or operator was provided an "approved copy of the permit and surface use plan." 41 FR 18117 (Apr. 30, 1976). No order or decision was issued.

In 1981, GS undertook to "revise and modernize the regulations in 30 CFR Part 221." 46 FR 56564 (Nov. 17, 1981). As adopted in 1982, the revised Part 221 included the NTL-6 requirement for an APD,

modified what the APD must include, and required initiation of the permitting process "at least 30 days before commencement of operations is anticipated." 30 CFR 221.23(d), 47 FR 47769 (Oct. 27, 1982). In response to the suggestion that "all operations be approved or rejected within a certain time frame," 46 FR 56564 (Nov. 17, 1981), GS committed to approve the application (with or without modifications or stipulations), return it with a statement of the reasons for disapproval, or advise the operator why a decision would be delayed beyond 30 days and when it could be expected. 30 CFR 221.23(f), 47 FR 47769 (Oct. 27, 1982). Reasons for delay and expected date of decision were to be in writing. *Id.* "Orders and notices" were employed to provide "other information" and implement the regulations. 30 CFR 221.2 (definition of "Notice to Lessees and Operators"); 30 CFR 221.23(e), 47 FR 47769 (Oct. 27, 1982); 47 FR 47762 ("Details concerning the actual items which must be provided in the [drilling] plan are included in applicable orders and notices."); 46 FR 56565 (Nov 17, 1981). In October 1983 BLM adopted Onshore Oil and Gas Order No. 1, "Approval of Operations on Onshore Federal and Indian Oil and Gas Leases," a revision of NTL-6 designed "to redefine and to describe more clearly the requirements for filing and processing applications for permits to drill (APD)." 48 FR 48916 (Oct. 21, 1983).

In the 1982 revision of the regulations, the "orders or decisions" language of the appeals provision was expanded to "[i]nstructions, orders or decisions," thus including a reference to the Supervisor's authority to issue "written orders or instructions" in the event of an act of noncompliance. *See* 30 CFR 221.50, 47 FR 47771 (Oct. 27, 1982). The "regulations in this part" language remained unchanged. The language about compliance was revised to read: "An appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken * * *." 30 CFR 221.73, 47 FR 47773, (Oct. 27, 1982), redesignated as 43 CFR 3165.4, 48 FR 36586 (Aug. 12, 1983). The comment on this revision stated: "Only one comment expressed concern that the filing of an appeal does not automatically stop the action being appealed. The section * * * does provide for this concern, and no change has been made." 47 FR 47765 (Oct. 27, 1982).

The 1982 revisions also added a "technical and procedural review" in response to suggestions that 30 CFR §§ 221.17 and 221.61 [sic] [be modified] "to provide for the prompt correction of erroneous or unreasonable decisions." 46 FR 56565 (Nov. 17, 1981). GS explained:

> If a lessee or operator exercises this review option, a decision will be given by the appropriate GS official within 10 working days. This procedure is not considered to be an appeal and will not affect the lessee or operator's rights to formally appeal to the Director. It will provide the lessee a method of obtaining review and a prompt decision from any decisions or requirements he considered incorrect pertaining to technical and procedural requirements. Legal issues will not be addressed by this review.

Id. As adopted, this new regulation provided that a request for technical and procedural review also would not result in a suspension

of the instruction or order unless the reviewing official so determined. 30 CFR 221.72, 47 FR 47773 (Oct. 27, 1982), redesignated as 43 CFR 3165.3, 48 FR 36586 (Aug. 12, 1983). When this regulation was redesignated in 1983 it provided that the technical and procedural review would be conducted by the appropriate BLM State Director. *Id.*

Our first decision after this new regulatory procedure was adopted was *Animal Protection Institute of America*, 79 IBLA 94, 91 I.D. 115 (1984). In that decision we declined to grant BLM's motion to dismiss an appeal from its decision giving overall approval to the drilling of 16 oil and gas wells and the construction of approximately 18 miles of associated roads and pipelines in the Little Book Cliffs Wilderness Study Area. The basis for this holding was that review of the cumulative effects of the proposed wells would be difficult if at some later date we were to attempt to assess the cumulative effects in the context of appeals from several grants of separate APD's. In a footnote we stated:

> Decisions of BLM concerning rights-of-way and applications for permits to drill are not stayed pending appeal. *See* 43 CFR 2804.1(b); 43 CFR 3165.4, 48 FR 36586 (Aug. 12, 1983) (formerly 30 CFR 221.66). Such decisions are final for purposes of the Administrative Procedure Act and, thus, subject to direct judicial review. *See* 43 CFR 4.21(b).

79 IBLA at 102 n.3, 91 I.D. at 120 n.3. We noted in our decision that BLM sought to have us place the decision on appeal in full force and effect if we did not grant its motion to dismiss. 79 IBLA at 95, 91 I.D. at 116.

Utah Wilderness Association, 91 IBLA 124 (1986), appears to be the first case in which a party appealing a BLM decision to approve an APD filed a motion to stay the decision pending the outcome on appeal. We said:

> Appellant contends that * * * operations under [the] permits should be suspended pending a determination whether approval of the APD's was proper.[4]

[4]On May 21, 1984, appellant specifically filed a motion to stay the effect of the BLM decisions approving the APD's involved, either under 43 CFR 4.21(a) or 43 CFR 3165.4. The regulation at 43 CFR 4.21(a) provides that a decision will be stayed during the time an adversely affected person may appeal and during the pendency of any appeal except where relevant regulations provide otherwise. However, 43 CFR 3165.4 provides that appeals from "[i]nstructions, orders or decisions issued under the regulations in [43 CFR Part 3160 (Onshore Oil and Gas Operations)] * * * shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken," unless the Board invokes a suspension. In *Animal Protection Institute of America*, 79 IBLA 94, 102 n.33, 91 I.D. 115, 120 n.3 (1984), we held that BLM decisions "concerning" APD's are not stayed pending appeal, citing 43 CFR 3165.4. Thus, the decision to approve an APD is not subject to the automatic stay provision of 43 CFR 4.21(a).

91 IBLA at 127 n.4.

In *Mark S. Altman*, 93 IBLA 265 (1986), we dismissed an appeal from a decision to approve an APD because the appellant was not a party to the case. We stated, however:

> Because of our disposition of the case, we need not discuss the standards applicable in determining whether or not to suspend a BLM decision to approve an APD. We note only that 43 CFR 3165.4 requires a determination that suspending the BLM decision will not be detrimental to the interests of the lessor (the United States) or an acceptance of a

bond to adequately indemnify the lessor. Although of course relevant, we do not regard the factors considered by Federal courts in granting preliminary injunctions as binding on our determinations whether to suspend BLM orders or decisions under 43 CFR Part 3160.

93 IBLA at 265 n.1.

In *Southern Utah Wilderness Alliance*, 100 IBLA 63 (1987), we held that under the 1982 language of 43 CFR 3165.4[3] the effect of a BLM decision granting an APD was not suspended by an appeal to this Board. Appellant argued that "approval of an APD is *not* a decision requiring compliance" and urged that *Animal Protection Institute of America, supra*, and *Utah Wilderness Association, supra*, be overruled to the extent they hold to the contrary. 100 IBLA at 66 (emphasis in original). It also argued that the "regulations at 43 CFR Subpart 3165 relate to relief from operating or producing requirements of a lease and are not applicable to decisions approving APD's." *Id.* We responded that an APD is granted or denied pursuant to 43 CFR 3162.3-1, that this regulation "is found within 43 CFR Part 3160," and that therefore "the rules regarding the effect of decisions pending appeal set forth at 43 CFR 3165.4 (1986) applied to all appeals of decisions regarding onshore oil and gas operations issued pursuant to the regulations at 43 CFR Subpart 3160." *Id.* at 67-68.[4] However, we noted that in

> the recently revised [February 1987] regulations provid[ing] for an intermediate appeal to the State Director with further right of appeal to the Board * * * the broad reference to all appeals of decisions regarding oil and gas operations pursuant to the regulations at 43 CFR Part 3160, which was contained in 43 CFR 3165.4 (1986), has been omitted,

and reserved judgment on whether the amended regulation would call for "a different result on the question of the stay of a decision approving an APD." *Id.* at 68 n.5.

These February 1987 amendments to the regulations were revisions of the regulations adopted in 1984 implementing section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (1988). *See* 49 FR 37356 (Sept. 21, 1984). The 1984

[3] 43 CFR 3165.4 (1986) provided:

"Instructions, orders or decisions issued under the regulations in this part [Part 3160] may be appealed in accordance with the provisions of Part 4 of this title if Federal lands are involved * * *. An appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the official to whom the appeal is made determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage."

[4] In addition to *Animal Protection Institute of America, supra*, and *Utah Wilderness Ass'n, supra*, the Board relied on *Park County (Wyoming) Resource Council* v. *United States Bureau of Land Management*, 638 F. Supp. 2 (D. WY 1986), in which the court denied a motion for a temporary restraining order to prevent the commencement of road work pursuant to an approved APD. The appellant had alleged that "BLM had violated its own regulations, (43 CFR § 4.21(a)), by not staying its own decision to allow drilling until such time as the IBLA had rendered a decision on the appeal." 638 F. Supp. at 4. The court held that 43 CFR 4.21(a)

"must be read in conjunction with all other pertinent laws and regulations. The language of 43 C.F.R. § 4.21(a) states that:

" 'Except as otherwise provided by law or pertinent regulation, a decision will not be effective during the time in which a person * * * may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal * * *.' (Italics added)

"43 C.F.R. § 3165.4[,] which applies to onshore oil and gas operations[,] provides an applicable exception. It states in relevant part:

" '* * * an appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the official to whom the appeal is made determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor.'

"Accordingly, it appears that the BLM has not acted contrary to its own regulations." 638 F. Supp. at 845-46.

regulations had provided that a person charged with a violation of the Mineral Leasing Act or FOGRMA and served with a notice of a civil penalty "may request a technical and procedural review under 43 CFR 3165.3," the procedure added by GS in 1982 and assigned to the BLM State Directors in 1983. 43 CFR 3163.4-1(a)(4), 43 CFR 3163.4-1(b)(7)(ii), 49 FR 37365-66 (Sept. 21, 19). The 1987 amendments to 43 CFR 3165.3 provided that any adversely affected party that contests "a notice of violation or assessment or an instruction, order, or decision of the authorized officer issued under the regulations in this part, may request an administrative review, before the State Director * * *." 43 CFR 3165.3(b), 52 FR 5395 (Feb. 20, 1987). An adversely affected party wishing to contest "a notice of proposed penalty shall request an administrative review before the State Director under the procedures set out in paragraph (b) * * *." 43 CFR 3165.3(c), 52 FR 5395 (Feb. 20, 1987). Section 3165.3(b) provided that a party adversely affected by the State Director's decision may appeal to IBLA "as provided in § 3165.4." Because section 109(e) of FOGRMA provides that no penalty may be imposed before a person is afforded an opportunity for a hearing, however, section 3165.3(c) gave a party adversely affected by the State Director's decision on a proposed penalty a choice between requesting a hearing before an Administrative Law Judge or appealing to IBLA "as provided in § 3165.4(b)(2)." Following a hearing, any party is authorized to appeal to IBLA.

Under 43 CFR 3165.3(e)(1), a request for State Director review (which was to be completed within 10 business days) would not result in a suspension of the requirement for compliance with either a notice of violation or a proposed penalty or stop the daily accumulation of penalties unless the State Director so determined. A request for a hearing before an Administrative Law Judge would not result in the suspension of the requirement for compliance with the decision, unless the Judge so determined; however, it would stop the accumulation of daily penalties, subject to their reinstatement by the Director of BLM. 43 CFR 3165.3(e)(2), 52 FR 5395 (Feb. 20, 1987).

In its comments BLM stated that the "intent of this [State Director review] provision * * * was to provide an operator with an opportunity for quick review but not to cut off any rights." 52 FR 5389 (Feb. 20, 1987). It explained the difference in the provisions suspending the accumulation of penalties during Administrative Law Judge and IBLA review but not suspending the requirement for compliance with a decision involved on the basis of the different practices of BLM and MMS:

> The comments on § 3165.3(d) of the proposed rulemaking stated that the accumulation of assessments or penalties should be automatically suspended during hearing on the record regarding a proposed penalty or during any appeal to the Interior Board of Land Appeals. Due to the length of time involved in the hearing and appeal process, it is agreed that the clock should be stopped on the accumulation either of penalties during

a hearing on the record or of assessments or penalties during the period the lessee exercises the right to appeal the decision to the Interior Board of Land Appeals. The final rulemaking has adopted the recommended changes subject to a determination by the Director, Bureau of Land Management, to reinstate the daily accumulation of penalties in the case of those major violations that are considered serious. This procedure differs from that provided in the proposed rulemaking and followed by the Minerals Management Service in cases related to royalty. In those royalty cases where there is no harm to the lessor, the lessee may, if permitted by the Service, post a bond for the disputed amount in lieu of immediate payment and thereby satisfy the order to abate the violation.

Generally, a similar interim compliance procedure is not available for violations of the Bureau's operations procedures. Because of the difference in the way the Service and the Bureau handle the abatement of violations, this final rulemaking will provide for a continuation of the suspension of the daily accumulation of penalties and assessments unless the Director specifically decides to reinstate them. *The effectiveness of the decision requiring that a violation be corrected will not, however, be suspended during the hearing or appeal.* [Italics added.]

52 FR 5389 (Feb. 20, 1987). The preamble concluded with the statement that "[s]ections 3165.3 and 3165.4 have been revised to consolidate the appeals provisions in one section." *Id.* The revised 43 CFR 3165.4 provided:

(a) *Appeal of decision of State Director.* Any party adversely affected by the decision of the State Director after State Director review, under § 3165.3(b) of this title, of a notice of violation or assessment or of an instruction, order, or decision may appeal that decision to the Interior Board of Land Appeals pursuant to the regulations set out in Part 4 of this title.

(b) *Appeal from decision on a proposed penalty after a hearing on the record.* (1) Any party adversely affected by the decision of an Administrative Law Judge on a proposed penalty after a hearing on the record under § 3165.3(c) of this title may appeal that decision to the Interior Board of Land Appeals pursuant to the regulations in Part 4 of this title.

(2) In lieu of a hearing on the record under § 3165.3(c) of this title, any party adversely affected by the decision of the State Director on a proposed penalty may waive the opportunity for such a hearing on the record by appealing directly to the Interior Board of Land Appeals under Part 4 of this title. However, if the right to a hearing on the record is waived, further appeal to the District Court under section 109(j) of the Federal Oil and Gas Royalty Management Act is precluded.

(c) *Effect of appeal on compliance requirements.* Except as provided in paragraph (d) of this section, an appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

(d) *Effect of appeal on assessments and penalties.* (1) Except as provided in subparagraph (3) of this paragraph, an appeal filed pursuant to paragraph (a) of this section shall suspend the accumulation of additional daily assessments. However, the pendency of an appeal shall not bar the authorized officer from assessing civil penalties under § 3163.3 of this title in the event the lessee has failed to abate the violation which resulted in the assessment. The Board of Land Appeals may issue appropriate orders to coordinate the pending appeal and the pending civil penalty proceeding.

(2) Except as provided in subparagraph (3) of this paragraph, an appeal filed pursuant to paragraph (b) of this section shall suspend the accumulation of additional daily civil penalties.

52 FR 5395 (Feb. 20, 1987).

In 1988 BLM again amended 43 CFR 3165.4(c). 53 FR 17365 (May 16, 1988). It explained:

The final rulemaking clarifies the language in § 3165.4(c) concerning the effect of an appeal on compliance requirements. This change is made to ensure that the provision in this regulation, which made the decision of the authorized officer effective pending an appeal, has the same effect and meaning as it did prior to its amendment on February 20, 1987 (52 FR 5384). The Department of the Interior Board of Land Appeals has suggested that the meaning and effect of this regulation may have been changed by the 1987 amendment (see *Southern Utah Wilderness Alliance*, 100 IBLA 63 (1987)). No change was ever intended by the amendment and this final rulemaking makes a technical correction to clarify this matter.

53 FR 17349-50 (May 16, 1988). As a result, 43 CFR 3165.4(c) now provides:

(c) *Effect of appeal on compliance requirements.* Except as provided in paragraph (d) of this section, any appeal filed pursuant to paragraphs (a) and (b) of this section shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

[1] As stated above, BLM argues that "[t]he regulations at 43 C.F.R. § 3165.4(c) only deal with the effect of an appeal on compliance requirements, i.e. orders by the authorized officer enforcing or specifying conditions that must be met by an operator, etc." (Answer at 22).

We agree. For reasons set forth below, we believe 43 CFR 3165.4(c) does not cover appeals to this Board from decisions approving APD's. Rather, the effect of a decision approving an APD is suspended by the timely filing of an appeal, in accordance with 43 CFR 4.21(a). As an exception to 43 CFR 4.21(a), 4 CFR 3165.4(c) prevents the suspension on appeal of the requirement to comply with a "notice of violation or assessment or an instruction, order, or decision," 43 CFR 3165.3(b), 3165.4(a), or a "notice of proposed penalty," 43 CFR 3165.3(c), 3165.4(b).

First, the historical purpose of the regulation, from 1936 forward, is consistent: when a lessee or operator exercises its right of appeal from an action initiated by the agency to enforce the oil and gas operating regulations or the terms of an oil and gas lease, its affirmative obligation to comply with what is ordered by the agency is not "suspended." Only when the agency determines that suspending compliance with the requirements of what it has ordered would not damage the lessor's resources -- or the lessor is assured any eventual damage caused by the lessee proceeding during the appeal would be compensated for by an adequate bond -- is the obligation to comply suspended.

Secondly, no change in the language of the regulation includes BLM approval of APD's and no preamble explaining any of those changes states that it was intended to include BLM approval of APD's. When "orders" was expanded to include "decisions" in 1973, GS did not issue either orders or decisions in response to notices of intent to drill. When

GS first required APD's in 1976, and when it incorporated this requirement in its 1982 revision of the regulations, it did not indicate that it intended to include approval of APD's among the "instructions, orders, or decisions" that would be covered by 30 CFR 221.73 (later designated 43 CFR 3165.4). The 1982 preamble comment on the amendment of this regulation does not signal the inclusion of APD approval within its scope. The comment "expressed concern that the filing of an appeal does not automatically stop the action being appealed." Given the history of the regulation, it is likely that the commenter's concern was directed to whether the amendment might mean an appeal would automatically stop an enforcement action. From this perspective, the effect of GS' response -- that the regulation "provide[s] for this concern and no change has been made" -- is to reassure that commenter that, as in the past, enforcement actions would not be suspended. The language of the response is ambiguous, however. It is also possible to interpret the comment as indicating a concern that a decision authorizing an action, *e.g.*, granting an APD, should not be automatically stopped by the filing of an appeal and BLM's response as indicating it would not be. We do not believe such a change was intended. The latter interpretation does not conform to the historical scope and function of the regulation and there is no clear statement of the significant change that interpretation would represent.

For similar reasons, BLM's 1988 amendment of the regulation and the accompanying comment cannot be taken as a rejection of the suggestion in *Southern Utah Wilderness Alliance, supra* at 68 n.5, that decisions approving APD's might not fall within section 3165.4(c)'s exception to 43 CFR 4.21(a). Both the title of the amended regulation and the language of the amended regulation speak of the effect of an appeal on "the requirement for compliance." The comment speaks of clarifying the language "concerning the effect of an appeal on compliance requirements," the historical focus of the regulation, and states that "no change was ever intended by the [1987] amendment" to the regulation. If a change to include approvals of APD's were intended, based on the Board's footnotes in *Animal Protection Institute* and *Utah Wilderness Association*, and its decision in *Southern Utah Wilderness Alliance*, BLM would have used the occasion of this special amendment to specifically and clearly state its intent. To be sure, BLM is bound by Board decisions interpreting statutes and regulations[5] and it is conceivable that BLM made its comment to acknowledge those decisions. In the preamble to the proposed rules for the 1988 rulemaking, however, BLM specifically rejected Board decisions interpreting another regulation. *See* 52 FR 22594 (June 12, 1987). A comparison of the two preambles makes interpreting BLM's subsequent comment about *Southern Utah Wilderness Alliance* as

[5] "[W]hen the appellate Boards of OHA interpret regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes *Departmental* policy which is fully binding upon the Bureau until such time as it is altered by competent authority." *Milton D. Feinberg (On Reconsideration)*, 40 IBLA 222, 228, 86 I.D. 234, 237 (1979).

acceptance of the basis for the Board's decisions referred to above dubious.

We do not lightly disregard our own decisions, and are aware that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 1, 852 (D.C. Cir. 1981). We are also aware of Justice Frankfurter's counsel that *stare decisis*

> embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Helvering v. *Hallock*, 309 U.S. 106 at 119 (1940).

The difficulties with the holding in *Southern Utah Wilderness Alliance, supra*, lie in its antecedents and in its analysis. Its original antecedent was the footnote in *Animal Protection Institute of America, supra*. That note was dictum which did not examine the background of the then recently adopted 43 CFR 3165.4. Further, although the note dealt with approvals of APD's, it was phrased in terms of "[d]ecisions of BLM concerning applications for permits to drill," and did not discuss the distinction between approval and denial of APD's.[6] Finally, the note also states that the effect of the regulation is that BLM's decisions on APD's "are final for purposes of the Administrative Procedure Act and, thus, subject to direct judicial review." The note cited 43 CFR 4.21(b), but that regulation only makes a decision placed in full force and effect by action of an Office of Hearings and Appeals Director or Appeals Board pursuant to 43 CFR 4.21(a) subject to judicial review.

The initial problem with *Southern Utah Wilderness Alliance, supra*, is that it treated the approval of an APD submitted by a lessee or operator as equivalent to an instruction, order, or decision issued by the agency because they were both "decisions issued under the regulations in [Part 3160]." 43 CFR 3165.4 (1986). Approval of a permit application is a response to action initiated by a lessee desiring to drill a well. However, enforcement of the regulations or the terms of a lease is an initiative by the agency directing the lessee to comply as ordered. The resulting defect in the analysis in *Southern Utah Wilderness Alliance* is that it overlooked the fundamental purpose of 43 CFR 3165.4. A BLM instruction, order, or decision enforcing the requirements of 43 CFR Part 3160 or the terms of a lease is designed to carry out the Department's obligations to conserve oil and gas resources and to protect other resources. Thus, automatic suspension

[6] *See* note 2, *supra*. *Utah Wilderness Association, supra*, apparently noted this overstatement in *Animal Protection Institute of America*, by setting off "concerning" in quotation marks, but overstated the importance of the footnote by reading it as a holding.

of an instruction, order, or decision under 43 CFR 4.21(a) is not appropriate. For the same reason, automatic suspension of a BLM decision approving an APD *is* appropriate because the automatic suspension of a BLM decision approving an APD conserves and protects the same resources during administrative review. The reason for automatically suspending a decision approving an APD under 43 CFR 4.21(a) and the reason for *not* suspending an instruction, order, or decision requiring compliance with 43 CFR Part 3160 are identical. *See* 43 CFR 3161.2. Therefore, *Southern Utah Wilderness Alliance*, 100 IBLA 63 (1987), *Utah Wilderness Association*, 91 IBLA 124 (1986), and *Animal Protection Institute of America*, 79 IBLA 94, 91 I.D. 115 (1984), are overruled to the extent inconsistent.

We recognize, of course, that there is an important competing policy. An applicant for an APD should not be unduly delayed in obtaining a response to its application. BLM promotes this policy by providing a decision on an APD within 30 days unless an environmental review or other cause makes this goal unattainable. When legitimate questions are raised about BLM's decision approving an APD, the Department's statutory obligations to conserve renewable resources and protect nonrenewable resources properly take precedence over the policy of promptly responding to an APD. The downside risk of allowing exploration or exploitation to proceed while arguments are being considered on appeal is that if the arguments prove well-founded the resources may be irreparably damaged during the period of review. We have stated several times -- and we repeat -- if BLM is confident its decision is correct and appellants are merely attempting to delay and ultimately frustrate exploration or exploitation based on specious arguments, BLM or the lessee may petition to have its decision placed in full force and effect. 43 CFR 4.21(a). In determining whether the public interest requires granting such a petition, we consider the factors suggested by BLM, *i.e.*, whether it is likely to prevail on the merits, the relative harm to the respective parties from granting the petition, and whether the appellant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Sierra Club*, 108 IBLA 381, 384-85 (1989). If we grant such a petition, the appellant may then seek judicial review. 43 CFR 4.21(b).

Therefore, because BLM's May 23, 1991, decision affirming the approval of the APD's was suspended by appellants' appeal, we need not act on their subsequent request for a stay. Similarly, the State Director undertook a review of this case prior to appeal to the Board, and we do not find it necessary to address whether the State Director review provided for in 43 CFR 3165.3(b) is mandatory before an appeal may be taken to the Board under 43 CFR 3165.4(a). Because of this

decision and the special circumstances of this case, we grant BLM's motion that we expedite our review of the merits.

WILL A. IRWIN
Administrative Judge

I CONCUR:

R. W. MULLEN
Administrative Judge

APPEALS OF RODGERS CONSTRUCTION, INC., FEDERAL INSURANCE CO.

IBCA-2777 *et al.* Decided *October 15, 1991*

Contract No. 4-CC-30-01480, Bureau of Reclamation.

Dismissed without prejudice.

1. Contracts: Contract Disputes Act: Jurisdiction--Rules of Practice: Appeals: Dismissal

Certification of multiple claims by a division manager under a contract for the construction, *inter alia*, of a pumping plant is found to be inadequate for the purpose of vesting jurisdiction in the Board over the claims in issue where appellants assert that the division manager qualifies as a senior company official in charge at the contractor's plant or location involved but the evidence offered fails to establish that the division manager had primary responsibility for the execution of the contract and that he had a physical presence at the location of the primary contract activity.

2. Contracts: Contract Disputes Act: Jurisdiction--Rules of Practice: Appeals: Dismissal

Certification of multiple claims by an assistant vice president of a surety company that completed the contract work is found to be inadequate for the purpose of vesting the Board with jurisdiction over the claims in issue where appellants assert that the assistant vice president had authority to bind the surety company and to certify the claims but make no attempt to show that the assistant vice president who certified the claims on behalf of the surety had overall responsibility for the conduct of the contractor's affairs in general.

3. Contracts: Formation and Validity: Formalities--Contracts: Federal Procurement Regulations

Regulations pertaining to the assignment of claims and contracts which are published in the *Federal Register* (*e.g.*, one mandating the inclusion of an Assignment of Claims provision in any contract to be awarded) have the force and effect of law.

4. Contracts: Contract Disputes Act: Jurisdiction--Contracts: Construction and Operation: Assignment of Claims--Rules of Practice: Appeals: Standing to Appeal

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that

even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown that the obligations of its principal had been fully satisfied.

5. Contracts: Contract Disputes Act: Jurisdiction--Contracts: Construction and Operation: Assignment of Claims--Rules of Practice: Appeals: Standing to Appeal

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a *de facto* takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

6. Contracts: Contract Disputes Act: Jurisdiction--Contracts: Construction and Operation: Assignment of Claims--Rules of Practice: Appeals: Standing to Appeal

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognized the assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

7. Contracts: Contract Disputes Act: Jurisdiction--Rules of Practice: Appeals: Dismissal

Besides moving to dismiss the instant appeals for lack of proper certification, the Government has also moved to dismiss two of the claims involved (captioned "Maladministration" and "Incidental Impact Expenses") on the ground that such claims were never presented to the contracting officer for decision. The Board finds, however, that the two claims in question were presented to and decided by the contracting officer and that subject to proper certification at the time of resubmission they may again be presented to the contracting officer in their present form for his consideration and decision.

APPEARANCES: Gregory L. Cashion, Attorney at Law,Manier, Herod, Hollabaugh and Smith, Nashville, Tennessee, for Appellant; Daniel L. Jackson, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeals on the ground that under the Contract Disputes Act (CDA) claims in excess of $50,000 must be properly certified and neither Rodgers Construction, Inc. (Rodgers), nor Federal Insurance Co. (Federal) has certified the claim, as required by the CDA and the implementing regulations. The Government has also moved to dismiss the appeal of Federal on the ground that the company is not a contractor as defined in section 601(4) of the CDA and that as surety it cannot be

substituted for Rodgers (the original contractor) without violating the anti-assignment of claims act (31 U.S.C. § 3727; successor to 31 U.S.C. § 203). In addition, the Government seeks dismissal of two claims on the ground that they have not been presented to the contracting officer for decision as required by the appellate nature of our jurisdiction.

Appellant opposes granting any of the Government's motions on the grounds (i) that Federal was substituted as contractor for Rodgers by reason of a defacto takeover agreement or by reason of the Government having waived the anti-assignment statutes by recognizing the assignment to Federal; (ii) that the claims were properly certified by the original contractor and later by the surety; and (iii) that there is no merit in the Government's position that two of the five claims submitted had not been presented to the contracting officer for decision.

The record to be used in arriving at our decision consists of the Appeal File (AF), appellants' Supplement to the Appeal File (SAF), the pleadings (Complaint and Answer), the Response of appellants to the Bureau's Answer (Response), the Government's Reply to appellants' Response (Reply), and Supplemental Authority in support of the Bureau's suggestion of the absence of jurisdiction (the decision of the Court of Appeals for the Federal Circuit in *United States* v. *Grumman Aerospace Corp.*, 927 F.2d 575 (1991)).

Background

Contract No. 4-CC-30-01480 in the amount of $10,708,088.40 was awarded to Rodgers on April 30, 1984. As required by the contract, Federal, as corporate surety, furnished Rodgers with payment and performance bonds (AF Tab 6 at 42-47). The contract was one feature of the Bureau of Reclamation's (Bureau) Central Arizona Project and was comprised of two parts. Part 1 involved the construction and paving of the access road to the Picacho and Brady Pumping Plant sites with a scheduled completion date of November 20, 1984. Part 2 called for the construction of the Picacho Pumping Plant and appurtenances with a scheduled completion date of June 23, 1986. The notice to proceed was received by the contractor on May 24, 1984. Modifications to the contract extended the completion date for the pumping plant construction to July 29, 1986, and the pumping plant and surge tank portions of the contract were determined to be substantially complete as of that date (AF 50 at 542-43; Complaint at 3; Answer, Exh. 1).

In the first quarter of 1985, Rodgers filed several claims of differing site conditions. On October 31, 1985, Rodgers submitted a claim to the Bureau in the amount of $584,523.33 for additional costs attributed to the nature of the excavation required in the area of the surge tank, pumping plant, and discharge manifold sites. Following a meeting with

representatives of the Bureau on January 17, 1986, Rodgers withdrew its request for equitable adjustment in order to reorganize the material and resubmit the request at a later date. On March 24, 1987, Rodgers submitted a claim for equitable adjustment in the amount of $2,169,008. The claim was certified to be properly submitted by John Seldenrust who signed the certificate as Division Manager of Rodgers and who requested a contracting officer's decision (Response at 6-10; Response, Exhs. A and B). In a letter of November 10, 1988, Federal submitted a revised request for equitable adjustment in the amount of $1,886,442. Certifying the claim on behalf of Federal was Malcolm B. Burton, a Vice President of the Chubb Group of Insurance Companies or of Federal or of both[1] (Answer, Exh. 7; Response, Exh. J; AF Tab 50 at 543-46).

In a letter to the Bureau dated May 1, 1987, directing how payment should be made, the contractor states:

> Rodgers Construction, Inc. of Nashville, Tennessee ("RCI") hereby irrevocably requests that all payments now or hereafter due on account of, or with respect to, the above contract for the above described project be made payable to Federal Insurance Company. There will be no modification or change in these instructions except by writing, signed by a representative of Federal Insurance Company and delivered to you, authorizing and consenting to such modification or change.

(Answer, Exh. 2).

Subsequently, in a June 2, 1987, letter, Rodgers confirmed to the Bureau that all payments under the Picacho Pumping Plant contract were to be made to Federal (Answer, Exh. 3). Rodgers' letters of May 1 and June 2, 1987, were respectively acknowledged by the Bureau in letters dated May 30 and June 12, 1987, both of which state: "The Government will make all future payments directly to the surety, unless directed to do otherwise" (Answer, Exhs. 5 and 6).

By letter of November 18, 1987, The Heme Consultants, Inc. (Heme),[2] transmitted to the Bureau a document which it described as a "Takeover Agreement" but which was captioned "Acknowledgment of Default."[3] The letter states: "This is transmitted to you in answer to your question about proof of Federal's involvement. This should satisfy

[1] The reason for injecting the Chubb Group of Insurance Companies into the certification process is not apparent from the record. The record clearly shows, however, (i) that it was Federal, as corporate surety, that furnished the payment and performance bonds (AF Tab 6 at 42-47); (ii) that it was to Federal as surety that the "Acknowledgment of Default" by Rodgers was made (Answer, Exh. 4); (iii) that the name of Federal was shown in the box for contractor in a modification issued in Sept. 1987 and in modifications thereafter (Answer at 6); (iv) that it was to Federal that payments were directed to be made in May and June 1987 (Answer, Exhs. 2 and 3); (v) that commencing in June 1987 and continuing thereafter, it was to Federal that payments were so made (Answer at 5, 6; Response at 18; Response, Exhs. F and G); and (vi) that it was to Federal that the contracting officer addressed his decision (AF Tab 50). Since, in the opinion, *infra*, the Board finds the certification of the claim by Burton to be inadequate for other reasons, the Board need not concern itself further with the question of the relationship of the Chubb Group of Insurance Companies to this appeal.

[2] The Answer identifies "The Heme Consultants" as "FIC's contractor" (Answer at 5). In the final decision the contracting officer states that when it became necessary for Federal to complete the contract, it was Heme that managed the remainder of the work for the surety. The equitable adjustment claims of Mar. 24, 1987, and Nov. 10, 1988, were both prepared by Heme (AF Tab 50 at 544, 546).

[3] In the "Acknowledgment of Default" (Answer, Exh. 4), Rodgers and the other signatories state:

"1. Principals and Indemnitors hereby affirm their assignment to the Surety of all rights under their contracts whereon Surety is surety in accordance with the Indemnity Agreement.

"2. Principals and Indemnitors acknowledge that they are unable to perform their obligations under the contracts in connection with which the bonds were issued, and accordingly hereby abandon such contracts and request that Surety, in the exercise of its sole discretion, arrange for the completion of such contracts."

the Bureau that Federal is the real party in interest and illustrate the assignment from Rodgers to Federal" (Answer, Exh. 4).

In the Answer the Bureau acknowledges that in September 1987, the Bureau substituted Federal's name in place of Rodgers in the box entitled "contractor" in a contract modification and continued that practice in subsequent modifications (Answer at 6). Later modifications evidencing the continuation of the practice include Modification No. 067 (transmitted to the Bureau by letter dated Jan. 27, 1988), Modification No. 70 (July 27, 1988), Modification No. 072 (Aug. 31, 1988), Modification No. 73 (June 28, 1989), Modification No. 074 (Sept. 26, 1989), Modification No. 075 (Aug. 16, 1989), and Modification No. 076 (Feb. 2, 1990) (SAF Exh. H; AF Tab 50).

On April 26, 1989, the Bureau entered into negotiations with Heme (representing Federal) with a view to reaching an agreement on the direct costs of six severable issues within the claim. Modification No. 73, dated June 28, 1989, reflects the agreement reached with respect to the six severable items of claim and provides for the payment to the contractor (shown to be Federal) of the sum of $195,427. Modification No. 074 dated September 26, 1989 (Federal is shown as the contractor) provides for the payment of interest in the amount of $41,311.72 on the settlement figure of $195,427 embodied in Modification No. 73 (AF Tabs 29 and 30; Response, Exh. H; AF Tab 50 at 546, 548). The record shows that on July 24, 1989, the sum of $195,427 was credited to a checking account (01 20 20W 15) maintained by Federal with the Sovran Bank in Nashville, Tennessee, and that on December 7, 1989, the sum of $41,311.72 was credited to the same account (SAF, Exh. I).

Regulatory and Contract Provisions In Issue

On September 19, 1983, there was published in the *Federal Register* an entirely new set of regulations called the Federal Acquisition Regulation (FAR). The FAR was prescribed for use by all executive agencies in their acquisition of supplies and services with appropriated funds and became effective April 1, 1984. In especially pertinent part, the regulations set forth in the initial edition of the FAR[4]read as set forth below:

SUBPART 32.8--ASSIGNMENT OF CLAIMS.

32.800 Scope of subpart.

[4]The Forward to the 1984 edition of the FAR states in part:

"The Federal Acquisition Regulation (FAR) is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. The FAR System has been developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974, as amended by Pub. L. 96-83. The FAR is issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator for Federal Procurement Policy.

* * * * * * *

"This edition is the initial publication of the FAR. It is effective on April 1, 1984 * * *." 48 FR at 42102 (Sept. 19, 1983).

This subpart prescribes policies and procedures for the assignment of claims under the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15 (hereafter referred to as "the Act"). [5]

32.801 Definitions.

"Assignment of claims," as used in this subpart, means the transfer or making over by the contractor to a bank, trust company, or other financing institution, as security for a loan to the contractor, of its right to be paid by the Government for contract performance.

* * * * * * *

32.802 Conditions.

Under the Assignment of Claims Act, a contractor may assign moneys due or to become due under a contract if all the following conditions are met:

(a) The contract specifies payments aggregating $1,000 or more.

(b) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency.

(c) The contract does not prohibit the assignment.

(d) Unless otherwise expressly permitted in the contract, the assignment--

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party, except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and

(3) Is not subject to further assignment.

(e) The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the--

(1) Contracting officer or the agency head;

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

32.803 Policies.

* * * * * * *

(b) A contract may prohibit the assignment of claims if the agency determines the prohibition to be in the Government's interest.

* * * * * * *

32.805 Procedure.

(a) *Assignments.* (1) Assignments by corporations should be (i) executed by an authorized representative, (ii) attested by the secretary or the assistant secretary of the corporation, and (iii) impressed with the corporate seal or accompanied by a certified copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.

* * * * * * *

(b) *Filing.* The assignee shall forward to each party specified in 32.802(e) an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.

* * * * * * *

32.806 Contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.232-23, Assignment of Claims. [6] * * *

[5] Sec. 32.800 was amended by removing the references "31 U.S.C. 203, 41 U.S.C. 15" and inserting in their place the reference "31 U.S.C. 3727." 51 FR at 2665 (Jan. 17, 1986).

[6] The clause set forth at FAR 52.232-23 reads as follows:

* * * * * * *

(b) The contracting officer shall insert the clause at 52.242-24, Prohibition of Assignment of Claims, [7] in solicitations and contracts for which a determination has been made under agency regulations that the prohibition of assignment of claims is in the Government's interest.

48 FR at 42348-49 (Sept. 19, 1983).

SUBPART 42.12--NOVATION AND CHANGE-OF-NAME AGREEMENTS

42.1200 Scope of subpart.

This subpart prescribes policies and procedures for--

(a) Recognition of a successor in interest to Government contracts when contractor assets are transferred;

* * * * * * *

(c) Execution of novation agreements and change-of-name agreements by the responsible contracting officer.

42.1201 Definitions.

* * * * * * *

"Novation agreement" means a legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the Government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.

* * * * * * *

42.1203 Processing agreements.

(a) When a firm performing Government contracts wishes the Government to recognize (1) a successor in interest to these contracts or (2) a name change, the contractor shall submit a written request to the responsible contracting officer (see 42.1202).

* * * * * * *

(c) The responsible contracting officer shall determine whether or not it is in the Government's interest to recognize the proposed successor in interest * * *.

* * * * * * *

*42.1204 Agreement to recognize a successor in interest (novation agreement).

(a) The law (41 U.S.C. 15) prohibits transfer of Government contracts. However, the Government may, in its interest, recognize a third party as the successor in interest to

"ASSIGNMENT OF CLAIMS (APR 1984)

"(a) The Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C. 203, 41 U.S.C. 15 (hereafter referred to as 'the Act'), may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence.

"(b) Any assignment or reassignment authorized under the Act and this clause shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract.

"(c) The Contractor shall not furnish or disclose to any assignee under this contract any classified document (including this contract) or information related to work under this contract until the Contracting Officer authorizes such action in writing."

[7] The clause set forth at FAR 52.232-24 entitled "Prohibition of Assignment Of Claims (APR 1984)" reads as follows: "The assignment of claims under the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15, is prohibited for this contract."

The reference in FAR 32.806(b) to 52.242-24 (48 FR 42349) is in error. The reference was later corrected to 52.232-24 (51 FR 2666 (Jan. 17, 1986)).

a Government contract when the third party's interest in the contract arises out of the transfer of (1) all the contractor's assets or (2) the entire portion of the assets involved in performing the contract. * * *

* * * * * * *

(b) When it is in the Government's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

* * * * * * *

(d) When recognizing a successor in interest to a Government contract is consistent with the Government's interest, the responsible contracting officer shall execute a novation agreement with the transferor and the transferee. * * *

48 FR 42381-82 (Sept. 19, 1983).

I. *Adequacy of Certification of Contract Disputes Act Claims*

Among the grounds cited by the Bureau for the dismissal of the instant appeals is the ground that neither the claim for equitable adjustment filed by the contractor (Rodgers) nor the revised claim for equitable adjustment submitted by the surety (Federal) contained a proper certification for the claims involved, as required by the CDA and the applicable FAR. The statutory and pertinent regulatory requirements for certification are set forth below:

For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C.A. § 605(c)(1) (West 1985).

The regulatory requirement for claim certification is set forth in FAR 33.207, 48 CFR 33.207, which in subsection (c)(2) states in pertinent part: "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."

In affirming a decision of this Board in *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426 (Fed. Cir. 1989), the United States Court of Appeals for the Federal Circuit stated:

Mr. Meek does not satisfy either of the requirements of subsection (c)(2). Even assuming that the chief cost engineer was a "senior company official" within the meaning of that provision, he was not "in charge at the contractor's plant or location involved" (subsection (c)(2)(i)), and he did not have "overall responsibility for the conduct of the contractor's affairs" (subsection (c)(2)(ii)). The fact that Mr. Meek may have had "authority to sign and certify claims on behalf of the corporation," as the corporation's president stated he had, does not establish that Mr. Meek comes within either of the two categories of persons the regulation authorizes to execute certifications of claims. [8]

[8] A short while later the Court addressed another question raised in the case, stating:
"The Act merely provides that 'the contractor shall certify.' The regulation constitutes a reasonable explication of how the 'contractor' shall certify, *i.e.*, it identifies the individuals within the contractor's organization who properly may act for the contractor in certifying. In terms of Admiral Rickover's suggestion, the regulation specifies the 'senior responsible contractor official[s]' who are authorized to sign the certification."878 F.2d at 1429 (citation omitted).

878 F.2d at 1428.

In *United States* v. *Grumman Aerospace Corp., supra*, the United States Court of Appeals for the Federal Circuit relied heavily upon FAR 33.207(c)(2), *supra*, in formulating its decision and in connection therewith quotes from its decision in *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d at 1429. 927 F.2d at 578-79. The Court notes that compliance with the regulation cited would require certification by either " '[a] senior company official in charge at the contractor's plant or location involved . . . ' " *or* '[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.' " 927 F.2d at 580 (italics in original).

In the Court's view "[t]he first description demands that the certifying senior company official have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." *Ibid.* (italics in original). Applying this criteria to the case before it, the Court found that while Mr. Paladino, as Grumman's Senior Vice President and Treasurer, was certainly a "senior company official," he was not "in charge" since he reported at least to Nat Busi, a Grumman Vice President and Grumman's Controller. *Ibid.* After noting that the second description requires "overall responsibility for the conduct of the contractor's affairs" in general and that "an individual having overall responsibility for just the contractor's financial affairs would not fit the description," the Court found that Grumman had not met its burden of establishing that Paladino had the overall responsibility for the conduct of Grumman's affairs required by the regulation. 927 F.2d at 580-81.

A. Certification of Claim by Contractor (Rodgers)

The contractor's request for an equitable adjustment of March 20, 1987, in the amount of $2,169,008 was certified by John D. Seldenrust in a letter to the Bureau dated March 24, 1987, from which the following is quoted:

> As Division Manager for Rodgers Construction Corporation, I certify that this claim: is brought in good faith; contains supporting data that is accurate and complete to the best of Rodgers Construction Corporation's knowledge; [9] the amount request accurately reflects the Contract adjustment for which Rodgers Construction Corporation believes the Government is liable; and meets all other requirements of FAR 52.233-1(d).

(AF Tab 32 at 114).

In support of the position that the March 24, 1987, certification of the claim satisfied the requirements set forth in FAR 33.207, counsel for appellants quotes subsection (c)(2) thereof after which he states: "Federal and Rodgers submit that Seldenrust qualifies under the first

[9] The failure of the contractor to include the word "belief" in the second requisite assertion renders the assertion defective and the certification inadequate. *See, e.g., Aiken Advanced Systems, Inc.*, ASBCA No. 39225 (Jan. 9, 1990), 90-1 BCA ¶ 22,590; *Liberty Environmental Specialties, Inc.*, VABCA No. 2948 (June 15, 1989), 89-3 BCA ¶ 21,982 at 110,564 ("It is clear that belief goes beyond mere awareness, to a personal conviction that what is 'known' is in fact correct. In our view, both terms must be expressly stated in the assertion that the data supporting the claim are accurate and complete. The omission of either word renders the assertion defective"). Since we find the certification to be defective on another ground, we need not resolve this question.

category" (*i.e.*, as a "senior company official in charge of the contractor's plant or location involved"). Thereafter, counsel states that at the time Seldenrust certified the claim, he was the Division Manager for Rodgers in Albuquerque, New Mexico, and was thus in charge of all the projects contracted out of the Albuquerque office of Rodgers; that he frequently visited the construction site and had an intimate knowledge of the details of the project; that more importantly, Seldenrust had specific authority to contract on behalf of Rodgers and signed modifications on behalf of Rodgers (Affidavit of Menicucci, Exh. B to Response and AF Tab 28; Response at 6-8).

In his affidavit, Glen Pillow states that he held the office of Vice President of Rodgers from January 1986 through March 31, 1987; that during 1986 and through March 31, 1987, John Seldenrust had authority to act on behalf of Rodgers and was in charge of all projects contracted out of the Albuquerque office of Rodgers; that he had specific authority to contract on behalf of Rodgers; and that he had the authority of Rodgers to certify the claim made by Rodgers to the Bureau on the Picacho Pumping Plant project (Response, Exh. A).

The affidavit of Michael F. Menicucci states (i) that from January 1986 through August 1, 1987, he held the office of contract administrator for Rodgers' Western Division Office; (ii) that at the time he was employed, John Seldenrust was employed by Rodgers as Division Manager of the Western Division Office; (iii) that during the period 1986 through April 1, 1987, Seldenrust was in charge of all projects contracted out of the Albuquerque office of Rodgers; (iv) that during the time of Menicucci's employment by Rodgers, Seldenrust spent more than three quarters of his time in the field managing the projects under the control of the Albuquerque Division Office; (v) that he spent specific set times at the Picacho Pumping Plant project; (vi) that Seldenrust and Menicucci both actively participated in preparing a claim against the Bureau on the Picacho Pumping Plant project; and (vii) that Seldenrust had authority to sign all claims, contracts with owners for change orders, and new jobs; and (viii) that he was specifically authorized to certify claims made by Rodgers to the Bureau on the project (Response, Exh. B).

The Bureau denies that Seldenrust was a senior company official in charge at the location involved. Consequently, in the Bureau's view, Seldenrust was not qualified to certify the contractor's claim as required by FAR 33.207(c)(2)(i). In support of its position, the Bureau cites the record to show that from 1986 through March 31, 1987, there were two individuals on the site who represented Rodgers in the capacity of Senior Project Manager and Project Coordinator. The Bureau states that during this time (the time when Seldenrust was said to be actively involved in the Picacho Pumping Plant project) there is no evidence in the record showing Seldenrust to have had any role in Rodgers' work on site in the performance of the contract or in the administration or supervision of the contract at all. According to the Bureau the evidence supports the conclusion that Seldenrust was a

contract manager in a division of Rodgers or a claim specialist and that he was rarely at the job site (Reply at 1-9).

In the declaration of James Macmorran (which accompanied the reply) Mr. Macmorran states that from June 19, 1984, to August 1986, he was the Supervisory General Engineer for the Picacho Pumping Plant; that in this period he was present at the Picacho Pumping Plant almost daily during each work week and when there, he was there full time; that as Supervisory General Engineer he was the senior Bureau officer on site at the Picacho Pumping Plant; that the contracting officer for the Bureau was located in Phoenix, Arizona, some 60 miles away; that as Supervisory General Engineer he was the Bureau employee who dealt with Rodgers on matters concerning Rodgers' work under the contract and the person with whom Rodgers interfaced on decisions involving Rodgers' performance of the subject contract; that during the period June 19, 1984, to August 1986, he does not recall ever meeting an individual named John Seldenrust; and during that period the onsite employees in charge of Rodgers' work under the contract did not include a John Seldenrust (Reply, Exh. 1).

Also accompanying the Bureau's reply was a declaration of David M. Johnson in which Johnson states that during the period June 19, 1984, to May 1987, he was the Office Engineer for the Picacho Pumping Plant; that he was present at the Picacho Pumping Plant almost daily during each work week and when there he was there full time; that as the Office Engineer he was the Bureau's employee who monitored progress on Contract No. 4-CC-30-01480 and was the Bureau employee who coordinated with Rodgers on site contractor personnel concerning submittals required by the contract; that during the period June 19, 1984, to May 1987 he does not recall ever meeting an individual named John Seldenrust but he does recall hearing of a person named John Seldenrust although not able to recall that person's capacity; and that during the period June 19, 1984, to May 1987, the onsite employees in charge of Rodgers' work under the contract in issue with whom he dealt were Chuck Parker, Dave Kucera, Paul Schwering, Robert Pheiffer, and some others which did not include a John Seldenrust (Reply, Exh. 2).

Discussion and Decision

According to appellants, the March 24, 1987, certification satisfies the requirements of FAR 33.207(c)(2)(i) since Seldenrust was a "senior company official in charge of the contractor's plant or location involved." For a number of appellants' statements there is no corroboration in the record. Except for citing one appeal file exhibit, appellants' entire case in this area is predicated upon the information contained in the affidavits of Pillow and Menicucci, *supra*. Appellants state that Seldenrust frequently visited the construction site. This is partially corroborated by the Menicucci affidavit which states that

Seldenrust spent specific set times at the pumping plant but which fails to provide either the dates or the duration for the time or times spent by Seldenrust at the site. No diary of either Seldenrust or Menicucci is contained in the record from which such information might be gleaned.

By way of contrast, the Bureau provides the names of five individuals who represented Rodgers in various capacities (Senior Project Manager, Project Manager, Assistant Project Manager, Project Superintendent, and Project Coordinator) from October 1984 to September 1986. The representative capacities of such individuals and various dates involving such representatives is corroborated by reference to 23 appeal file exhibits (Reply at 3-4). In the declarations which accompanied the Bureau's reply, James Macmorran and David M. Johnson declare under penalty of perjury (28 U.S.C. § 1746) that they were at the Picacho Pumping Plant almost daily and when there they were there full time; that during that time period the onsite employees in charge of Rodgers' work under the contract with whom they dealt were Chuck Parker, Dave Kucera, Paul Schwering, Robert Pheiffer, and some others which did not include a John Seldenrust; and that neither of them had ever met an individual named John Seldenrust (Reply, Exhs. 1 and 2).

Even greater significance is attached by appellants to the fact that Seldenrust had specific authority to contract on behalf of Rodgers and to sign modifications on behalf of Rodgers (Menicucci Affidavit and AF Tab 28). In their affidavits Pillow and Menicucci both say that Seldenrust had authority to contract on behalf of Rodgers on the Picacho Pumping Plant project and to certify the claims made by Rodgers on that project. The periods covered by their affidavits is 1986 through March 31, 1987 (Pillow) and through April 1, 1987 (Menicucci). Modification No. 45 (AF Tab 28) was signed by Seldenrust on behalf of Rodgers on July 13, 1987 (*i.e.*, approximately 3-½ months after the expiration of the periods covered by the affidavits).

The fact that a person has been given authority to execute contracts or modifications and to certify claims is not sufficient to establish that the person meets the regulatory requirements for certification of claims. In *Grumman, supra*, the Federal Circuit refused to accept appellee's position that agency principles should be applied to determine who may properly certify the contractor's claims. 927 F.2d at 578. Earlier in *Ball, Ball & Brosamer, supra*, the Federal Circuit noted that the fact the person certifying the claim may have had authority to sign and certify claims on behalf of the corporation does not establish that such person comes within either of the two categories of persons the regulation authorizes to execute certifications of claims. 878 F.2d at 1428.

[1] In this case it beggars the imagination to believe that Seldenrust frequently visited the construction site (Response at 7-8) and that he spent specific set times at the Picacho Pumping Plant project (Response, Exh. B, Menicucci Affidavit) when neither the Bureau's

Supervisory General Engineer for the project nor the project's Office Engineer had ever met him and only the Office Engineer had even heard of him while on the project (Reply, Exhs. 1 and 2). Applying the criteria announced in *Grumman, supra,* to the facts involved in this appeal, the Board finds that Seldenrust was not a proper certifying official. He has not been shown to have had "both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." 927 F.2d at 580 (italics in original). Accordingly, the Board finds that the March 24, 1987, certification of the contractor's claims by Seldenrust was defective and that, consequently, the Board has no jurisdiction over the claims asserted based upon such certification.

B. Certification of Claim by Surety (Federal)

By letter dated November 10, 1988 (AF Tab 32 at 197), Federal transmitted to the Bureau a revised Request for Equitable Adjustment in the amount of $1,886,422. The letter of transmittal was signed by Malcolm B. Burton, Vice President, who in the same letter certified the claim.

Appellants assert that the revised claim was properly certified and in connection therewith state (i) that Burton is an Assistant Vice President of the Chubb Group of Insurance Companies and an Assistant Vice President of Federal; (ii) that as Federal had been assigned all the rights of Rodgers and had been substituted in all the contract modification documents as the "contractor," the certification of the revised claim would have to be done by an officer of Federal; (iii) that Burton was unquestionably an Assistant Vice President and officer of Federal at the time he certified the revised claim; (iv) that as an officer Burton had the authority to bind Federal and to certify the claim; and (v) that the certification of the revised claim by Burton satisfies the requirements of the section of FAR 33.207(c)(2)(ii) which reads as follows: "If the contractor is not an individual, the certification shall be executed by -- (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs" (Response at 21; SAF, Exh. J).

Very recently in *Grumman, supra*, the Federal Circuit held that certification of a claim by Grumman's Senior Vice President and Treasurer did not satisfy the requirements of FAR 33.207(c)(2)(ii). The Court stated:

> The second description requires "overall responsibility for the conduct of the contractor's affairs" in general. The Board said "Paladino's functions included overall responsibility for GAC's financial affairs." However, the regulation requires more than that, and clearly, an individual having overall responsibility for just the contractor's financial affairs would not fit the description. *Ball, Ball & Brosamer*, 878 F.2d at 1429 (holding that an official whose responsibility is limited to financial aspects of a contractor's affairs is not the proper person to certify a claim). GAC has not met its burden of establishing that Mr. Paladino had the overall responsibility for the conduct of GAC's affairs required by the regulation.

927 F.2d at 580-81.

Discussion and Decision

[2] Where, as here, appellants seek to show that the certification of a claim satisfies the requirements of FAR 33.207(c)(2)(ii), it is not enough for them to show that the officer who certifies the claim has authority to bind the corporation and to certify the claim on its behalf. Appellants must also show that the corporate officer who certifies a claim under the CDA has " 'overall responsibility for the conduct of the contractor's affairs' in general." *Ibid.* at 580.

In this case appellants have made no attempt to show that Burton - who certified the revised claim in his capacity of assistant Vice President - had overall responsibility for the conduct of the contractor's affairs in general. In the absence of the requisite showing, the Board finds that Burton was not a proper certifying officer and that, consequently, the November 10, 1988, certification of the revised claim by Burton was defective. So finding, the Board further finds that it has no jurisdiction over the revised claim based upon such certification.

II. Regulations Governing Assignments

The Bureau calls attention to the fact that the FAR's were published in the *Federal Register* on September 19, 1983, and became effective on April 1, 1984. Noted by the Bureau is the fact that the regulations so published include Subpart 32.8, Assignment of Claims (48 FR at 42348-49) and Subpart 42.12, Novation and Change-of-Name Agreements (48 FR at 42381-83) (Answer at 6-8). Thereafter, after discussing the mandatory nature of the various regulations included in the subparts cited, the Bureau states: "The noted FAR regulations were incorporated into the contract between the Bureau and Rodgers by operation of law under the *Christian Doctrine. G. L. Christian and Assoc.* v. *United States*, 312 F.2d 418, 160 Ct. Cl. 1, *cert. denied*, 375 U.S. 954 (1963)" (Answer at 9).

Appellants deny that the regulations cited by the Bureau apply since "there is nothing incorporating these regulations into the contract to make them applicable" (citing *Nutt* v. *United States*, 12 Cl. Ct. 345 (1987), *aff'd sub nom. Smithson* v. *United States*, 847 F.2d 791 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 782, 102 L.Ed.2d 774 (1989), for the proposition that whether or not a statute or regulation has been incorporated into a contract depends on the specificity of the incorporating language) (Response at 12-13). Before examining the cases cited, a brief summary of the factual background against which the disparate contentions of the parties are to be viewed would appear to be in order.

The instant contract was awarded pursuant to an Invitation for Bids dated December 20, 1983, as modified by Amendment Nos. 1 through 10 thereto. The invitation included General Provisions (Construction Contracts) Standard Form 23-A (Rev. 4-75) and a Supplement to General Provisions (Construction Contract) (11-81), issued by the

Bureau. The supplement made no changes in clause 8 (Assignment of Claims), as set forth in the 1975 edition of Standard Form 23-A (AF Tabs 1 and 4). Bids for the work and materials covered by the contract were opened on March 21, 1984 (AF Tab 4). Contract No. 4-CC-30-01480 was awarded to Rodgers on April 30, 1984 (AF Tab 6). As has been previously noted, an entirely new set of regulations (FAR) was published in the *Federal Register* on September 19, 1983. The new regulations were prescribed for use by all Federal executive agencies in their acquisition of supplies and services with appropriated funds and became effective April 1, 1984 (note 4, *supra*).

The decision in *G. L. Christian & Assoc.* v. *United States*, 160 Ct. Cl. 1, 312 F.2d 418 (1963), involved a case in which the Court of Claims found that a contract was properly terminated for the convenience of the Government, even though the contract did not contain a termination for the convenience of the Government clause. In support of its decision, the Court of Claims found (i) that a regulation published in the *Federal Register* prior to the award of the contract to *Christian* mandated the inclusion of a termination for the convenience of the Government clause in all construction contracts (an exception to the requirement was noted but was not considered pertinent); and (ii) that the contract in issue was a construction contract to which the mandate applied. The effect of the holding was to deny the plaintiff the right to include in its claim for breach of contract any damages for anticipated profits.

In the course of setting forth the rationale for the decision reached, the Court of Claims stated:

> In the present case, although the Fort Polk housing contract did not contain any provision expressly authorizing the Government to terminate the contract for its convenience, the Government contends that the contract should be read as if it did contain such a clause. This argument is largely based upon Section 8.703 of the Armed Services Procurement Regulations. Section 8.703 provided (with an exception which is not pertinent here) that "the following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000," * * *. As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law. If they applied here, there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did. [Footnotes and citations omitted.]
>
> *G. L. Christian & Associates*, 160 Ct. Cl. at 11-12, 312 F.2d at 424.

We are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy. [10] * * *

[10] Restrictions relating to the transfer of Government contracts and to the assignment of claims under them also involve deeply ingrained strands of public procurement policy. "The voluntary assignment of Government contracts by private agreement has been barred as a matter of public policy since 1862 under R.S. Sec. 3737, now 41 U.S.C. 15." *Mancon Liquidating Corp.*, ASBCA No. 18304 (Jan. 24, 1974), 74-1 BCA ¶ 10,470 at 49,511. Prohibitions against the assignment of claims under Government contracts can be traced as far back as an 1846 statute (9 Stat. 41). *Patterson* v. *United States*, 173 Ct. Cl. 819, 822-23 (1965).

This history shows, in our view, that the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur.

Ibid. at 15-16, 312 F.2d at 426.

[W]e believe that it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law.

Ibid. at 17, 312 F.2d at 427.

In denying the plaintiff's motion for rehearing and reargument in *Christian*, 160 Ct. Cl. at 58, 320 F.2d at 345, the Court of Claims had occasion to consider other questions involved in the case and in connection therewith stated:

To accept plaintiff's plea that a regulation is powerless to incorporate a provision into a new contract would be to hobble the very policies which the appointed rule-makers consider significant enough to call for a mandatory regulation. Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against *ad hoc* encroachment or dispensation by the executive. * * * There is a comparable need to protect the significant policies of superior administrators from sapping by subordinates.

* * * Like other individuals who deal with the Federal Government (see, e.g., Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make. Our concern is not at all whether the policy of embodying mandatory contractual provisions in regulations is the best one. Our special interest is only the legality of such a practice, and we hold that, in the procurement field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government. [Footnote and citation omitted.]

Ibid. at 66-67, 320 F.2d at 351.

Discussion and Decision

Appellants do not directly address the holding in *Christian, supra*. Instead, appellants rely upon the holding in *Nutt, supra*, to the effect that whether a statute or regulation is to be incorporated into a contract so as to become a contractual obligation of the Government depends upon the specificity of the incorporating language. In the *Nutt* decision the Claims Court stated (12 Cl. Ct. at 351):

Unless a statute or regulation is money-mandating, the Government creates no legal right enforceable in the Claims Court to money damages by violating it. Yet, when entering into contracts, the Government may include any number of promises to conduct itself in a certain way, for example, by restating regulatory procedures and duties as contractual obligations of the Government. If the Government then violates those regulations, it may become liable for damages for breach of contract. *See Dahl v. United States*, 695 F.2d 1373, 1376, 1381 (Fed. Cir. 1982).

As the above quote indicates, and as is clear from the remainder of the opinion, the Claims Court in *Nutt* is concerned about whether the language used in the agreement to incorporate regulatory provisions is sufficiently specific to warrant finding the Government liable in damages for breach of contract if the provisions so incorporated are violated. The line of cases represented by *Nutt* has an entirely different

focus[11] than do *Christian* and the cases citing *Christian*. In *Christian* and its progeny, effect has been given to regulations directing the inclusion in future contracts of a specific clause (or clauses) provided that (i) the regulations have been issued by competent authority; (ii) they designate the category of contracts to which the clauses apply; (iii) the contract in issue falls within the designated category; and (iv) the regulation directing the inclusion of a particular clause in contracts to be awarded has been published in the *Federal Register*.

One of the principal arguments advanced by appellants is premised upon a factual error. According to appellants, the clause set forth in 48 CFR 52.232-23 prohibiting the assignment of claims was required to be included in the contract but was not so included (Response at 14). In point of fact, however, FAR 32.806(a)(1) calls for the insertion of the clause at 52.232-23, Assignment of Claims (see footnote 6 for the text of clause). FAR 32.806(b) does authorize inserting the clause at 52.242-24[12] "Prohibition of Assignment of Claims" (see note 7 for text of clause) but only "in solicitations and contracts for which a determination has been made under agency regulations that the prohibition of assignment of claims is in the Government's interest." In this case, there is no evidence that any such determination has been made.

Other arguments advanced by appellants are that there is nothing incorporating the FAR regulations relied upon by the Bureau into the contract; that those regulations were passed less than 30 days before the contract was awarded; that at the time the contract was put in final form and let out to bidding, the regulations in issue were not in force; and that as the terms of the contract were necessarily complete prior to bidding, any subsequent regulations could not be applicable without risking an invalidation of the bidding (Response at 12-14).

[3] All of these arguments founder upon the fact that from the time the solicitation here in question was issued on December 20, 1983 (AF Tab 1), until the opening of bids on March 21, 1984 (AF Tab 4), appellant Rodgers and other potential contractors could "validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make." *Christian*, 160 Ct. Cl. at 67, 320 F.2d at 351, citing *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947).[13] In this case, the record shows that

[11] Other cases involving the same focus include *Pettersen* v. *United States*, 10 Cl. Ct. 194, 198, *aff'd mem.*, 807 F.2d 993 (Fed. Cir. 1986); *Washington Internat'l Insurance Co.* v. *United States*, 16 Cl. Ct. 663 (1989). In the latter case the Claims Court quoted the following passage from page 351 of the Opinion in *Nutt, supra*:

"[T]he Government will be held to have obligated itself in contract only upon a showing of an express or implied-in-fact agreement to do so. This formidable standard serves to protect the fisc from all suits under contract claims except where the evidence guarantees with some certainty that the Government has agreed to waive its sovereign immunity. *See United States v. Testan*, 424 U.S. 392 [96 S. Ct. 948, 47 L.Ed.2d 114] ... (1976)." 16 Cl. Ct. at 669.

[12] The reference to 52.242-24 is in error. The correct reference is to 52.232-24. *See* note 7, *supra*.

[13] *Christian* has been cited and followed in many cases. *See, e.g., Fireman's Fund Insurance Co.*, ASBCA No. 38284 (Sept. 28, 1990), 91-1 BCA ¶ 23,439 at 117,555 ("[A]lthough [the contract] included a superseded Disputes clause, which did not specify who could certify a contractor's claim, the correct Disputes clause, which did specify who could certify the claim, is read into the contract as a matter of law. *G. L. Christian & Associates*, 312 F.2d 418, *reh. den.*, 320 F.2d 345 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963)"); *Commonwealth Electric Co.*, IBCA-1048-11-74 (July 15,

Continued

the FAR regulations were published in the *Federal Register* on September 19, 1983 (note 4, *supra*),and that the regulations so published included all of the provisions pertaining to assignment of claims and novation agreements (among which were FAR 32.806(a)(1) directing the inclusion in any contract awarded the clause set forth in FAR 52.232-23) upon which the Bureau is relying in part to contest Federal's right to be recognized as a successor-in-interest to Rodgers as contractor and to take an appeal in its own name.

The Board finds that the clause prescribed by FAR 32.806(a)(1) (note 6, *supra*) is incorporated into the contract by operation of law. *Christian, supra; Fireman's Fund Insurance Co.*, note 13, *supra*. The Board further finds that as all of the regulations pertaining to assignment of claims and contracts were issued under statutory authority and were published in the *Federal Register*, they have the force and effect of law.

Although germane to the question presented, the above findings are not dispositive of the question of whether, under the anti-assignment statutes and the FAR regulations cited, Federal is precluded from being recognized as a successor-in-interest to Rodgers and presently "the contractor" within the meaning of the CDA. This question will be addressed and resolved in Part III of this opinion.

III. Federal (Surety) as Successor-In-Interest to Rodgers (Contractor)

The principal issue to be determined in this case is whether, by its course of conduct over a substantial period of time, the Bureau has waived its right to invoke the anti-assignment statutes as a bar to recognizing Federal as the "contractor" within the meaning of the CDA. Other issues raised tangentially by appellants concern Federal's standing as contractor under an alleged "takeover agreement" and Federal's status as a subrogated surety.

Before addressing the above questions, we wish to place the anti-assignment statutes in a historical perspective against which the mandatory language of the statutes has been viewed with respect to both the purposes sought to be achieved and the types of transfers or assignments of claims purportedly covered by the anti-assignment statutes which have been determined to be exempted from the statutory bar by operation of law. A succinct statement of this history is contained in the decision of the Court of Claims in *Patterson* v. *United States*, 354 F.2d 327, 329 (Ct. Cl. 1965), from which the following is quoted:

> The prohibitory language contained in the first paragraph of the statute above dates back in essentially its present form to 1853 (10 Stat. 170, Rev. Stat. Sec. 3477 (1875)), and originally to an 1846 statute (9 Stat. 41). Over the years it has consistently been recognized by the courts to have two purposes--primarily, to prevent fraud; and secondarily, to avoid multiple litigation. More specifically, Congress is said to have had

1977), 84 I.D. 407; 77-2 BCA ¶ 12649; and *Paul E. McCollum, Sr.*, IBCA-1080-10-75 (Feb. 24, 1976), 83 I.D. 43, 46, 76-1 BCA ¶ 11,746 at 56,045 ("Federal Procurement Regulations, which are issued under the Federal Property and Administrative Services Act of 1949 * * * have been held to have the force and effect of law * * *"). (Footnote omitted.)

as its major objective the prohibiting of trafficking in claims against the Government such as by persons who would be in a position to exert political pressure or improper influence in prosecuting claims before the departments, the courts, or the legislature. Secondarily, the courts have ascribed to Congress the motive of enabling the United States to deal exclusively with the original claimant instead of with several parties, thus obviating the necessity of having to inquire into the validity of specific transfers or assignments of the claim, minimizing subjection to successive litigation upon the same claim, and eliminating the risk of double payment or multiple liability. [Citations and footnote omitted.]

A. Federal as Subrogated Surety

In the Complaint, appellants state that Federal, as corporate surety to Rodgers, is entitled to recover any sums due under the contract by reason of its equitable subrogation rights as surety and that Federal anticipates additional payments pursuant to the terms of its bonds (Complaint at 2-3). The Bureau, in the Answer, admits that Federal made payments for completion costs, labor, and materials pursuant to its bonds (Answer at 11).

The right of a surety on the original contract to rely on the equitable doctrine of subrogation is of a longstanding origin. *See, e.g., Prairie State Bank* v. *United States*, 164 U.S. 227, 231 (1896). In the comparatively recent case of *Balboa Insurance Co.* v. *United States*, 775 F.2d 1158 (1985), the United States Court of Appeals for the Federal Circuit vacated a partial summary judgment by the Claims Court denying the surety's claim for the recovery of a progress payment alleged by the surety to have been improperly paid to the prime contractor by the Government after it had notified the Government that the contractor was in default. *Id.* at 1159. The Court found (i) that the Government's potential liability to the surety upon the general contractor's default was not limited to retained funds, but also extended to funds paid to general contractor after the surety informed the Government of the general contractor's default and (ii) that the evidence presented by the surety raised genuine issues of material fact as to whether the Government had abused its discretion in making progress payments after receiving notice of the default, thereby precluding summary judgment for the United States.

The *Balboa* Court also found that, insofar as privity of contract with the Government was concerned, there were fundamental differences between the status of a subcontractor and that of a surety. In connection therewith the Court stated:

In contrast to a subcontractor, which has no obligations running directly to or from the Government (and therefore possesses no enforceable rights against the United States), a surety, as bondholder, is as much a party to the Government contract as the contractor. If the *surety* fails to perform, the Government can sue it on the bonds. *E.g., Carchia v. United States*, 485 F.2d 622 (Ct. Cl. 1973).

* * * * * * *

* * * When a contractor defaults under the contract, the obligation of the surety then arises under its performance and payment bonds. When the surety then finances the

contract to completion, it is subrogated to the contractor's property rights in the *contract balance*. [Citations omitted, emphasis in original.]

775 F.2d at 1160-61.

Prior to the *Balboa* decision, the uniform practice of boards of contract appeals was to accord standing to a surety to prosecute an appeal in its own name only when it had entered into some form of novation or "takeover" agreement with the Government to complete performance of a defaulted contract. *Sentry Insurance*, ASBCA No. 21918 (Aug. 5, 1977), 77-2 BCA ¶ 12,721. In the absence of a takeover agreement, the surety could appeal under the defaulted contract only in a representative capacity with the consent of its principal, the contractor on the defaulted contract. *General Construction Corporation of America By Financial Indemnity Co.*, IBCA-1178-2-78 (Mar. 29, 1979), 79-1 BCA ¶ 13,770.

Following the Federal Circuit's *Balboa* decision, several board decisions were issued concerned with the question of the standing of a surety to bring an appeal to a board of contract appeals in its own name. *See William I. Franklin*, GSBCA No. 8606 (Jan. 12, 1988), 88-1 BCA ¶ 20,520; *Peerless Insurance Co.*, ASBCA No. 28887 (Mar. 23, 1988), 88-2 BCA ¶ 20,730; *Indiana Lumbermen's Mutual Insurance Co.*, VABCA No. 2719 (June 7, 1988), 88-3 BCA ¶ 20,865; and *Mid-Continent Casualty Co.*, DOT BCA No. 1996 (July 27, 1989), 89-3 BCA ¶ 22,120.

In *Franklin, supra*, the General Services Board of Contract Appeals determined that because the appellant was a surety, it had jurisdiction to hear its appeal. On the merits the appeal was denied based upon the Board's finding that the appellant was obligated to pay respondent under the terms of the performance bond. The question presented in *Indiana Lumbermen's, supra*, was whether the Board should grant a Government motion to dismiss for lack of jurisdiction in a case where the surety has appealed a final decision of the contracting officer which had denied the surety's claim against the Government for it having wrongfully disbursed progress payments to the prime contractor. Quoting extensively from the *Balboa* decision and citing the *Peerless* decision, *supra*, the Veterans Administration Board of Contract Appeals denied the Government's motion to dismiss on the ground that the theory of subrogation was a sufficient basis for retaining jurisdiction over the surety's claim.

In *Mid-Continent, supra*, the Department ofTransportation Board of Contract Appeals determined that because the surety's claim was not a claim within the right of subrogation, it was unnecessary to address the question of whether the Board would have had jurisdiction over a properly asserted subrogation claim brought under the authority of the CDA. In its opinion the DOT Board took note of the decisions in *Peerless, supra*, and *Indiana Lumbermen's, supra*, after which it stated:

However, we need not and do not decide in this appeal whether a subrogated surety, which has not entered into an express or implied takeover agreement, acquires standing for purposes of our jurisdiction under the Contract Disputes Act because, when Mid-

Continent asserted its right to complete the project, its rights of subrogation had not accrued.

89-3 BCA at 111,243.

In *Peerless, supra,* the Armed Services Board concluded that a subrogated surety has the right to take an appeal to the Board in its own name. The conclusion was reached only after the ASBCA had examined the question in depth including the review of a number of cases which had arisen in the Federal Circuit and in other courts, as well as before boards of contract appeals. In undertaking to show the basis for the decision reached and the limits on the type of claims covered by subrogation, the Armed Services Board stated:

> The question of a subrogated surety's standing before the Board has never been decided. As pointed out earlier, however, standing to pursue contract claims against the Government before both the courts and the boards, whether under the Tucker Act or the Contract Disputes Act or the Disputes clause, has always been premised on the identical relationship of privity of contract. Moreover, we find nothing in the Court of Claims or Federal Circuit cases taking jurisdiction under the doctrine of subrogation which intimates that jurisdiction is founded on some provision of the Tucker Act that was unique to that Act or would not apply equally to the Claims Court and Boards of Contract Appeals under the Contract Disputes Act. We therefore conclude that the foregoing decisions of the federal courts finding standing for subrogated sureties based on privity derivative from the contractor's privity are authoritative precedents for this Board.
>
> There is also a direct parallel to be drawn between standing for a subrogated surety and standing for other transferees of contract rights by operation of law. The federal courts have held:
>
> As a transfer by operation of law, this equitable subrogation right is not subject to the Assignment of Claims Act. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 373-76, 70 S. Ct. 207, 212-13, 94 L. Ed. 171, 181, 182 (1949). In priority, this right relates back to the time of the surety's original contract to provide the performance bonds.
>
> * * * * * * *
>
> We see no basis for distinguishing, for purposes of standing to take an appeal here, between a subrogated surety (within the scope of its subrogation, i.e., to the extent the surety is seeking the balance of the contract price either unpaid or allegedly wrongfully paid out) and other transferees of contract rights by operation of law. * * *
>
> * * * * * * *
>
> The issue of a surety's standing to pursue a claim which is not a liquidated claim for money payable under the contract, and which is outside the scope of the subrogation, is beyond the scope of this case.

88-2 BCA at 104,740-741.

Discussion and Decision

Comparatively recently it was found that boards of contract appeals do have jurisdiction over subrogation claims submitted by sureties. *Peerless Insurance Co., supra, Indiana Lumbermen's Mutual Insurance Co., supra.* The assumption of jurisdiction over a subrogation claim presupposes, however, that a claim falling within this category has been submitted to the contracting officer for decision and that the

claim submitted is a claim within the meaning of the CDA. In this case, neither of these conditions appear to have been met.

The CDA does not define a claim but the Court of Appeals for the Federal Circuit has stated that in order to comply with section 6(a) of the CDA (41 U.S.C. § 605(a)), "[a]ll that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc.* v. *United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). The same Court has stated: "[T]he FAR mandates that, *inter alia*, a claim must seek payment of a sum certain as to which a dispute exists at the time of submission." *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872, 878 (Fed. Cir. 1991). Based upon the *Dawco* holding, the Claims Court concludes that "the parties must have reached something approaching impasse on some of the elements of the contractor's demand before a claim can arise (footnote omitted)." *Essex Electro Engineers, Inc.* v. *United States*, 22 Cl. Ct. 757, 765 (1991). The mere presence of a CDA certification, without more, "does not transform [the letter] into anything more than a cost proposal." *Dawco*, 930 F.2d at 878.

The Armed Services Board of Contract Appeals has found that "in order to be 'adequate,' the contractor's statement must be sufficient to enable the contracting officer to undertake a meaningful review of the claim." *Holk Development, Inc.*, ASBCA Nos. 40579, 40609 (June 29, 1990), 90-3 BCA ¶ 23,086 at 115,938 and authorities cited.

Under the CDA, "claims for a monetary recovery must be quantified as to amount before the contracting officer is obliged to issue a decision." *Metric Construction Co.*, ASBCA No. 33385 (Oct. 23, 1986), 87-1 BCA ¶ 19,344; *The Harris Management Co.*, ASBCA No. 27291 (Oct. 14, 1982), 84-2 BCA ¶ 17,378; *Westclox Military Products*, ASBCA No. 25592 (Aug. 4, 1981), 81-2 BCA ¶ 15,270 at 75,616-17. In addition to setting forth a sum certain "[a] contractor has a responsibility to furnish a reasonably detailed breakdown of and supporting data for the amount claimed." *I.B.A. Co.*, ASBCA No. 37182 (Jan. 26, 1989), 89-1 BCA ¶ 21,576 at 108,656.

The rationale of these ASBCA decisions is well stated in *Westclox Military Products*, 81-2 BCA at 75,615, from which the following is quoted:

> [O]ne of the goals of the Contract Disputes Act was to induce the settlement of claims before the litigation process commences. The extent to which the parties are successful in achieving a negotiated settlement is, at least in part, dependent upon the nature of the claim submission and the Government's response thereto. In order for the negotiation process to commence, it is vital that the contractor's claim be presented in sufficient detail to notify the contracting officer of the basic factual allegations upon which the claim is premised. Where a submitted claim fails to include basic factual allegations there is no basis upon which the parties can enter into a meaningful dialogue towards settlement, or upon which the issues can be sufficiently identified by a contracting officer's final decision to facilitate the litigation process.

[4] In the Complaint, appellants aver that Federal as corporate surety is entitled to recover any sums due under the contract by reason of its equitable subrogation rights. The items of claim covered by the subrogation rights asserted, however, have not been identified; no reference has been given to any data submitted in support of the subrogation claim; no attempt has been made to quantify the amount claimed by reason of subrogation; and there is no indication that any claims of this nature were presented to the contracting officer for decision. The Complaint also states that Federal anticipates having to make additional payments pursuant to the terms of its bonds.

The Board finds (i) that no claim involving the equitable doctrine of subrogation was presented to the contracting officer for decision; (ii) that the final decision from which the instant appeal was taken did not refer to any subrogation claim; and (iii) that by reason of the appellate nature of our jurisdiction, no subrogation claim is presently before us. The Board takes this occasion to note, however, that even if a subrogation claim cognizable as a claim under the CDA had been presented to and decided by the contracting officer, appellant Federal, as corporate surety, would be able to recover on any subrogation claim only when the obligations of its principal have been shown to have been fully satisfied which, according to the Complaint, had not occurred at the time the Complaint was filed. See *Mid-Continent Casualty*, 89-3 BCA at 111,243.

B. Federal as Successor Contractor Under Takeover Agreement

Citing *Morrison Assurance Co.* v. *United States*, 3 Cl. Ct. 626 (1983), and *Transamerica Insurance Co.* v. *United States*, 6 Cl. Ct. 367 (1984), appellants state that the Bureau's substitution of Federal for Rodgers amounted to a *de facto* takeover agreement (Response at 10). Elsewhere appellants state that at the time Rodgers' default occurred the project was substantially complete, so a formal takeover agreement was unnecessary (Response at 1).

In *Morrison, supra*, the plaintiff surety entered into a separate agreement with the Government under which it assumed primary responsibility for completion of the contract work. *Ibid.* at 630-31. In *Transamerica, supra*, the plaintiff surety executed a takeover agreement with the Government under which the surety agreed to engage a contractor to complete the work under the original contract in accordance with all the terms and conditions thereof. 6 Cl. Ct. at 369. Commenting upon the significance of a takeover agreement to the standing of a surety to bring an action in its own name in *Universal Surety Co.* v. *United States*, 10 Cl. Ct. 794, 800 (1986), the Claims Court states:

> *Carchia* and other similar cases are therefore factually distinct from the case at bar in one critical respect: there were separate takeover agreements between the government and the surety after default by the contractor. In that circumstance, the surety in effect becomes the contractor, subject to the terms of the new agreement. *See, e.g.,*

Transamerica Insurance Co. v. United States, 6 Cl. Ct. 367 (1984); *Morrison Assurance Co. v. United States*, 3 Cl. Ct. 626 (1983).

[5] In this case the appellants acknowledge that no formal takeover agreement was entered into with the Government. They have failed to point to any agreement with the Government following Rodgers' default on which they rely as a takeover agreement. In these circumstances, the Board finds that Federal is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist. *Universal*, 10 Cl. Ct. at 800; *Sentry, supra*.

C. Federal (Surety) As Contractor: Recognition of Assignment

In the preceding sections of this part, the Board has found that Federal had failed to present any subrogation claim to the contracting officer and that the surety company had failed to show that it had standing to take an appeal in its own name by reason of a takeover agreement entered into with the Bureau following the default of the contractor, Rodgers. Remaining for consideration is the question of whether, by its course of conduct over a substantial period of time, the Bureau had consented to the assignment of the instant contract to Federal and had thereby waived its right to invoke the anti-assignment statutes as a bar to recognition of Federal as "contractor" within the meaning of the CDA.

Application of the Anti-Assignment Statutes

The Court of Claims has stated that "[t]he Anti-Assignment statute [31 U.S.C. § 203, predecessor to 31 U.S.C. § 3727] was enacted for the purpose of preventing third parties, with whom the Government was not in privity, from acquiring an enforceable interest in a claim against it." *Pittman* v. *United States*, 127 Ct. Cl. 173, 180 (1954). Construing the same statute more than a decade later, the same court noted that "[o]ver the years it has consistently been recognized by the courts to have two purposes -- primarily, to prevent fraud; and secondarily, to avoid multiple litigation." *Patterson* v. *United States*, 354 F.2d at 327, 329.

In this case, appellants are relying chiefly upon the decision of the Court of Claims in *Tuftco Corp.* v. *United States*, 614 F.2d 740 (Ct. Cl. 1980). In that case the assignees brought action against the United States on the ground that the Government was aware of and recognized assignments of contracts from original contractor to plaintiff but, nevertheless, wrongly forwarded some of the payments due under the contract to the original contractor, resulting in the assignees' loss. The Court held that the contracting officer had the authority to waive the requirements of the Anti-Assignment Act and that the Government's actions constituted a valid recognition of the assignment of two Department of Housing and Urban Development contracts for the purchase of mobile homes. The Court also found that payments to the original contractor after notice of the assignment, rather than to

assignee, were improper and that the assignee was entitled to judgment in the amount of the improper payments.

In *Radiatronics, Inc.*, ASBCA No. 15133 (June 19, 1975), 75-2 BCA ¶ 11,349, the Armed Services Board held that a corporate contractor could take an appeal to the Board, even though the assignment of the claim involved in the dispute may have violated the anti-assignment statutes because the Government had waived the requirement that it consent to any assignment. Two assignments were involved.

On October 22, 1963, Radiatronics, Inc., hereafter R.I., entered into a contract with the Navy to furnish electronic devices. A claim related to a change was submitted to the Navy by R.I. on July 28, 1966, in the amount of $288,131. On January 26, 1968, R.I. entered into a contract with Whittaker Corp. (Whittaker) in which R.I. agreed to transfer to Whittaker the business and assets, including contracts of R.I., in exchange for the assumption by Whittaker of certain liabilities of R.I. and the transfer by Whittaker to R.I. of stock in Whittaker. By a bill of sale and assignment dated April 30, 1968 (referencing the earlier agreement), R.I. sold its tangible and intangible assets to Whittaker. A bilateral modification dated May 7, 1968, was executed by Radiatronics Division of Whittaker Corp. Discussions pertaining to the Changes claim were held between representatives of the Navy and representatives of Whittaker R.D. (Radiatronics Division) at a meeting on August 16, 1968. In a letter to the Navy of August 26, 1968, Whittaker R.D. referred to the August 16 meeting and described the claim as being in the amount of $316,945. 75-2 BCA at 54,060-62.

By contract dated December 5, 1968, Whittaker R.D. agreed to transfer to Tasker Industries, hereafter Tasker, Whittaker's Radiatronics Division and its Electronics Division, and all the business and assets thereof, including the Navy contract under which the Changes claim previously identified had been submitted. By Bill of Sale and Assignment dated December 20, 1968, Whittaker implemented the contract of December 5, 1968, selling and assigning the property and contracts of Whittaker R.D. to Tasker in exchange for 80 percent of the voting stock of Tasker.

In *Radiatronics*, the appellants argued that the sales by R.I. to Whittaker and by Whittaker to Tasker effected assignment of the Navy contract and claims in issue by operation of law. Under applicable decisions, this would exempt both from the anti-assignment statutes and dispense with any legal necessity for the Government's consent to the assignments by novation or otherwise. The ASBCA found it unnecessary to decide whether or not an exception should be applied as a matter of law to the sales by R.I. to Whittaker and by Whittaker to Tasker because it was "of the opinion the motion must be denied in any event on other grounds even if those sales involved violations of the anti-assignment statutes." Immediately thereafter, the ASBCA stated:

It is well settled that the Government may waive 41 U.S.C. 15, consenting to the assignment of a contract and recognizing the assignee as successor contractor. The concept of consent also applies to a claim within 31 U.S.C. 203. See *Freedman's Savings & Trust Co., et al. v. Shepherd*, 127 U.S. 494, 505, 506, 32 L. Ed. 163, 167, 168 (1888); *Dulaney v. Scudder, et al.*, 94 Fed. 6, 10 (CCA-5, 1899). Consent is a matter of substance not form. There is no statutory barrier or regulation preventing *de facto* recognition by means other than novation or formal written consent. See *Vertical Aviation Transport Systems, Inc., supra* at page 50,365. [Citations omitted.]

75-2 BCA at 54,069.

Concerning the first assignment from R.I. to Whittaker, the ASBCA found that the Government had consented to the assignment and recognized Whittaker as the first successor contractor, both before and during the life of the second assignment to Tasker, by joining with Whittaker in amendments to the contract, by making payments to Whittaker and by other contractual dealings with Whittaker with knowledge that Whittaker had taken over R.I.'s business, including the disputed claim. With regard to the second assignment from Whittaker to Tasker, the ASBCA concluded that the Government had consented to the assignment and recognized Tasker as the successor contractor, prior to the merger of Tasker into Whittaker, by joining with Tasker in amendments to the contract, by accepting deliveries from Tasker, by express admission in the Answer on appeal, by identifying Tasker as responsible for a claimed overpayment to Whittaker, by recognizing the location of contract performance as Tasker's address, and by accepting refunds from Tasker. The Board also concluded that each of the successive purchasers - assignees had relied on manifestations of the Government's consent and recognition. *Ibid.* at 54,069-70.

Board decisions rendered since the enactment of the CDA involving consideration of waiver of the anti-assignment statutes include *In-Vest Corp.*, GSBCA No. 6365 (Apr. 29, 1983), 83-1 BCA ¶ 16,502, and *CBI Services, Inc.*, ASBCA No. 34983 (Dec. 8, 1987), 88-1 BCA ¶ 20,430.

The principal question presented in *In-Vest* was whether the appellant -- who, as a purchaser of a building leased by the Government and as an assignee of the lease, was required to furnish the Government with cleaning services -- could take an appeal in its own name from an adverse decision of the contracting officer on the quality of some of the cleaning services performed by the assignee. In denying the Government's motion to dismiss for lack of jurisdiction, the Board noted that "[t]oday it is undisputed that the Government may waive the Anti-Assignment Act," after which it stated that the critical issue in the case was what Government actions, if any, constituted waiver of the requirement that Government consent to the assignment be obtained. 83-1 BCA at 82,007.

Among the factors cited in support of the Board's findings of waiver and implied consent to the assignment were the Government's dealings and course of conduct with appellant. Additional factors cited by the Board in support of its decision reached were: (i) the Government had received lease assumption and assignment documents from the transferor; (ii) the cleaning services required by the lease had been

performed by In-Vest and accepted by the Government without complaint for a period of at least 18 months; (iii) before the disputes arose the Government had treated the appellant as the party responsible for cleaning the premises in accordance with the terms of the lease; and (iv) the record indicated that for many months the Government had routinely made its rental payments to In-Vest. Thereafter the Board stated: "As the courts have held in other cases, the totality of the circumstances presented establishes the Government's recognition of the assignment by its knowledge, assent, and actions consistent with the assignment." *Id.* at 82,008-09.

In *CBI Services, supra*, the Government filed a motion to dismiss the appeal upon the ground that the Board lacked jurisdiction because the appellant was not the "contractor" authorized to appeal under the CDA, 41 U.S.C. §§ 605(a), 606.

Contract No. N62477-85-C-0240 was awarded to the Chicago Bridge and Iron Company (Chicago Bridge) on October 25, 1985. Both Chicago Bridge and CBI Services, Inc., were subsidiaries of CBI Industries, Inc. Various standard clauses were incorporated into the contract by reference, including "ASSIGNMENT OF CLAIMS (APR. 1984)," as prescribed by FAR 52.232-23. By letter dated December 18, 1985, Chicago Bridge advised the Government that due to restructuring by the parent company, CBI Industries, Inc., performance of the contract would be assigned from Chicago Bridge and Iron Co. to CBI Services, Inc., effective December 22, 1985. In an identically worded letter, dated December 27, 1985, the appellant advised the Government to the same effect. In both letters the contract was identified as "CBI Contract 851949."

In the course of its opinion, the Board noted that for it to have jurisdiction over the appeal the Board would have to conclude that the appellant had been lawfully substituted as the "contractor" in place of Chicago Bridge. Commenting upon various aspects of the jurisdictional question presented, the ASBCA stated, *inter alia*, that (i) nowhere does the appellant contend that the alleged assignment comports with the anti-assignment statutes, 31 U.S.C. § 3727, and 41 U.S.C. § 15; (ii) that the Board independently concludes that the assignment there involved did not fall either within the statute or any recognized exception; (iii) that a literal reading of 31 U.S.C.§ 3127 requires the conclusion that any attempted transfer of a Government claim "may be made only" after specified conditions are met, none of which had been met in the case under consideration; (iv) that a literal reading of 41 U.S.C. § 15 requires the conclusion that any attempted transfer of a claim against the United States "shall be absolutely null and void"; (v) that, nonetheless, the Supreme Court had long recognized an exception to these broad statutory prohibitions where a transfer occurs by operation of law; (vi) that the ASBCA had previously held that the operation of law exception did not extend to the sale of the assets of

an enterprise; and (vii) that the facts in the case in question "all point towards the characterization of the transaction as a sale of assets" and hence not within the operation of law exception. 88-1 BCA at 103,337.

Thereafter, the Board noted that since the alleged assignment did not comport with the statutes, the issue becomes whether the Government waived compliance with those statutes by treating the appellant as the contractor. After taking note of the fact that the appellant does not contend, and the record nowhere suggests, that the appellant complied with the procedures for express recognition of assignments set forth in FAR 42.1204, the Board observed that "the thrust of appellant's argument is that respondent has waived the statutory bar by taking or failing to take various actions which are tantamount to recognition of the alleged assignment." *Id.* at 103,337-38.

The Board found that the various factors cited by the appellant failed to show Government recognition of the alleged assignment. The first factor cited by the appellant -- the lack of response to the December 18 and 27, 1986, notifications -- was considered insufficient because it assumes that both letters, once sent, were received by an official of the Government with the authority to act and it also assumes that the recipient deduced that the references in both letters to an assignment of "CBI Contract 851949" meant that the contract in issue was being assigned. The second factor cited by the appellant -- oral acceptance by the Government's director of hyperbaric projects -- was found to be unsupported by any evidence, and, even if it were supported, would still leave open the question of the authority of this official to bind the Government. As to the third factor -- the appellant's allusion to the Government's acceptance of progress reports and invoices from the appellant -- the Board noted that even if it were to assume that the Government did accept the progress reports and invoices, there is no evidence that the Government took the affirmative step of advising the appellant to submit progress reports and invoices in lieu of Chicago Bridge.

The final factor cited by the appellant -- the issuance of the contracting officer's final decision to the appellant -- was not found to be dispositive. The Board noted that the circumstances preceding the issuance of the decision were ambiguous, consisting of one letter from the Government addressed only to "C.B.I." at the Washington, D.C., office of Chicago Bridge, and a second letter addressed to the appellant. Apropos the final decision, the ASBCA states: "From the text of the decision itself, with its assertion that 'the award of this contract was made to you,' it seems evident that the author entertained the mistaken belief that appellant was the original contractor, not an assignee." *Id.*

Discussion

Contentions of Appellants

Earlier in this opinion the Board has addressed all of the contentions advanced by appellants relating to the assignment except for the question of whether the Bureau had recognized the assignment to Federal and thereby waived the anti-assignment statutes and the applicable regulations. As to appellants' contentions, the Board has found (i) that the clause prescribed by FAR 52.232-23, "Assignment of Claims (APR 1984)," footnote 6, *supra*, was incorporated into the contract by operation of law and (ii) that since all of the FAR regulations pertaining to assignment of claims or contracts had been issued under statutory authority and had been published in the *Federal Register*, they have the force and effect of law (see Part II, *supra*). The Board has also found that it has no jurisdiction over a claim for subrogation alluded to by appellants but not presented to the contracting officer for decision. See Part III.A, *supra*. In addition, the Board has found that appellants failed to show that Federal had standing to prosecute an appeal in its own name by reason of a takeover agreement with the Bureau (see Part III.B, *supra*).

Contentions of the Bureau

In support of its position that the Board should dismiss the appeals for the lack of standing of Federal to bring an appeal in its own name,[14] the Bureau relies principally upon the following grounds:

1. *Tuftco Corp.* v. *United States*, 222 Ct. Cl. 277, 614 F.2d 740 (1980), is inapplicable to the instant case, since *Tuftco* involved an assignment of a contract (614 F.2d 744 n.4) and not, as in this case, a purported assignment of a contract claim which is controlled by 31 U.S.C. § 3727 (the successor to 31 U.S.C. § 203 discussed in *Tuftco*) (Reply at 13).

2. The FAR regulations pertaining to the assignment of claims or contracts are mandatory and preclude the recognition of any assignment not in compliance therewith (Reply at 15-16; Answer at 6-9).

3. Actions of the Bureau in making payments to Federal after May 30, 1987, and in substituting the name Federal for Rodgers in a contract modification in September 1987 and in all modifications issued thereafter did not make Federal a successor-in-interest to Rodgers and did not constitute a recognition of Rodgers' assignment of its pre-May 1987 claims to Federal which Federal can assert as the "contractor" in this appeal (Reply at 12).

[14] In the event the Board were to determine that the Bureau had not recognized Federal as the contractor, the right to prosecute the pre-May 1987 claims would remain with Rodgers. *See Sun Cal Inc.* v. *United States*, 21 Cl. Ct. 31, 37 (1990), from which the following is quoted: "When an attempted assignment of a claim against the government does not comply with applicable statutory requirements, it is void against the government * * * and the cause of action remains with the entity that sought unsuccessfully to assign the claim." (Footnote and citations omitted.)

As to the Bureau's first contention (the asserted inapplicability of *Tuftco*), the Board notes (i) that Federal completed the contract work (AF 50 at 546); (ii) that in May 1987 both parties agreed that "all payments now or hereafter due" pertaining to the contract were to be made to Federal (Answer, Exhs. 2 and 5); and (iii) that in the agreement captioned "Acknowledgment of Default," Rodgers assigned to Federal "all rights" under the contract (Answer, Exh. 4). In these circumstances, there would appear to be an ample basis for the Board to conclude that an assignment of the contract, as well as an assignment of a claim, is involved. *See Schwartz* v. *United States*, 16 Cl. Ct. 182, 188 (1989); *American Financial Associates, Ltd.* v. *United States*, 5 Cl. Ct. 761, 766-67 (1984); and *Maryland Small Business Development Financing Authority* v. *United States*, 4 Cl. Ct. 76, 78-79 n.2 (1983).

Assuming, *arguendo*, however, that in the instant case only an assignment of a claim is involved, the Bureau's reliance upon the reference cited would appear to be misplaced. In fact, the reference given is considered to be supportive of the contrary position, namely, that the same general principles would govern the disposition of waiver cases arising under either of the anti-assignment statutes. While noting that the case before it dealt with 41 U.S.C. § 15, the *Tuftco* court, in footnote 4, stated: "Some of the cases cited in the discussion, *infra*, of assignment principles, arose under 31 U.S.C. § 203. In general terms, however, the concerns of the two statutes and the legal concepts involved in their applicability are the same." 614 F.2d at 744. *See also Radiatronics*, 75-2 BCA at 54,069.

In its pleadings the Bureau disparages the significance of *Tuftco* as a precedent by referring to it as a "pre-Contract Disputes Act and a pre-FAR case" (Answer at 8). Before undertaking to determine the present significance of *Tuftco* as precedent, the Board notes that at its inception the Court of Appeals for the Federal Circuit found it necessary "to adopt an established body of law as precedent" and that the body of law so adopted included the holdings of the Court of Claims announced before the close of business on September 30, 1982. *See South Corp.* v. *United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

In the post-CDA era, the courts and the agency boards of contract appeals continue to apply the *Tuftco* standards in determining whether the Government's actions in a particular case evince recognition of the assignment sufficient to constitute a waiver of the Anti-Assignment Act. *See*, for example, *American Financial Associates, supra, aff'd* 755 F.2d 912 (Fed. Cir. 1985), a case involving the purported assignment of two Navy contracts to the same financing institution. There the Claims Court found that the action the Navy had taken under one of the contracts did not constitute a recognition of the assignment (5 Cl. Ct. 769) but that by its actions under the other contract the Navy had effectively recognized the assignment and waived the provisions of the Anti-Assignment Act. (5 Cl. Ct. 771-72). *See also Sun Cal, Inc.* v. *United States*, 21 Cl. Ct. 31 (1990). The case

involved an action brought under the CDA in which, citing *Tuftco, supra*, the Claims Court noted that the Government had conceded that its actions had resulted in an implied-in-fact novation of the original contract and the creation of privity of contract between the Government and the successor lessor. 21 Cl. Ct. at 36.

Post CDA, the decisions of boards of contract appeals have also applied the *Tuftco* standards in determining whether the Government by its actions had recognized an assignment and thereby waived the Anti-Assignment Act. See *In-Vest Corp.*, 83-1 BCA at 82,008-09 (assignment recognized) and *CBI Services*, 88-1 BCA at 103,337-38 (assignment not recognized).

Concerning the Bureau's second contention (*i.e.*, the FAR regulations pertaining to the assignment of claims or contracts are mandatory and preclude the recognition of any assignment not in compliance therewith), the Board notes that the regulations to which the Bureau refers are set forth in Subpart 32.8 (Assignment of Claims) and Subpart 42.12 (Novation and Change of Name Agreements) of the FAR. As will be seen from an examination of the referenced regulations from which we quote extensively in the Background Section of this opinion, *supra*, many of the regulations in question are of a mandatory nature.

In support of its position, the Bureau refers to the fact that in its Response appellants had relied upon *Transamerica Insurance Co.* v. *United States*, 6 Cl. Ct. 367 (1984), and *Morrison Assurance Co.* v. *United States, supra*, in furtherance of its argument that the substitution of Federal in contract modifications amounted to a *de facto* takeover agreement. Thereafter the Bureau states that "[i]n the case at hand, the pertinent regulations are mandatory, not permissive as was the case in *Morrison*" (Reply at 14-15). While the regulations in *Morrison* were found to be permissive (3 Cl. Ct. 636), the Claims Court noted that if the regulations in issue were found to be applicable, "it would not be unreasonable to construe the August 24th agreement between the plaintiff and the Park Service as a waiver by the government of strict compliance with the termination provisions of section 1-18.803."[15] The decision in *Morrison* favorable to the surety has come to be viewed, however, as involving a takeover agreement between the Government and the surety after default by the contractor. *See Universal Surety Co.* v. *United States*, 10 Cl. Ct. at 800.

In presenting its case, the Bureau seems to be oblivious to the anomalous nature of its position. That is, since the FAR regulations pertaining to assignments are mandatory they cannot be waived, even though the anti-assignment statutes which these regulations purport to implement (see FAR 32.800, *supra*) can be waived if the standards

[15] 3 Cl. Ct. 635 n.3. In the same footnote the *Morrison* Court states:

"In certain instances, government procurement officials can waive statutory and/or regulatory rights. See *Bank of California National Ass'n v. Commissioner*, 133 F.2d 428, 433 (9th Cir. 1943); *California Bank v. United States Fidelity & Guaranty Co.*, 129 F.2d 751, 752-53 (9th Cir. 1942), (assignment of claims requirements). The facts at hand would support a waiver approach to recovery by plaintiff."

established in the case law are met. Of special interest in this regard is the decision of the Armed Services Board of Contract Appeals in the case of *CBI Services, supra*.

In *CBI Services* the contract in issue was awarded on October 25, 1985, and incorporated various standard clauses by reference including Assignment of Claims (APR 1984), as prescribed by FAR 52.232-23 (88-1 BCA at 103,335). From the opinion it is apparent that the Board was concerned with the question of whether the Government had waived compliance with the anti-assignment statutes, 31 U.S.C. § 3727 and 41 U.S.C. § 15, by treating the appellant as the contractor. Although in *CBI Services*, the same contract provisions pertaining to assignments were presumably incorporated into the contract involved in that case, as we have found were incorporated into the instant contract under the *Christian* doctrine, the only substantive comment on regulations in the entire opinion is the statement that "[a]ppellant does not contend, and the record nowhere suggests, that appellant complied with the procedures for express recognition of assignments set forth in FAR § 42.1204." 88-1 BCA at 103,337.

Thereafter, the ASBCA paid no further attention to the absence of a novation agreement. Instead, after citing *Tuftco, supra*, and other cases involving waiver, the Board applied various factors commonly used in determining whether an assignment had been recognized after which it concluded that recognition of the assignment had not occurred.

In the paragraph of the Reply in which its discussion of the regulations is concluded, the Bureau notes that the regulations were promulgated under statutory authority and thus had the force and effect of law when promulgated. Then the Bureau states:

> Accordingly, Federal was prohibited from being the assignee of Rodgers' purported pre-existing contract claims and is prohibited from being the "contractor" under the Contract Disputes Act in asserting in its own name such claims or in certifying such claims. Accord, *G. L. Christian and Associates v. United States, supra, Westech opinion at pp. 4-5.*

(Reply at 16).

As to the above-cited cases, the Board notes that it primarily relied upon *Christian* for its holding that the regulations with which we are here concerned were to be given the force and effect of law. The decision reached in *Christian* does not otherwise support the Bureau's position, however, since the decision in that case was rendered long before the enactment of the CDA and was one of the principal cases relied upon in *Tuftco* where the Court of Claims found that the assignment had been recognized and the anti-assignment statutes had been waived; nor does the *Westech* decision support the Bureau's position since in that case there was no occasion for the Claims Court to discuss waiver, as Fireman's Fund (the surety) "could not make, and expressly waived, any claim under the theory of assignment. Assignment of Claims Act, 31 U.S.C. § 3727, 41 U.S.C. § 15 (1988)." *See Westech Corp.* v. *United States*, 20 Cl. Ct. 745, 748 n.3 (1990).

With respect to the Bureau's third contention (*i.e.*, that the actions of the Government in making payments to Federal (the Surety) after May 30, 1987, and in substituting the name Federal for Rodgers (the original contractor) in a contract modification in September 1987 and in all subsequent modifications did not constitute a recognition of Rodgers' assignment of the pre-May 1987 claims to Federal which Federal could assert in this appeal), the Board notes (i) that none of the cases relied upon by the Bureau in support of its position involve consideration of the questions related to waiver of the anti-assignment statutes; (ii) that no consideration appears to have been given to the sweeping nature of the language used in *Tuftco* to describe the effect of waiver of the Anti-Assignment Act; and (iii) that no effect has been given to the significant holding of the Armed Services Board in *Radiatronics, supra*,[16] cited and quoted from in *Tuftco*. 614 F.2d 745 n.7.

The Bureau has acknowledged that Federal is a completing surety (Reply at 10) and that appellants are relying chiefly upon the decision of the Court of Claims in *Tuftco* to support their position. Although the principal finding in *Tuftco* was that by its actions the Government had recognized the assignment and thereby waived the Anti-Assignment Act, the only case referred to by the Bureau that can be said to relate to waiver is *Morrison, supra*. There, in a decision favorable to the surety on the question of standing, the Claims Court stated in a footnote that the facts involved in that case would support a waiver approach to recovery by the plaintiff (note 15, *supra*).

Earlier in this opinion we have cited the decision of the Court of Claims in *Tuftco*. The principal defense offered by the Government in that case was that because of the notice provisions applicable to banks and other financial institutions had not been followed, the contracting officer was wholly without authority to recognize the assignment. The Court gave short thrift to that argument, stating:

> The argument is novel indeed for as often as this court has stated the Government may waive the Anti-Assignment Act and recognize an assignment, it has never intimated waiver of the Act is nevertheless conditional upon fulfillment of certain provisions of the Act. Recognition encompasses waiver of the entire Act; recognition of an assignment is not, as the defendant argues, simply another exception to the Act, as assignment to a financing institution. Reduced to its fundamental point, the Government's argument is that compliance with the notice provisions applicable to banks and financing institutions is the *exclusive* method of avoiding the Act's prohibition. The cases cited in the court's discussion, *supra*, demonstrate that such an assertion is incorrect. [Italics in original.]

614 F.2d at 746.

[16] As to the significance as precedent of boards of contract appeals decisions antedating the enactment of the CDA but not inconsistent therewith, see our decision in *Blaze Construction Co.*, IBCA-2668-A (Dec. 14, 1989), 90-1 BCA ¶ 22,522 at 113,030, in which, quoting with approval, we stated:

"In *Imperator Carpet & Interiors, Inc.*, GSBCA No. 6167 (July 31, 1981), 81-2 BCA par. 15,266 at 75,595, the General Services Board of Contract Appeals, citing authority, stated: 'The Contract Disputes Act of 1978 is largely a statutory restatement of former agency board practice and procedure under the contractual "Disputes" clause' and that '[t]hat Act * * * is to be taken as intended to fit into the existing system and to be given a conforming effect unless a different purpose is plainly shown.' "

See also American Financial Associates Ltd., 5 Cl. Ct. at 771, in which the Claims Court stated:

> It is clear from the *Tuftco* opinion and its predecessors, however, that if the government has recognized an assignment, as evidenced by its knowledge, assent, and action(s) pursuant thereto, it has waived the entire statute, including the notice provisions. *See, e.g., Tuftco, 222 Ct. Cl. at 285-86, 288, 614 F.2d 740; G. L. Christian & Assoc. v. United States*, 160 Ct. Cl. 1, 10, 312 F.2d 418 (1963). Consequently, the courts have never suggested that the government can waive only those elements of the Act that pertain to nonfinancial institutions; to the contrary, the provisions of the Anti-Assignment Act have been deemed waived to the benefit of financial as well as nonfinancial institutions, even if all of the statutory prerequisites have not been complied with by the assignee. *See Maryland Small Business Development Financing Authority v. United States*, 4 Cl. Ct. 76 (1983).

For its position that the pre-May 1987 claims could not be assigned, the Bureau appears to be relying upon the decisions of the Claims Court in *Westech Corp., supra*, and *Universal Surety, supra* (Reply at 9-14). No question of waiver appears to have been raised in either of the cited cases. In *Westech* the right of the contractor to proceed with performance was terminated for default. ollowing the default termination, Fireman's Fund (the surety) submitted a claim on behalf of *Westech* for recovery of delay and acceleration damages. As has been previously noted, Fireman's Fund expressly waived any claim under the theory of assignment (20 Cl. Ct. at 748 n.3).

In *Universal Surety* the Claims Court found against the surety on the question (termed "novel") of whether a surety has the right to assert, independently of the contractor, claims against the Government for amounts other than the "contract price." 10 Cl. Ct. 794-95. In resolving the question presented, the *Universal* Court discussed and applied the principles governing subrogation and takeover agreements. Nowhere in the discussion is the term "waiver" even mentioned. The opinion specifically notes that the contractor (Kener) had not submitted a claim to the contracting officer (10 Cl. Ct. 795); nor is there any indication in the opinion that the contractor had assigned the right to submit a claim to *Universal*.

In the instant case, however, claims for equitable adjustment were filed with the Bureau by Rodgers as contractor (AF Tab 50 at 543-46) and a revised claim for equitable adjustment in a lesser amount was later filed with the Bureau by Federal under an assignment by Rodgers to Federal of "all rights" under the contract (AF Tab 50 at 546-47; Answer, Exh. 4). The circumstances involved in this case are quite similar to those present in *Radiatronics, supra*, where with respect to the first assignment from Radiatronics to Whittaker the Armed Services Board found that the Government had consented to the assignment and recognized Whittaker as the first successor contractor by joining with Whittaker in amendments to the contract, by making payments to Whittaker and by other contractual dealings with Whittaker with knowledge that Whittaker had taken over Radiatronics' business, including the disputed claim. 75-2 BCA at 54,069.

The disputed claim to which the opinion in *Radiatronics* refers was initially filed with the Navy by Radiatronics on July 28, 1986, in the amount of $288,131. Following a bill of sale and assignment by which Radiatronics sold its tangible and intangible assets to Whittaker, discussions were held between the representatives of the Navy and of Whittaker pertaining to the changes claim at a meeting on August 16, 1968. By letter to the Navy dated August 26, 1968, Whittaker referred to the August 16 meeting and described the claim as being in the amount of $316,945. 75-2 BCA at 54,060-62. In *Radiatronics*, as here, there was an initial submission of a claim by the contractor, the execution of an assignment of rights under a contract to another firm by the contractor, the subsequent exercise of dominion over the assigned claim by the assignee, and negotiations between the Government and the assignee on the assigned claim.

The Bureau acknowledges that after May 30, 1987, payments under the contract were made to Federal and that in September 1987 and thereafter modifications showed Federal to be the contractor. The Bureau denies, however, that from the actions so taken any inference should be drawn that the Bureau had recognized Federal as the successor in interest in any pre-May 1987 claims or that it had effectively recognized Rodgers' assignment of its pre-May 1987 claims to Federal which Federal could assert as the "contractor" in this appeal (Reply at 12).

The Board need not draw any inferences from the general admissions made by the Bureau with respect to payments and modifications, however, where, as here, the record clearly shows that a significant number of the actions taken by the Bureau over a substantial period of time directly pertained to the pre-May 1987 claims and were specifically so identified. *See, e.g.*, Modification No. 73 (June 28, 1989) and Modification No. 074 (Sept. 26, 1989). Both of these modifications refer to the contractor's Request for Equitable Adjustment of March 20, 1987, as revised on October 31, 1988, by letter dated November 10, 1988, from Federal Insurance Company to the Bureau (Response Exh. H).

On April 26, 1989, the Bureau entered into negotiations with Heme, representing Federal, to reach agreement on the direct costs of six severable issues within the claim, clearly identified as having their origin in pre-May 1987 claims (AF Tab 50 at 544-48). Modification No. 73, dated June 28, 1989, resolved a number of the issues involved in the negotiations and provided for a payment to Federal in the amount of $195,427 (Response, Exh. H). Negotiations pertaining to the remainder of the claim were conducted on July 26 and 27, 1989, as well as on September 7, 1989, but they proved to be unsuccessful (AF Tab 50 at 548). The sum of $195,427 was deposited to Federal's account on July 24, 1989 (Response, Exh. I). Interest on the $195,427 settlement figure was computed to be in the amount of $41,311.72

(Response, Exh. H) and a deposit in that amount was made to Federal's account on December 7, 1989 (SAF, Exh. I).

Decision

While the instant appeals are subject to dismissal in any event on the ground that appellants had failed to properly certify the claims, as required by the CDA, 41 U.S.C. § 605(c)(1), and the implementing regulations, 48 CFR 33.207, the Bureau has also moved to dismiss Federal as a party to the appeal upon the ground that Federal, as a surety is not a "contractor" within the meaning of section 601(4) of the CDA. That section of the CDA defines the term "contractor" to mean "a party to a Government contract other than the Government." For our jurisdiction to attach in this case to appeals prosecuted by Federal in its own name, it would be necessary for the Board to find that Federal has been lawfully substituted as the "contractor" in place of Rodgers.

Appellants nowhere contend that the purported assignment complies with the anti-assignment statutes, 31 U.S.C. § 3727, 41 U.S.C. § 15. The Board concludes that the purported assignment does not fall within the statutes or any recognized exception. The courts have long recognized an exception to the statutory prohibitions where a transfer is found to have occurred by operation of law.[17] If an operation of law exception were found to apply here, it would exempt the purported assignment from the anti-assignment statutes and dispense with any legal necessity for the Government to consent thereto by novation or otherwise. *Radiatronics*, 75-2 BCA at 54,069. Here, however, appellants have failed to bring themselves within any recognized operation of law exception. They have also failed to show that Federal is the proper party to prosecute an appeal in its own name by reason of having executed a takeover agreement with the Bureau following the default of Rodgers or by reason of having submitted a cognizable subrogation claim to the contracting officer for decision.

[6] Since the Board has found that the assignment here in issue does not comply with the anti-assignment statutes, and does not fall within any recognized exception thereto, the question becomes what actions by the Government, if any, constituted waiver of the requirement that appellants obtain Government consent for their assignment. *In-Vest Corp*, 83-1 BCA at 82,007. "[I]f the government has recognized an assignment, as evidenced by its knowledge, assent, and action(s) pursuant thereto, it has waived the entire statute, including the notice provisions." *American Financial Associates* v. *United States*, 5 Cl. Ct.

[17] Delineating the scope of the operation of law exception in *Patterson* v. *United States*, 173 Ct. Cl. at 823-24, 354 F.2d at 329-30 (1965), the Court of Claims stated:

"[T]he courts have held the following assignments or transfers to be by 'operation of law,' and exempt from the relevant statutory provision: transfers by intestate succession or testamentary disposition, Erwin v. United States, 97 U.S. 392, 24 L. Ed. 1065 (1878); by consolidation or merger to the successor of a claimant corporation, Seaboard Air Line Ry. v. United States, supra; by judicial sale, Western Pacific R. Co. v. United States, 268 U.S. 271, 45 S.Ct. 503, 69 L.Ed. 951 (1925); by subrogation to an insurer, United States v. Aetna Casualty & Surety Co., supra; by statutory provision to a trustee in bankruptcy, McKay v. United States, 27 Ct. Cl. 422 (1892), Accord, Erwin v. United States, supra; and by voluntary assignment of all the assets of an insolvent debtor for the benefit of creditors, Goodman v. Niblack, supra."

at 771, citing *Tuftco*, 222 Ct. Cl. at 285-86, 288, 614 F.2d at 740; *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. at 1, 10, 312 F.2d at 418 (1963).

In all the cases in which the Government has been found to have recognized an assignment and waived the anti-assignment statutes, the notice of the transfer or assignment has been clear and unambiguous and the Government has either expressly agreed to the assignment as in *Tuftco*, 614 F.2d at 745, or has so conducted itself that the assignee was warranted in concluding that recognition of the assignment or transfer had occurred. *See, e.g., Sun Cal, Inc.*, 21 Cl. Ct. at 36; *American Financial Associates*, 5 Cl. Ct. at 771-72; *In-Vest Corp.*, 83-1 BCA at 82,008-09; *Radiatronics*, 75-2 BCA at 54,069; *Vertical Aviation Transport Systems, Inc.*, ASBCA No. 18266 (Apr. 19, 1974), 74-1 BCA ¶ 10,617 at 50,365-66.

In *Tuftco*, the Court of Claims stated that it was unnecessary to identify any one particular act as constituting recognition of the assignments by the Government. Immediately thereafter it stated that "[i]t is enough to say that the totality of the circumstances presented to the court establishes the Government's recognition of the assignments by its knowledge, assent, and action consistent with the terms of the assignments." 614 F.2d at 746. Actions taken by the Government which have been found to weigh in favor of recognition when present with other factors include (i) modifications to the contract showing the assignee to be the contractor, *Radiatronics*, 75-2 BCA at 54,069; (ii) payments under the contract being made to the assignee after receipt by the Government of the notice of assignment, *American Financial Associates*, 5 Cl. Ct. at 771-72; *In-Vest Corp.*, 83-1 BCA at 82,008-09; *Radiatronics*, 75-2 BCA at 54,069; (iii) discussions and negotiations with the assignee pertaining to contract claims, *Radiatronics*, 75-2 BCA at 54,062; *Vertical Aviation Transport Systems*, 74-1 BCA at 50,365; and (iv) rendition of a final decision to the assignee, *Radiatronics*, 75-2 BCA at 54,063; *Vertical Aviation Transport Systems, supra. Ibid.*

In *CBI Services, supra*, where the alleged assignment was found not to have been recognized by the Government, substantially the same factors were considered by the Armed Services Board in arriving at its decision. There the notice of assignment cited an incorrect contract number and it was not shown that the purported notices of assignment once sent were received by an official of the Government with the authority to act in the circumstances. While the contracting officer's decision in that case was addressed to the appellant, the Board found the circumstances surrounding its issuance to be ambiguous and noted that the text of the decision indicated that the contracting officer was proceeding under the mistaken belief that the appellant was the original contractor, not the assignee. With respect to two other factors,

the ASBCA noted that the record showed consistent payments and contract modifications in favor of the original contractor.

Apropos the significance to be attached to the two factors of payments and modifications, the ASBCA states:

> Moreover, while it [CBI Services] mentions the progress reports and invoices, appellant disregards the far more persuasive countervailing factors of consistent payment and contract modifications in favor of Chicago Bridge. In *Tuftco*, the Court of Claims concluded that payments to an assignee over time constituted the most significant factor evidencing Government recognition. 222 Ct. Cl. at 287, 614 F.2d at 746. By [contrast], the record here discloses no payments whatever to the alleged assignee, and consistent payments to the original contractor. In addition, we can hardly disregard the execution of eight bilateral modifications between respondent and Chicago Bridge over a period of fourteen months.

88-1 BCA at 103,338.

In the case at bar, the record shows that the notice of assignment was sent to the Bureau and was accepted by a person with authority to act for the Bureau. All of the other factors enumerated above indicating recognition of the assignment are present here. Over a period of 29 months all modifications showed Federal as the contractor. For a period of approximately 30 months (from May 30, 1987, to December 7, 1989), all payments under the contract, including progress payments, were made to Federal. Negotiations pertaining to the present claims were conducted between the Bureau and a representative of Federal on four occasions. The final decision of the contracting officer was addressed to, sent to, and received by Federal without any indication that a copy of the decision was ever sent to Rodgers.

Based upon the above summary of the law and the facts, the Board holds that the Bureau was aware of, assented to, and recognized the assignment from Rodgers to Federal. The effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of Federal as the successor contractor to Rodgers, and to give standing to Federal to prosecute the instant appeals in its own name as the "contractor" within the meaning of section 601(4) of the CDA. Accordingly, the Bureau's motion to dismiss Federal as a party to the instant appeals is hereby denied.

IV. Count 4, Maladministration, and Count 5, Incidental Impact Expenses, of the Complaint

Under the caption "Affirmative Defenses" the Bureau states that the Board is without jurisdiction over "Count 4, Maladministration" and "Count 5, Incidental Impact Administration,"[18] of the Complaint, because these claims were not contained in the Notice of Appeal (Answer at 14-15). In opposition to the position of the Bureau, appellants assert that the Board does have jurisdiction because the contracting officer heard and decided the claims contained in Counts

[18] In regard to Count 5 the Bureau uses the terminology "Incidental Impact Administration." The same terminology is employed by appellants at p. 23 of the Response. In the Complaint, however, the language employed at p. 10 in referring to Count 5 is "Incidental Impact Expenses."

4 and 5 and the Notice of Appeal complied with section 4.102(b) of the Board's rules (Response at 22-24).

With respect to appellants' contention that the claims here in issue were heard and decided by the contracting officer, the Bureau offers the observation that appellants have not pointed to any specific reference in the record to substantiate their position but instead simply point generally to the contracting officer's decision to support their allegations. Noted by the Bureau is the absence of references to claims designated as "Maladministration" or "Incidental Impact Administration" in an index to the contracting officer's decision or in a table of contents to Rodgers' March 24, 1987, claim. Also noted is the fact that there is no reference to claims so designated in the revised claim of November 10, 1988, or in the contracting officer's decision (Reply at 16-17). In support of its position the Bureau cites the case of *Blount Construction Group of Blount, Inc.*, ASBCA No. 38998 (Feb. 9, 1990), 90-2 BCA ¶ 22,688.

In the later case of *Constructora Experta, S.A.*, ASBCA No. 39262 (Apr. 25, 1990), 90-2 BCA ¶ 22,932, the Armed Services Board granted the Government's motion to strike from the Complaint claims which the appellant conceded had not been submitted to the contracting officer for decision. As the rationale for the decision reached, the ASBCA stated that "[t]he Board's jurisdiction is determined by the adequacy or sufficiency of the claim submitted to the contracting officer, not by the information contained in the notice of appeal or the complaint filed with the Board." *Ibid.* at 115,117 (citation omitted).

Discussion and Decision

[7] The question to be decided is whether the claims covered by Counts 4 and 5 of the Complaint were presented to the contracting officer for his consideration and decision.

With respect to the claims contained in "Count 4 Maladministration" of the Complaint, it is noted that (i) under that count appellants are claiming for time sensitive costs attributed to Government delays in the amount of $185,233 (Complaint at 9-10); (ii) in the revised claim of November 10, 1988, time sensitive costs were claimed for in that amount (AF Tab 39 at 275); (iii) following the completion of negotiations, the amount claimed for time sensitive costs remained unchanged at the figure of $185,233 (AF Tab 50 at 548); and (iv) in the final decision, the contractor was found to be entitled to the sum of $13,045.98 for time sensitive costs (AF Tab 55 at 660).

In "Count Five Incidental Impact Expenses" of the Complaint, appellants state that they are "entitled to additional sums representing small tool expense, payroll tax and insurance, profit on subcontractors' work, on prime contract work, taxes, expense of bond premiums, home office overhead expense and contract negotiation overhead in the

amount of approximately * * * $531,244.00" (Complaint at 10). The record shows that in the revised claim of November 10, 1988, claims for all of the above-listed items were shown and that in the aggregate the amount claimed therefor was the sum of $531,890 (AF Tab 39 at 276). In the final decision, all of the above enumerated items of claim are also shown under the heading of "Remaining Items" (AF Tab 50 at 548). Except for one item, all of the amounts shown for specific claim items in the final decision are less than the corresponding amounts shown in the revised claim of November 10, 1988. Since in the final decision it is stated that the negotiated settlement resulted in revised claim figures, "calculated by Reclamation," *ibid.*, the differences involved may be attributable to the parties not being fully in accord as to the effect of the negotiations upon the remaining claim items.

For the reasons stated and based upon the authorities cited, the Board finds that the claims covered by Counts 4 and 5 of the Complaint were presented to and decided by the contracting officer.

V. Conclusion

1. The Board has found that it had no jurisdiction over the instant appeals because the claims covered thereby had not been properly certified, as required by the CDA, 41 U.S.C. § 605(c)(1), and the implementing regulations, FAR 33.207(c)(2). *See* Part I, A and B. Accordingly, the above-captioned appeals are hereby dismissed without prejudice to the resubmission of properly certified claims to the contracting officer for decision.

2. In Part III.C hereof, the Board denied the Bureau's request to dismiss Federal as a party to the instant appeals on the ground that the Bureau had recognized the assignment of the contract from Rodgers to Federal and had thereby conferred standing upon Federal to prosecute the subject appeals in its own name. Accordingly, after proper certification and resubmission to the contracting officer of the claims covered by the above-captioned appeals, Federal may take an appeal in its own name to this Board from a final decision of the contracting officer.

3. In Part III.A, hereof, the Board also found that appellants had alluded to but had failed to present any subrogation claims to the contracting officer for decision. Within what has been described as the narrow parameters of subrogation[19] (*e.g.*, claimant must show that all of the obligations of the prime contractor have been fully satisfied), Federal may present any subrogation claim it has to the contracting officer for decision accompanied by any required certification.

4. From a review of the Appeal File (132 exhibits), an examination of the March 1987 claim (AF Tab 32) and the November 1988 revised claim (AF Tabs 33-49) in light of the contracting officer's final decision

[19] *See Westech Corp.* v. *United States*, 20 Cl. Ct. 745, 749 (1990) ("A surety may also bring suit if its claims fit within the narrow parameters of equitable subrogation. *See, e.g., Balboa Ins. Co. v. United States*, 775 F.2d 1158 (Fed. Cir. 1985)").

(AF Tab 50) and the issues raised by the pleadings, it would appear to be to the advantage of all concerned to have counsel for the parties undertake to enter into a *Hamilton* stipulation[20] and thereby avoid further delays attributable to questions arising as to whether properly certified claims have been presented to the contracting officer for decision.

WILLIAM F. MCGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

STATE OF CALIFORNIA *ET AL.*

121 IBLA 73 Decided *October 28, 1991*

Appeals from a decision of the State Director, California State Office, Bureau of Land Management, concluding that there is no Federal interest in certain land on the Bolinas Sandspit. CA CA 23521.

Affirmed as modified.

1. Rules of Practice: Appeals: Standing to Appeal

In order to establish standing to appeal under the provisions of 43 CFR 4.410, one must be a party to a case and must assert a cognizable interest which was adversely affected by the decision sought to be appealed.

2. Rules of Practice: Appeals: Standing to Appeal

The fact that a question may have been the subject of a prior Departmental decision will not prevent a party from establishing standing to appeal a subsequent decision to adhere to the prior precedent, where that party was not a participant in the prior decision.

3. Patents of Public Lands: Effect--Private Land Claims: Generally

Where the description of land in a patent issued under the Act of Mar. 3, 1851, 9 Stat. 631, differs from the description used in the decree of confirmation, the description in the patent controls over the description in the decree of confirmation, particularly where the initial Mexican concession was determined to be a grant of quantity rather than a grant of description.

[20] *See Aguila Corp.*, EBCA No. C-9102103 (July 17, 1991), in which the Energy Board of Contract Appeals stated: "Appellant eventually submitted a certified claim for reformation to the Contracting Officer and the parties thereafter filed a *Hamilton* stipulation, *see United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038(Fed. Cir. 1988), which the Board received June 27, 1991. This stipulation is signed by Appellant's counsel, Respondent's counsel, and the Contracting Officer. The Board accepts this stipulation as a valid *Hamilton* stipulation, and consequently, its filing with the Board moots any grounds for dismissal relating to submission of the claim to the Contracting Officer and certification." Slip Op. at 1-2.

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4. Administrative Practice--Res Judicata--Rules of Practice: Appeals: Generally

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

APPEARANCES: Robert G. Collins, Esq., Deputy Attorney General, Los Angeles, California, for the State of California; Johanna H. Wald, Esq., and James Thornton, Esq., San Francisco, California, for the Natural Resources Defense Council, Inc.; Peter L. Townsend, Esq., San Francisco, California, for the Seadrift Association *et al.*; Edgar B. Washburn, Esq., Sean E. McCarthy, Esq., and Louis F. Claiborne, Esq., San Francisco, California, for the First American Title Insurance Co. *et al.*

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

The State of California, on behalf of itself, the California State Lands Commission, and the California Coastal Commission, and the Natural Resources Defense Council, Inc. (NRDC), have appealed from a decision of the California State Director, Bureau of Land Management (BLM), dated March 6, 1989. In his decision, the State Director declined to reconsider the September 9, 1904, decision of the Acting Secretary of the Department of the Interior, rendered in the appeal of *John Lawler*, affirming the rejection by the Commissioner of the General Land Office (GLO) of an application to survey assertedly unsurveyed public lands located on an "arenal" or sandspit in secs. 28, 29, 30, and 33, T. 1 N., R. 7 W., Mount Diablo Meridian, California, based on the conclusion of the GLO Commissioner that no Federal lands were described in the application for survey. This arenal is generally referred to as the Bolinas Sandspit.[1]

The immediate genesis of the present controversy was an inquiry by the California Coastal Commission as to the possible Federal ownership of various lands on the Bolinas Sandspit. In 1983, the Seadrift Association, an association of various property owners on the westerly portion of the sandspit, constructed an emergency rip-rap seawall to protect against ocean waves. Thereafter, in 1987, the County of Marin, following the decision of the United States Supreme Court in *Nollan* v. *California Coastal Commission*, 483 U.S. 825

[1] The spelling of the word "Bolinas" has varied considerably over the years. Thus, at different times it has been spelled "Baulines" or "Baulinas" or, more recently, "Bolinas." The text will use these variant spellings interchangeably, generally following the usage of the time period under examination. The one exception will be in references to the grant of the Rancho Las Baulines, in which case, unless it is part of a direct quotation, the spelling will reflect the title of the rancho as it appeared on the official plats of survey.

(1987),[2] retroactively issued a coastal permit for the seawall, which action was then appealed by various individuals to the California Coastal Commission. In the course of its consideration of the matter, the Commission inquired of the California State Office, BLM, as to the possible Federal ownership of a strip of beach running the length of the sandspit in a narrow band, between and including a rock revetment and the ordinary high water mark of the ocean, comprising 36.305 acres. However, while this part of the beach consisted only of 36.305 acres, the total acreage of the sandspit is approximately 300 acres. As will be shown below, questions relating to the possibility of Federal ownership of the beach area necessarily implicate ownership of the entire sandspit.[3]

Subsequent to the Commission's inquiry, representatives of Seadrift and various title companies which have insured titles to properties located on the sandspit[4] apprised the BLM State Office of their interest and informed BLM of their view that no part of the sandspit was unpatented Federal land. Pointing to the decision rendered in the *John Lawler* appeal, these parties argued that millions of dollars had been spent in reliance upon the determination that the lands involved were not Federally owned. As noted above, on March 6, 1989, the California State Director issued his decision, declining to reconsider the factual predicates underlying the *John Lawler* decision, and the State of California and NRDC pursued this appeal.

We note initially that Seadrift and the Title Companies have submitted a number of procedural challenges to the appeals of the State and NRDC. Adjudication of some of these matters, however, requires considerable knowledge of the historical framework from which the present appeal arises. Accordingly, we will limn the history of the sandspit as well as the adjoining uplands. While the length of this description might seem to betoken that the outline is in great detail, we recognize that, in reality, our factual recitation merely scratches the surface of a tangled and complex record.

The starting point for an understanding of the problems contained in this appeal rests in the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican War. Under this Treaty, the United States acquired a vast territory from Mexico, stretching from the Texas border to the Pacific Ocean, including all of the present State of California. Pursuant to Article VIII of the Treaty, 9 Stat. 929-30, the United States bound

[2] The *Nollan* decision involved a determination by the U.S. Supreme Court that the preconditioning of approval of certain permits on the grant of public-access easements was an unconstitutional taking where the condition of public access did not serve public purposes related to the permit requirement.

[3] While we recognize that appellants have strenuously argued that the only matter under appeal is the Federal ownership of the beach area adjacent to the Seadrift development and not the adjoining uplands or any other land on the sandspit (*see* State of California's Additional Statement of Reasons (SOR) at 2-3), the simple fact of the matter is that the theory upon which the appeal is based would require, at a minimum, an initial finding that no part of the sandspit was ever conveyed or confirmed by the United States.

[4] The title insurance companies involved are First American Title Insurance Co., the Commonwealth Land Title Insurance Co., Ticor Title Insurance Co. of California, Chicago Title Insurance Co., Fidelity National Title Insurance Co., Transamerica Title Insurance Co., and Title Insurance Co. of Minnesota. These appellees will be referred to jointly as the "Title Companies."

itself to recognize both Spanish and Mexican titles to land within the newly acquired territories. In fulfillment of this obligation, Congress adopted the Act of March 3, 1851, 9 Stat. 631, establishing a three-member Board (ultimately known as the Board of Land Commissioners) for the purpose of adjudicating land claims within the State of California, with an initial term of 3 years. Claimants were afforded a 2-year period in which to present their claims. Appeals from the decisions of the Board of Land Commissioners could be taken to the District Court for the district in which the land was situated and thence to the United States Supreme Court.

In making decisions under this Act, section 11 noted that adjudications "shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." Section 13 of the Act provided, in relevant part, that:

> [F]or all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same * * *.

Thereafter, Congress adopted a number of amendments to the provisions of the Act of March 3, 1851, *supra*. Two of these extended the term of the Board of Land Commissioners to permit it to adjudicate claims made under the Act of March 3, 1851 (*see* Act of January 18, 1854, 10 Stat. 265; Act of January 10, 1855, 10 Stat. 603), while another extended the time for submission of land claims by specified claimants (*see* Act of February 23, 1854, 10 Stat. 268).

Of more direct pertinence to the issues presented by this appeal, however, were the provisions of the Act of June 14, 1860, 12 Stat. 33. This Act required the publication of surveys of private land claims in California in the manner prescribed and further provided that the surveys could be ordered returned into the district court upon the objection of any interested party. Upon being ordered into court, testimony could be taken thereon and the court was authorized, upon a finding that the survey was erroneous, to annul or correct and modify the survey. Section 5 of the Act further provided that "said plat and survey so finally determined by publication, order, or decree, as the case may be, [5] shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States." Finally, section 6 of the Act provided:

> That all surveys and locations heretofore made and approved by the surveyor-general of California, which have been returned into the said district courts, or either of them, or in which proceedings are now pending for the purpose of contesting or reforming the same, are hereby made subject to the provisions of this act * * *.

[5]Publication of the plat of survey was final where no application was made to the district court, while the order was final where the district court declined to accept the application for review. In those cases in which the district court accepted review, the court's decree, whether accepting the original survey or reforming it, was the final action.

The Act of June 14, 1860, *supra*, was repealed by the Act of July 1, 1864, 13 Stat. 332. In effect, this statute vested the original authority to approve or disapprove surveys completed by the surveyor-general in the Commissioner of the GLO, and provided for an appeal from his decision to the district courts and thence to the circuit courts. Under section 3 of this Act, it was expressly provided that whenever a new survey was ordered, such survey of the surveyor-general would be under the supervision of the Commissioner of the GLO and not the district or circuit courts. Section 2 of the Act, however, granted the district courts the authority to continue with any proceedings with respect to the correction or confirmation of a survey pending before the court as of the date of the adoption of the Act.

While the foregoing describes the shifting legal framework which guided adjudications of land claims in California, it is also necessary to understand the practices of the Mexican government with respect to land grants, since these were the "laws, usages, and customs of the government from which the claim is derived" which were required to be taken into consideration in the adjudication of these claims. In brief, the process was commenced by the filing of an application with the governor, alleging compliance with the requirements of Mexican law. This initial filing was required to be accompanied by a diseno, or sketch, of the land sought. An espediente, the collection of relevant papers in the nature of a case file, would be established and the governor would cause an investigation to be made of the application and of its conformity with the statutory authorization and the implementing regulations. Upon a determination that compliance was shown, a concession or grant by the governor would issue and the perfected espediente would be transmitted to the Departmental Assembly for its approval.[6]

Thereafter, under the Mexican procedures, the claimant would obtain juridical (also called judicial) possession. This was a process in which the grantee, in the company of the adjacent landowners and a Mexican magistrate, normally the alcalde or one acting on his behalf, traversed the boundaries of the granted land. While the delivery of juridical possession was not essential for the validity of the grant (*see, e.g., Fremont* v. *United States*, 58 U.S. (17 How.) 542, 563 (1855)), it was of some importance in determining whether the grant was sufficiently definite as to be judged a grant of the entire premises described or was, alternatively, merely a grant of a *quantity* of land within larger limits. Thus, it was generally held that where juridical

[6] The Departmental Assembly consisted of seven members chosen by electors qualified to vote for deputies to the general Congress. *See United States* v. *Osio*, 64 U.S. (23 How.) 273, 285 (1860). If the Departmental Assembly disapproved a grant, it was the duty of the governor to transmit the grant to the supreme executive government for its final decision. It was early held, however, that once the governor had made the grant, the failure to transmit it to the Departmental Assembly, or, upon rejection by the Departmental Assembly, to transmit it to the supreme executive government, did not vitiate the subsisting rights of the grantee with the result being that such titles held by the grantee were sufficient for confirmation under the 1851 Act. *See United States* v. *Reading*, 60 U.S. (19 How.) 1, 7-8 (1856).

possession was given, the land so circumscribed passed as a grant in its entirety, regardless whether it contained more or less land than that enumerated in the grant. *See Arguello* v. *United States*, 59 U.S. (18 How.) 539, 545-46 (1856).

On the other hand, in the absence of delivery of juridical possession or of a description by metes and bounds or some other means by which a confirmation of the boundaries of the grant were indicated, grants of a specified quantity of land within a much larger tract were construed, consistent with Mexican law, as limited to the amount so specified, which the claimant could select subject to the control of the United States,[7] with the remainder, or sobrante (*see Rancho Mission De La Purisima*, 1 L.D. 248 (1882)), being reserved to the nation, originally Mexico and, thereafter, the United States. *See, e.g., United States* v. *Sepulveda*, 68 U.S. (1 Wall.) 104, 108 (1864); *United States* v. *Fossat*, 61 U.S. (20 How.) 413, 426-27 (1858). This last point is of relevance herein, since the grant of the Rancho Las Baulines, upon which appellees base much of their claim to ownership of the sandspit, was ultimately determined to be a grant of quantity and the land conveyed was limited accordingly.

Having briefly outlined the relevant legal considerations which generally guided adjudication of Mexican land claims, we turn now to the historical record relating to the grant of the Rancho Las Baulines to Gregorio Briones and, to a lesser extent, the grant of the Rancho Saucelito, immediately to the southeast.[8] In October 1841, Briones presented a petition to Salvador Vallejo, Military Commander of the Northern Frontier, seeking a grant of lands which aggregated a little more or less than two square leagues,[9] which land, Briones stated, bordered on the rancho of Don Rafael Garcia and Don Guillermo (William) Richardson, and he noted, also "coasts" of the Pacific Ocean. Vallejo granted permission for Briones to occupy the land pending approval of the request by the governor.

Briones then presented his petition to the Prefect of the 1st District of California who forwarded it to Pio Pico, then governor of California.

[7] In *Fremont* v. *United States, supra*, the Court noted that under the Mexican procedures, the government retained the absolute right to fix the location of a quantity grant of land within the boundaries mentioned in the grant. In *United States* v. *McLaughlin*, 127 U.S. 428, 456 (1888), the Supreme Court expressly held that within such larger areas, Congress retained the power to grant lands to others, even during the pendency of Mexican land claims, so long as sufficient acreage remained so as to satisfy the Mexican grant. In point of fact, however, the United States generally permitted the grantee to select the land desired in such circumstances, subject to the caveat that the selection be compact and include, to the extent practicable, lands actually occupied by the grantee and any lands which had been conveyed by a grantee to a third party. *See United States* v. *Pacheco*, 69 U.S. (2 Wall.) 587-88 (1865).

[8] The history of Briones' grant is generally taken from the "Transcript of Las Baulines Rancho Confirmation Proceedings" submitted by the State of California with its Additional SOR. As numbered at the bottom of the page, this document consists of 165 pages. While we recognize that there is some argument among the parties concerning the precise transcription of some of the documents appearing therein (*see, e.g.*, Response of the Title Companies, Exhs. 11 and 12), these disputes do not substantially affect the history as set forth in the text. For convenience, citations to the transcript will be "Tr." followed by the page number shown at the bottom of the page. Where the transcription has been disputed or the record is unclear, we have referred to both the transcription provided by the State of California and the copies of the documents submitted by the Title Companies, as well as the copy of the transcription which is found in the case file.

[9] A league was a unit of measurement used in Mexico with a value equal to 5,000 varas. The vara, however, had a varying value. In California, the bordered the vara was considered to measure exactly 33 inches. Thus, a square league in California totalled 4,340.278 acres. *See United States* v. *Perot*, 98 U.S. 428, 431-32 (1879). *But see* The 1858 General Instructions for the Surveying of Land Claims in California, State of California's Additional SOR, Exh. 7A at 2-3, determining the value of the vara as "33 372/1000 English inches," and thus a judicial square league would contain 4,438.683 acres.

Accompanying this petition was a diseno which, we note, clearly showed the arenal or sandspit within the limits of the land sought, nearly enclosing an area identified as an estuary and lagoon ("Estero y Laguna"). *See, e.g.*, State of California's Additional SOR, Map No. 3; Title Companies' Answer, Exh. B. On February 11, 1846, Pio Pico granted Briones the land, identified as "Rancho de las Baulenos" located within "boundaries of Wm. Richardson, Garcia, the Sierra and the Sea" (Tr. 38).[10] Three conditions were attached to this grant. The first allowed him to enclose it, so long as he did not interfere with existing roads, paths, and servitudes.[11] The second condition required Briones "to solicit of the proper justice to give juridical possession" of the land.[12] While the third condition cannot be translated in its entirety with absolute certainty, it clearly provided that the grant was of two square leagues and further provided that the justice giving juridical possession was directed to leave the surplus remaining reserved to the government.[13]

On January 31, 1853, Briones filed his claim with the Board of Land Commissioners. This document noted that the boundary began at the ocean and continued along the northwest line of the Rancho Saucelito, owned by William Richardson (Tr. 1). A number of supporting documents were thereafter submitted. In an affidavit dated February 14, 1854, Richardson stated that "juridical possession was given by the proper officer to the said claimant about the year 1841" (Tr. 7; Title Companies' Response, Exh. 14). Other testimony indicated that Salvador Vallejo had authorized the grant of possession and that this was accomplished by riding the boundaries on horseback. *See* Deposition of Antonio Ortega, Tr. 11-15. All of the testimony presented was to the effect that the land claimed aggregated roughly two square leagues. *See, e.g.*, Tr. 7, 13, 21.

By order filed August 15, 1854, the Board of Land Commissioners entered a decree of confirmation. The land confirmed was described as follows:

> Bounded on the northwest by the place called Canada Serro known as the land of Rafael Garcia; on the southeast by the place called Saucelito known as the rancho of William A. Richardson; on the northeast by the ridge or mountains known by the name of Temalpais running southeast and northwest, and on the southwest by the Pacific Ocean, containing two square leagues of land more or less; reference to be had also the grant and to the map connected with the traced copy of the Espediente, both of which are filed in this case.

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[10] The grant from Pio Pico had been translated for consideration by the Board of Land Commissioners in their deliberations. Unfortunately, this translation is no longer completely legible. *See* Title Companies' Response, Exh. 12. There are, accordingly, gaps in the translation.

[11] The translation submitted by the State of California shows this condition as "[h]e may enclose it without pre__ing the roads, paths, and servitudes" (Tr. 38). Our review of the Title Companies' Exh. 12 convinces us that the missing word is "prejudicing." *See also Summa Corp.* v. *California*, 466 U.S. 198, 201 n.1 (1984).

[12] The translation provided by California, viz., "solicit to the proper justice to give judicial possession," has been corrected according to our review of the actual text of the translation at Title Companies' Exh. 12.

[13] A review of the documents indicates that this provision should be translated as "The land which has been mentioned is of two Square leagues, a little more or less. The Justice who may give possession will have it used conformably to ordinance, leaving the surplus which may remain to the nation for convenient uses."

(Tr. 43; Title Companies' Response, Exh. 16).

It is of some importance to note that the opinion of the Board which was reported the same day, expressly noted that no delivery of juridical possession had occurred[14] but concluded that "the boundaries are fully described and the measurements are of such a character that with the aid of the map and even without it, there would seem to be no difficulty in locating and running out the premises with accuracy" (Tr. 41). Arguably, this might constitute a finding that sufficient evidence existed, even in the absence of juridical possession, to qualify the grant as one of description rather than quantity. However, the legal import of such a finding was undermined by the next sentence, wherein the opinion noted that "[t]he testimony of the witnesses concur in proving the quantity of land within the limits defined and does not exceed the two square leagues granted by the Governor." *Id.*

Thereafter, the United States pursued an appeal to the District Court for the Northern District of California, as provided by the Act of March 3, 1851, *supra*. On January 19, 1857, District Judge Ogden Hoffman affirmed the decision of the Board of Land Commissioners (Tr. 50-51). No appeal was taken from this decision. While the failure of the United States to pursue an appeal from Judge Hoffman's decision made the confirmation of the grant final (*see United States* v. *Throckmorton*, 98 U.S. 61, 64-69 (1879)), the issuance of a patent thereto was committed by section 13 of the Act of March 3, 1851, to the GLO upon receipt of a survey duly certified and approved by the surveyor-general of California. Before turning to the problems which arose within the surveying and patenting process, however, it is useful to make a brief reference to the claim filed by William Richardson for the Rancho Saucelito.

At about the same time that Gregorio Briones made his original request to the Mexican authorities for a grant of the lands which he occupied, William Richardson, who lived on the land immediately southeast of the Rancho Las Baulines, filed his request for a concession of the land which he was occupying and which he referred to as the Rancho Saucelito. The diseno which he filed with his request, however, appeared to show the entire southern tip of the arenal within the limits of Richardson's claim (State of California's Additional SOR, Map No. 4).[15] Richardson's request for a concession was eventually granted and subsequently recognized by the Board of Land Commissioners.

In March of 1858, Deputy Surveyor William J. Lewis surveyed the Rancho Saucelito. This survey traced the boundaries of the Saucelito

[14] We set forth above the statements of Richardson and Ortega asserting that juridical possession had been delivered. The conclusion of the Board of Land Commissioners on this point, however, seems clearly correct. Under Mexican procedures, juridical possession was delivered only *after* the concession. *See, e.g., United States* v. *Reading, supra*; *Fremont* v. *United States, supra*. Indeed, the concession issued by Pio Pico clearly presupposed that delivery of juridical possession would occur subsequent to the grant. Since both Richardson and Ortega testified to activities occurring in 1841, these actions could not be seen as delivery of juridical possession because the concession was not approved by Pio Pico until 1845.

[15] The Title Companies, while admitting that two copies of the diseno for the Rancho Saucelito seem to place the foot of the arenal within that rancho, suggest that another diseno "appears to contradict the others on this point" (Title Companies' Answer, Exh. A at 44).

grant beginning at the northeast corner of that grant proceeding southeast to Saucelito Bay, then proceeding along the shore of San Francisco Bay, through the Golden Gate and northwest up the Pacific Coast. Of particular relevance herein, is the northwest corner of the survey. He established this corner with a stake marked "S 58."[16] His notes explained his reason for locating the corner at the point chosen:

> Captain J. A. Morgan, the proprietor of the part of the Briones Rancho adjacent to the Saucelito Rancho being notified in writing met me on the ground and pointed out the above mentioned corner where there was a large pole planted and surrounded by a barrel of sand as the *point of division on the Pacific Ocean between the two Ranchos* which had been established when the Judicial Possession of the Saucelito Rancho was given & which had been so recognized by the adjoining proprietors from that date to the present time. [Italics supplied.]

State of California's Additional SOR, Exh. 6 at 4.

Lewis' field notes then state that he left the shore of the Pacific Ocean on a bearing of N. 55¼° E. for a distance of 101 chains, where he marked an oak at "a corner of the Briones Rancho." The explanation of how he was able to find a corner of the adjacent rancho which had not yet been surveyed can be found at the end of his field notes. Lewis noted that

> [t]he line from the head of the before named Arroyo to the shore of the Pacific Ocean corresponds with the old established line of Judicial possession [17] given to Mr. Richardson and was run in the presence of Capt. J. A. Morgan, the proprietor of that part of the Rancho of Briones adjoining the Saucelito Rancho, and is agreed to by him.

Id. at 5. The plat of survey depicting the results of the survey of the Saucelito Rancho clearly located the sandspit, or "sand beach" as it was thereon described, within the limits of the Briones Rancho. *See* State of California's Additional SOR, Map No. 2, and Appendix B attached hereto.

The survey of the Rancho Las Baulines was conducted by Deputy Surveyor Robert C. Matthewson in October 1858.[18] In the course of his survey, Matthewson discovered that the area within the boundaries described by the grant from Pio Pico encompassed nearly four leagues, rather than the two leagues called for in the grant. *See* State of

[16] The survey instructions for private grants directed that the corners be numbered in succession and be preceded by the initial letters of the Rancho being surveyed. *See* State of California's Additional SOR, Exh. 7.

[17] While the record before this Board does not contain a transcript of the espediente and other documents considered by the Board of Land Commissioners in their adjudication of the Richardson claim to the Rancho Saucelito, it is clear that the adjudication proceeded on the assumption that Richardson had obtained juridical possession. Indeed, in its later challenge to the survey of the Briones grant, the United States asserted that the line of juridical possession of the Saucelito grant was actually further north than was surveyed by Lewis and encroached upon the southeastern boundary of the Las Baulines grant as surveyed by Matthewson. *See* Seadrift Reply, Exh. 19. Subsequently, however, the United States sought to invalidate the patent which had issued to the Rancho Saucelito on the ground that it was based on fraudulent misrepresentations including the assertion that delivery of juridical possession had taken place. This attempt to invalidate the patent was rejected by the Supreme Court in *United States* v. *Throckmorton, supra*, which noted, *inter alia*, that delivery of juridical possession was not essential to the validity of a Mexican concession. In any event, the finding that Richardson obtained juridical possession is not necessarily inconsistent with the finding that Briones had not done so since the 1841 activities upon which Briones relied as constituting delivery of juridical possession did not include a "survey" of the Rancho Saucelito. *See* Tr. 14.

[18] While this was the first official survey of the Rancho Las Baulines, an earlier private survey had been made in 1854 by Bernard Carter. *See* Tr. 72-78.

California's Additional SOR, Map No. 5; Seadrift Reply, Exh. 18a. Concluding that the Las Baulines grant was one of quantity rather than description, Matthewson, in accordance with the standard surveying instructions, approached Briones and offered him an opportunity to select the part which he wished confirmed. While he objected to this limitation, Briones' choice was a division of the land along a line commencing at the head of Baulines Bay and proceeding in a generally northwesterly direction almost to the boundary of the original area surveyed and then westerly to the Pacific Ocean.[19] The effect of this choice would have been to relinquish all lands on the eastern side of Baulines Bay.

Matthewson, however, refused to agree with this selection, noting that it failed to include substantial areas of land east of Baulines Bay which Briones had already conveyed to third parties. *See* Tr. 83. Therefore, under instructions of J. W. Mandeville, Surveyor-General, Matthewson changed the selection to include all of the land surrounding Baulines Bay and to exclude all land in the northwestern half of the area included within the descriptive limits of the grant.[20]

The field notes of this survey indicate that Matthewson commenced his survey at the head of Baulines Bay and proceeded south along the western edge of the Bay, along the Pacific Ocean, thence northeast along the boundary of the Rancho Punta de los Reyes (Sobrante) and continuing along the south boundary of the Rancho Tomales y Baulines to the west boundary of the latter Rancho (its general shape being an inverted "L"), and proceeding along that boundary to the northwest boundary of the Rancho Saucelito where he set a corner post marked B.XVIII. At this point, the field notes recite that Matthewson descended down a grassy spur a distance of 119 chains: "To the shore of Baulines Bay, opposite a long Sand Bar or 'Arenal' whose general course is N. 60 W. slightly curving to the left. Here I set a Post marked T.B. 208. Thence up the shore of Baulines Bay, at ordinary high tide mark" (State of California's Additional SOR, Exh. 5 at 5).[21]

Whether Matthewson actually resurveyed the entire area ultimately patented to Briones is certainly an open question. In his subsequent testimony before Judge Hoffman, Matthewson noted that "[u]pon making this survey," presumably the original survey, he realized that the exterior boundaries contained four rather than two leagues (Tr. 82). He then consulted with Briones who elected to receive a tract of land generally to the west and northwest of Baulines Bay. The courses and distances for both the survey of the entire tract and the line of

[19] The area which Briones selected is depicted on the State of California's Additional SOR Map No. 5 and was described by Matthewson in his testimony taken when the survey was ordered into court. *See* Tr. 83.

[20] Part of the land excluded by Matthewson from the Rancho Las Baulines was apparently added to the Rancho Punta de los Reyes (Sobrante) as Addition A, and the other part was included in the patent to the Rancho Tomales y Baulines. *See* Title Companies' Response, Exh. 9.

[21] The field notes submitted by the State of California were taken from those submitted to the California courts in the course of the litigation which resulted in *Curtis* v. *Upton*, 175 Cal. 322 (1917). The assertion in the field notes that Matthewson set post T.B. 208 is difficult to credit. Inasmuch as the survey instructions required that all posts be monumented by successive numbers preceded by the initials of the Rancho being surveyed (a requirement otherwise observed by Matthewson), we must agree with appellees that it is likely that Matthewson merely recovered and did not set post T.B. 208, and it is certainly possible, as appellees suggest, that this post represents a corner of an earlier, ultimately rejected, survey of the Rancho Tomales y Baulines, which lay to the northwest of the Rancho Las Baulines.

division chosen by Briones are shown on Map No. 5, State of California's Additional SOR. Thereafter, Matthewson testified, as noted above, that a number of individuals who had purchased land from Briones which was not within the area of his selection complained to Mandeville, who then "instructed [Matthewson] to change the survey and make it as returned to the Surveyor General and approved by him, partly on the Southwest and partly on the Northeast of Baulinas bay, as indicated by the deep red lines on the official plat" (Tr. 83). From the foregoing, one would logically assume that the northwest line of the land patented to Briones was surveyed *after* the survey of the exterior limits of the land described in the grant by Pio Pico. In point of fact, however, this is not what the field notes disclose.

The field notes indicate that the survey was commenced on October 12, 1858, pursuant to instructions issued on September 22, 1858. The survey commenced from the head of Baulines Bay proceeding along its southwesterly shore to the mouth of the bay. The field notes then recount the balance of the survey of the southwestern area of the grant along the shoreline of the Pacific Ocean and report that by October 13, 1858, Matthewson's party had reached the Arroyo "Honda." The next day, the survey moved up the gulch of the arroyo, leaving the Pacific Ocean and proceeded on a straight line N. 46-3/4° E. a total of 300.64 chains to an oak which had also been noted on the northwestern line of the original plat of the four-league survey. The following day, Matthewson's notes recite, he proceeded down this line, in effect retracing the line as shown on the initial four-league survey plat,[22] continuing, over the next few days, to the point of beginning which was reached on October 20, 1858. Thus, if Matthewson's notes are to be believed, he surveyed all except the northwestern boundary of the land granted to Briones twice: the first time when he discovered that the calls of the grant embraced four leagues and the second time after Mandeville rejected Briones' selection of the parcel he desired.

We think it singularly unlikely that the field notes accurately portray the sequence of events. Not only is it unlikely that Matthewson would resurvey those boundaries which were not being altered, if for no other reason than it is questionable whether he would have been paid to do so, but also the fact of the matter is that had he actually resurveyed all of the boundaries he would have been required to obliterate markings on the posts along the northeastern and southeastern lines abutting the Rancho Tomales y Baulines and the Rancho Saucelito, since a number of posts were clearly set on the initial four-league survey and would have had inconsistent markings. *Compare* State of California's Additional SOR, Map No. 5 *with* State of California's Additional SOR, Map No. 1. Nor is it possible that Matthewson had earlier surveyed the northwestern line of the final

[22] Indeed, the courses and distances from Station 22 to Station 57 (the point of beginning) on the final plat are verbatim replications of the calls from Station 36 to Station 71 shown on the original plat.

survey in the course of running the four-league survey since he clearly testified that it was not until various individuals protested that Mandeville instructed him to "change the survey" (Tr. 83). Thus, the field notes are, at best, viewed as an amalgam of two different surveys, though we must admit that it is also possible that the northwestern boundary shown on the final plat of survey was *never* actually surveyed on the ground. However, while this is not an insignificant problem, it does not directly bear on corner T.B. 208 which is the focal point of the instant controversy.

In any event, the plat of final survey was approved by Mandeville on December 3, 1859. See Appendix A attached hereto. It is important to note that, though the plats of both the initial four-league survey and the final survey, which served as the ultimate basis for the patent to Briones, show an exclusion of the arenal, the first plat clearly indicates that the base of the arenal is adjacent to land within the limits of the Rancho Baulines, while the final plat places the arenal's base distinctly to the south of the southern line of the survey and shows the arenal as within the Rancho Saucelito. *Compare* State of California's Additional SOR, Map No. 5 *with* State of California's Additional SOR, Map No. 1.

On June 21, 1859, prior to the approval of the final survey by Mandeville, counsel for Briones sought an order from Judge Hoffman returning the survey to his court (Tr. 55). Thereafter, individuals claiming under grants from the Rancho Tomales y Baulines sought to intervene in the proceedings, alleging that the survey of the Briones claim was erroneous and conflicted with their rights (Tr. 56). On August 27, 1860, Judge Hoffman ordered the survey into court (Tr. 59).[23]

It is clear from the record of the proceedings, that the survey initially before Judge Hoffman was the survey depicted on Map No. 5 of the State of California's Additional SOR, showing both the original boundaries as containing four leagues and the subsequent division on which Mandeville insisted. *See* Tr. 112. Indeed, this map contains Judge Hoffman's signature approving it, dated August 1, 1864. Subsequent proceedings were then had, at the request of one of the intervenors, in which Judge Hoffman approved the official survey on file in the GLO, as depicted on Map No. 1 of the State of California's Additional SOR, showing only the two-league tract. Judge Hoffman signed this map on August 31, 1865, and amended his earlier order to conform to this survey. A patent for the land, as described in the final survey, issued on January 9, 1866.

The final plats of the Rancho Saucelito and the Rancho Las Baulines vividly illustrate the core of the problem before the Board. Thus, the

[23] In their original Answer, the Title Companies suggested that the ultimate approval of the final survey by Judge Hoffman was of no effect. *See* Title Companies' Answer at 10. This argument, however, was essentially abandoned in their subsequent response. *See* Title Companies' Response at 21-22. In any event, it seems clear to us that the provisions of section 6 of the Act of June 14, 1860, *supra*, cured any jurisdictional deficiency which might have existed with respect to the original request to return the survey to court and that nothing in *United States* v. *Sepulveda*, *supra*, is to the contrary.

plat of the Rancho Saucelito places the arenal within Rancho Las Baulines and locates the supposed common corner on the shore of the Pacific Ocean. The plat of the Rancho Las Baulines, on the other hand, locates the arenal within the Rancho Saucelito and locates the common corner on the shore of Baulines Bay. Yet each also shows the other rancho as directly abutting its boundaries. And, as shown above, a review of the field notes establishes that this problem is not merely the result of erroneous mapping. On the contrary, the field notes of the Saucelito survey explicitly call for a corner on the Pacific Ocean, while the field notes for the Baulines survey are equally clear in calling for a corner on Baulines Bay, inside the arenal. Thus, paradoxically, while the original disenos of Rancho Saucelito and Rancho Las Baulines indicated an overlap in the area of the arenal, the actual surveys seemingly created a hiatus.

We note that appellees argue at length that any hiatus created was at total odds with the Mexican grants, since each grant was described in relationship to the other. With respect to the grant of the Rancho Las Baulines, appellees point out that the land as originally requested by Briones bordered the "ocean" and that the concession granted by Pio Pico referenced the "Sea." Moreover, the diseno which accompanied the Briones' request clearly included the arenal within the area sought. Thus, appellees contend, since the Board of Land Commissioners confirmed the grant awarded to Briones, a decision affirmed by the District Court, and in that this grant embraced the arenal in question, the failure of Matthewson to survey this arenal as part of the grant was an obvious error.[24]

Appellants argue, for their part, that regardless of the reason for the failure of the Matthewson survey to include the arenal, the simple fact of the matter is that neither the survey nor the patent which ultimately issued included the arenal and, therefore, the arenal did not pass with the patent. Conceding that the survey might have been subject to correction in a direct appeal, appellants point out that not only did Briones not object to the exclusion of the arenal in the proceedings before Judge Hoffman, but also that Judge Hoffman expressly approved the survey in 1865 and that the patent thereafter issued in conformity therewith. Relying both on section 15 of the Act of March 3, 1851, *supra*,[25] and subsequent decisions of the United States Supreme Court (*e.g., Summa Corp.* v. *California*, 466 U.S. 198

[24] Appellees assail, correctly we believe, the argument made by the State of California that the arenal was excluded because Matthewson determined that the grant in question was one of quantity rather than description. As appellees point out, the original plat of survey which showed the land covered by the description in the grant also excluded the arenal. *See* State of California's Additional SOR, Map No. 5. As the reduction of the area described in the concession occurred subsequent to the running of this survey, it is clear that Matthewson excluded the arenal not because its inclusion would add excess acreage to the Briones grant but because he believed that it was not within the limits of the grant.

[25] Section 15 provided

"[t]hat the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

(1984); *Dominguez De Guyer* v. *Banning*, 167 U.S. 723 (1897)), appellants argue that the patent issued is conclusive as to the lands conveyed.[26]

Leaving aside, for the moment, the various contentions of the parties, it is necessary to note certain subsequent events which affect, critically we believe, the issues before the Board. Commencing in 1864, even before the issuance of the patent for either the Rancho Las Baulines or the Rancho Saucelito,[27] a series of tideland surveys (TLS) were performed which ultimately covered the entire sandspit.[28] While the first three of these TLS's (TLS Nos. 10, 34, and 42) at least purported to exclude that part of the spit above high tide, the final four TLS's (TLS Nos. 77, 203, 204, and 205) expressly embraced such lands. Patents had issued for all of these lands by August 28, 1891.

The State points to these tideland surveys and patents as evidencing the contemporaneous understanding of local officials that the sandspit had not been included in the grants of the Rancho Las Baulines or the Rancho Saucelito (State of California's Additional SOR at 55-56). The appellees respond that "as the State itself intimates, what is revealed is the opportunism and ingenuity of local officials, quick to exploit an apparent ambiguity in federal surveys" (Title Companies' Response at 30).[29] While the motivation of the Marin County surveyors may well be suspect, what is not debatable is that the various tideland surveys and patents created a chain of title totally at odds with an assertion of title by claimants or grantees of the Rancho Las Baulines. It is not surprising, therefore, that, in little more than a decade after the issuance of the majority of the TLS patents, litigation was commenced in the California courts between those claiming under conveyances from the Rancho Las Baulines and those asserting title from the State of California pursuant to the tidelands patents. This litigation will be examined, *infra*. At the present time, we must turn to the application filed by John Lawler upon which so much of appellees' case rests.

On February 26, 1903, John Lawler assertedly entered upon certain lands within the sandspit for the purpose of establishing a homestead, built a house thereon and commenced to cultivate an orchard of

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[26] Appellants criticized the decision of the State Director for its reliance on the Department's decision in *Rancho Corte de Madera del Presidio*, 1 L.D. 232 (1882), which had stated that the decision of the Board of Land Commissioners or, if an appeal were taken, the courts was binding on the Department and any subsequent survey of the land confirmed "becomes a mere ministerial act, requiring only practical knowledge and skill, without any discretion whatever in the officer who performs the service." *Id.* at 239. Appellants note, correctly, that no patent had issued in that case. Nor had a patent issued in *Stewart* v. *United States*, 316 U.S. 354 (1942), also cited by appellees. This fact, appellants argue, critically distinguishes those precedents from the case before the Board. *See United States* v. *Sepulveda, supra* at 109 ("If the survey does not conform to the decree of the board, the remedy must be sought from the Commissioner of the General Land Office before the patent issues * * *"); *United States* v. *Peralta*, 99 Fed. 618, 631 (N.D. Cal. 1900), *citing Chipley* v. *Farris*, 45 Cal. 527, 538 (1873) ("The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand, can it be limited, by a showing that the decree comprised a greater or less area than the survey").

[27] Issuance of a patent to the Rancho Saucelito was delayed until Aug. 7, 1879, because of extended litigation. *See United States* v. *Throckmorton, supra.*

[28] Swamp and Overflowed Lands Survey No. 85 (covering 26.56 acres) was also made by the Marin County Surveyor in August 1864. This survey was ultimately cancelled in 1915 because some of the land therein described had been determined to be within the limits of the Rancho Las Baulines. *See* Title Companies' Answer, Exh. A at 17.

[29] Thus, the State noted that the first tidelands survey (TLS No. 10) was performed by Marin County Surveyor H. Austin based on a claim by Marin County Surveyor Alfred Easkoot. The State further noted that "[b]y 1891 the entire sandspit was claimed on the basis of such tideland surveys by various persons, most of whom were Marin County government officials" (State of California's SOR at 55).

approximately 1 acre. *See* Seadrift Reply, Exh. 1a. Shortly thereafter, Lawler filed an application with the U.S. Surveyor General, San Francisco, for the survey of the land he desired to enter, which he described as all of the arenal excepting 20 acres at the northwesterly end. *Id.* On March 26, 1903, the GLO authorized the issuance of special instructions for the survey.

Pursuant to this authorization, the Surveyor General contacted Paul E. Lepoids, a U.S. Deputy Mineral Surveyor, who commenced an initial investigation of the matter. Lepoids subsequently informed the Surveyor General that "the land in question was surveyed by the State Surveyor General as Swamp or overflowed land [30] and patented to private individuals many years ago as shown by the enclosed data and tracing from the State Surveyor General's Office." *See* Seadrift Reply, Exh. 1b. So advised, the Surveyor General, by letter dated April 20, 1903, requested that the authorization for a survey be cancelled. By letter dated May 6, 1903, the GLO revoked the authorization for the survey.

Lawler then obtained counsel who filed a protest with the Commissioner of the GLO alleging serious irregularities in the treatment of the request for survey. *See* Title Companies' Answer, Exh. A, Subexh. L. After recounting the earlier actions set forth above, the Acting Commissioner stated:

> The official plat of the survey of the Rancho Las Baulines confirmed to Gregorio Briones and patented January 9, 1866, which survey was executed by Robert C. Matthewson, D.S., in October, 1858, according to the plat approved December 3, 1859, shows the land in question as a "Sand Bar or Arenal" and according to this plat is attached to the Rancho Saucelito, which latter named rancho was confirmed to Wm. A. Richardson and patented August 7, 1879, as per survey executed by Wm. J. Lewis, in March, 1858, according to the plat approved October 2, 1860.
>
> It appears, by comparing the two plats of the survey of said ranchos, that between the time of the survey of the Baulines Rancho and the Saucelito Rancho a change in Baulines Bay occurred by filling in so that according to the plat approved October 2, 1860, what is shown as "Sand Beach" thereon (the land in question) is attached to the Baulines Rancho. [31]

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[30] On this point, Lepoids was clearly mistaken. As noted above (*see* note 28 *supra*), while there was an initial swamp and overflowed lands survey conducted for a small part of the sandspit, no patent ever issued based on that survey. The patents which had issued had issued for lands deemed tidelands. *See* Title Companies' Response, Exhs. 30, 31, 32, and 33. Indeed, while the survey form used contained the printed notation "Swamp and Overflowed Lands Survey No. ___", great care was taken in all of the later surveys to strike out any reference to "Swamp and Overflowed" and to insert the word "Tide" in lieu thereof. *See, e.g.*, Title Companies' Answer, Exh. A, Subexhs. H, I, J, and K.

[31] With due respect to the Acting Commissioner, we are constrained to observe that his attempt to explain what had happened cannot be credited. First of all, we are not aware of any evidence before him that any such change had occurred. Indeed, in the present proceeding, appellees note that the U.S. Coast Survey topographic chart T-452, surveyed in 1854, "shows the spit as an upland feature (above ordinary high tide) of almost identical size, configuration and position as is observed today" (Title Companies' Answer, Exh. A at 41). A review of that chart confirms this observation. *See* State of California's Additional SOR, Map No. 6. Moreover, an examination of the tide records for the months from March to October 1858, fail to disclose any significant tidal event which might have caused so radical an alteration of the shoreline over so short a period of time. *See* Title Companies' Response, Exh. 6.

More fundamentally, the Acting Commissioner confused the date that the plats were approved with the date the surveys were run on the ground. While the Baulines plat was approved before the Saucelito plat, the Baulines survey was run *after* the Saucelito survey had been completed. Thus, if Baulines Bay had been filled in during the period between the two surveys, Matthewson would have ended up on the coast of the Pacific Ocean and not, as he reported,

Continued

Title Companies' Answer, Exh. A, Subexh. M at 5-6. After noting that the State of California had asserted jurisdiction over the lands as tidelands, the Acting Commissioner opined that "[i]t makes no difference whether the land was surveyed as swamp and overflowed land or as tide land, as, if it were land of either kind it would not be regarded as *public land* of the United States subject to survey and disposal as such" (*id.* at 8 (italics in original)). While the Acting Commissioner concluded that since the land had not been shown to be public land of the United States the instructions to revoke the authorization for a survey would not be modified, he also noted that

> this action does not preclude [Lawler] or any other person from applying at any time in due form for the survey of the land, and if it should be hereafter shown that the land is public land of the United States subject to survey and disposal as such, proper action would then be taken by this office on such application.

Id.

Pursuant to this suggestion, Lawler then filed a formal application for a survey of the land which he sought to embrace within his homestead entry. This matter was once again referred to the GLO Commissioner by the Surveyor General with a recommendation that the application be denied on the theory that the decree of confirmation of both the Rancho Las Baulines and the Rancho Saucelito declared the Pacific Ocean as the Southwestern boundaries of the Ranchos and, hence, the sandspit must be in either one or the other.

By letter dated May 25, 1904, after recounting much of the prior history of Lawler's attempt to obtain a survey of the sandspit, the application was again rejected. A reading of the Commissioner's decision makes it clear that, to a large extent, the application was rejected in reliance on a decision of the Superior Court of Marin County in *Adams* v. *Mulvaney*, dated January 18, 1904, which was quoted extensively by the Commissioner.[32]

The case of *Adams* v. *Mulvaney* involved a suit in ejectment initiated by Walter M. Adams and other claimants who based their title on tideland patents received from the State of California against various individuals then occupying areas of the sandspit, including Lawler. While the court did render a decision on behalf of the plaintiffs, this decision was *not* based on a conclusion that all of the lands were properly patented as tidelands. On the contrary, the court expressly found that:

> [T]he *entire* "arenal", whatever its dimensions may have been, was not in 1850, and never, since, has been, what is known, in the eyes of the law, as tide land * * *. In fact the evidence of both plaintiff and defendant establishes beyond a doubt that the *entire* "arenal" was never covered, at any time, by any kind of tide water except upon the rare occasions of very great storms. [Italics in original.]

State of California's Additional SOR, Exh. 18 at 4. Plaintiff's suit was ultimately successful because, while the court found that the entire arenal was not tideland, it also found that "the inference to be drawn

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on the shore of Baulines Bay. While it may be impossible to determine with certitude what exactly transpired during the performance of the two surveys, the explanation advanced by the Acting Commissioner is clearly not the answer.

[32] *See* State of California's Additional SOR, Exh. 18, for the text of the decision in *Adams* v. *Mulvaney*.

from all the evidence is as strong as it is unavoidable, that at least a portion of the 'arenal' was tide land although what *precise* and *particular portion* is not quite clear." *Id.* at 5 (italics in original). Since the court also found that it was the defendants' obligation to affirmatively establish that the lands which they occupied were not tidelands, the inability of the court to locate that portion of the arenal which was tidelands proved fatal to their claims. It is difficult, however, to understand the Commissioner's reliance on this decision since it clearly held that part of the arenal was *not* tidelands.

In any event, Lawler then pursued an appeal to the Secretary of the Interior. On September 8, 1904, the Acting Secretary, after briefly recounting both the assertion of the Surveyor General that the land was part of either the Rancho Las Baulines or the Rancho Saucelito as well as the claim by the State of California that the lands were tidelands, affirmed the decision of the Commissioner (Seadrift Reply, Exh. 1m). In doing so, the Acting Secretary rejected a request the action be stayed pending the termination of litigation in the California courts with respect to the status of the land in question, noting that:

> As there were other sufficient grounds for rejecting the application there appears to be no reason for suspending action upon the appeal, especially since the applicant would not be prejudiced thereby but can renew his application at any time hereafter if the result of the litigation referred to should furnish any ground for a favorable consideration of his application.

Id. No appeal, however, was ever prosecuted from the decision in *Adams* v. *Mulvaney, supra*. Yet, as appellants argue, subsequent events have, indeed, greatly undermined the theoretical basis for the rejection of the Lawler application.

Contemporaneously with the proceedings before the Department, another dispute between conflicting claimants was being adjudicated by the California courts. In *Upton* v. *Easkoot* (No. 2525, Sept. 18, 1905), the Superior Court for Marin County rejected a quiet title suit brought by A. H. Upton, claiming rights derived from the patent of the Rancho Las Baulines,[33] against various other individuals claiming under tideland patents from the State. In its decision, the court expressly held that: "No land * * * which is situated south or southwesterly of the northeasterly line of the shore (at the line of ordinary high tide thereon) of Bolinas Bay (sometimes called Bolinas Lagoon) as the same existed in the month of October, A.D. 1858, is or ever was any part or portion of the Rancho de los Baulinas * * *" (State of California's Additional SOR, Exh. 24 at 3-4). Judgment pursuant to this decision was entered on November 13, 1905. While no

[33] Upton's claim was both to the sandspit and to the lands lying under Bolinas Bay. N. H. Stinson intervened in the proceeding, also claiming under the grant of the Rancho Las Baulines. Stinson's claim, however, was limited solely to the sandspit. Additionally, it should be noted that one of the defendants, William Kent, claimed title to the entire sandspit based on the theory that the sandspit was part of the Rancho Saucelito, in addition to claiming a one-half interest in the patents of TLS Nos. 203 and 204. *See* State of California's Additional SOR, Exh. 20 at 5.

direct appeal was perfected from this decision,[34] subsequent suit based thereon eventually reached the California Supreme Court.

The litigation which culminated in the decision in *Curtis* v. *Upton*, 175 Cal. 322, 165 Pac. 935 (1917), was an outgrowth of *Upton* v. *Easkoot, supra*. Pursuant to the judgment in the latter case, J. F. D. and H. L. Curtis, successors-in-interest to Easkoot, applied for a writ of restitution, seeking to compel the sheriff to put them in possession of a tract of land alleged to be part of TLS Nos. 10 and 34. Contingent therewith, they also filed an action in ejectment seeking damages for their unlawful ouster. The critical issue in this litigation was the location of TLS Nos. 10 and 34. Upton answered by arguing that the lands involved were not within the tideland patents and that these patents were, in any event, void for uncertainty since it was impossible to locate them upon the ground. Upton also claimed new title based on a conveyance from William Kent, then owner of the Rancho Saucelito.

On March 13, 1913, the Superior Court of Marin County denied the relief requested by the Curtises. The court noted that the key point in determining the situs of the patents for TLS Nos. 10 and 34 was the location of corner T.B. 208 of the Matthewson survey.[35] As was noted by the court, however, corner T.B. 208 was no longer extant. *See* State of California's Additional SOR, Exh. 38 at xii. The parties accordingly introduced the work of private surveyors attempting to locate this corner.

The Curtis forces relied on a survey conducted by George M. Dodge. The Dodge survey attempted to locate corner T.B. 208 based on the original location of the Easkoot house which was referenced by Matthewson in the initial course following corner T.B. 208. Computing backwards from this location, Dodge located T.B. 208 approximately half a mile southeast from the southeastern extremity of Bolinas Bay, as it then existed, and approximately 140 yards from high water on the Pacific Ocean. *Id.* at xiv. The court, in rejecting the Dodge survey, noted that, even taking into consideration the filling in of the Bay between the date of the Matthewson and the date of the Dodge surveys, the most favorable testimony would place the corner of Bolinas Bay as of the date of the Matthewson survey at least 200 feet northwest of the Dodge location. Moreover, the boundary line of TLS No. 10, as depicted by Dodge, at one point ran fully 330 feet to the northeast of a county road, which everyone admitted was, itself, above the high tide line. *Id.* at xvi.

These problems with the Dodge survey were exacerbated by the fact that TLS Survey No. 34, which commenced 0.30 chains *northwest* of T.B. 208, was also described as "[b]eing a portion of the beach of the

[34] Actually, Stinson did file a notice of appeal from the judgment. *See* State of California's Additional SOR, Exh. 37. This appeal was ultimately dismissed. *See* State of California's Additional SOR, Exh. 38 at iv.

[35] Thus, the State patent for TLS No. 10 started at that corner, also declaring "said post being S. 28 ½° E. 15.80 chains from the NW corner of the NE ¼ of sec. 33, T. 1 N., R. 7 W., M.D.M." The patent for TLS No. 34, on the other hand, commenced "[b]eginning S. 28 1/2° E. 15.50 chains from the N.W. corner of the N.E. ¼ of sec. 33." Since, as the court noted, there had been no general monumentation of the area around Bolinas Bay and no section corner monument existed from which the NE ¼ could be located, the location of corner T.B. 208 would actually control the location of the NW corner of the NE ¼, sec. 33. *See* State of California's Additional SOR, Exh. 38 at xii.

Pacific Ocean lying between high and low water," which would effectively place the shore of the Pacific Ocean north of the southeastern corner of Bolinas Bay. *Id.* at x and xxii.

Upton relied upon a survey conducted by George L. Richardson. Richardson concluded that, while the survey plat of the Rancho Saucelito was correct, the survey plat of the Rancho Las Baulines was in error. Richardson based this assertion on his conclusion that T.B. 208 was set on the shore of the Pacific Ocean, not on the shore of Bolinas Bay, and was identical with post S 58 set by Lewis in running the Rancho Saucelito survey. *See* Title Companies' Response, Exh. 7 at 2. This placement of the corner, of course, also necessitated a finding that the next call, *i.e.*, "Thence up the shore of Baulines Bay, at ordinary high tide mark" a distance of 78.20 chains on a course N. 38½° W. to a Station, was actually a random course which did not follow the shore of Bolinas Bay. *Id.* With such a corner placement, the vast majority of the land within TLS No. 10 would have consisted of uplands not covered by the ordinary tides of the Bay.[36]

Comparing these two surveys with the official field notes and plat of survey of the Rancho Las Baulines, the court concluded that it was impossible to accept the Dodge location of corner T.B. 208, finding that "the collateral call to Easkoot's house [in the Matthewson survey] was inaccurate." *Id.* at xx. He held, therefore, that the Curtises "have not shown the location of the tracts in such a way as to enable the sheriff to put them in possession, nor have they shown in the ejectment suit that they have title to any land which is in the possession of the defendants." *Id.*

In addition to making this ruling, however, the court also addressed the contentions of Upton and Stinson, the intervenors. Thus, the court found that "no title ever vested in Upton by virtue of his grants from the heirs of Briones," specifically holding that "[t]he patent to Briones superseded the Mexican 'expediente' for all purposes." *Id.* at xxi. He also expressly held that "the arenal was never part of the Saucelito Rancho." *Id.* In effect, therefore, while the court rejected the adverse claims by the holders of the Rancho Las Baulines and the Rancho Saucelito to the arenal, it ultimately held against the Curtises because of the inability to locate the tideland patents, which they claimed under, on the ground. The Curtises thereupon sought review of this decision in the California Supreme Court.

In its decision in *Curtis* v. *Upton, supra*, the California Supreme Court reversed the decision of the Superior Court denying relief to the Curtises. Essentially, the Supreme Court predicated its reversal on the failure of the Superior Court to establish the location of TLS Nos. 10

[36] Quite frankly, it is difficult to give much credence to Richardson's conclusions. They are in such thorough conflict with Matthewson's field notes that they simply cannot be reconciled with them, absent a showing, and none has ever been even attempted, that the Matthewson survey was fraudulent, at least with respect to corner T.B. 208. While it may be impossible, at the present time, to ascertain how Matthewson came to be on the shore of Bolinas Bay rather than the Pacific Ocean, the fact that he was there seems unassailable.

and 34. Thus, the Supreme Court noted that the question before the court, as framed by the complaint, was not to decide whether the Dodge corner was correct but to determine the true position of T.B. 208 on the ground:

> It was the duty of the court to consider all the evidence on the subject and therefrom to find the fact of the true position of the corner and determine whether or not the defendants had taken possession of any part of the tract claimed by the plaintiffs, when measured from such true position.

Id. at 330, 165 Pac. at 938. And, the court found, that, to the extent that any land so determined was under the occupancy of either Upton or Stinson, they were barred by the judgment in *Upton* v. *Easkoot*, from asserting any right thereto.

We note, however, that in the course of its decision, the Supreme Court expressly held that the title to the tidelands held by the Curtises vested no rights in any of the uplands of the sandspit. Thus, the opinion noted:

> The state patents purport to convey state tidelands only, and they could convey none of the upland of the sandspit, for, as it was neither school land nor swamp land, the state had no title to that upland. The terms of the descriptions of the surveys imply that no upland was intended to be included therein and they should be construed to embrace only tidelands, to which the state held title. The plaintiffs therefore failed to establish a record title to this upland along the center of the sandspit.

Id. at 329, 165 Pac. at 938. Yet, at the same time that the court was, in effect, disallowing any claim to the upland based on the tidelands patents, it was also invoking the holding of *Upton* v. *Easkoot, supra*, that "the patent of the United States to Briones, under which both Upton and Stinson claimed their alleged titles, did not include, or convey to Briones, any portion of the sandspit." *Id.* at 331, 165 Pac. 938. These rulings when combined with the fact that the Department of the Interior had already, in the *John Lawler* litigation set forth above, disclaimed any Federal ownership of the sandspit seemed to leave the question of the ownership of the sandspit in a legal no-man's land.

Nor have subsequent events served to clear up the muddied waters. Shortly after the end of the *Curtis* v. *Upton* litigation, William Kent, who had participated in the *Upton* v. *Easkoot* suit as both a tidelands claimant and a claimant under the grant to the Rancho Saucelito (*see* note 33, *supra*), acquired most of the claims to the western portion of the sandspit from those claiming under the tideland grants as well as most of those rights inuring to the Rancho Las Baulines and the Rancho Saucelito.[37] *See* State of California's Additional SOR, Exh. 16; Seadrift Reply, Exh. 10b. While the area adjacent to the eastern end of the sandspit[38] had been subdivided in 1913 by Charles Robinson, no

[37] Kent's acquisition of rights occurred primarily in the western portion of the sandspit, beyond the area of TLS Nos. 10, 34, and 42. *See* Seadrift Reply, Exh. 10b.

[38] *See* Seadrift Reply, Exh. 9b. Whether and to what extent this subdivision was actually on the sandspit or within the grant of the Rancho Saucelito or the Rancho Las Baulines would be dependent upon the placement of corners S 58 and T.B. 208, respectively.

further action to develop the sandspit was undertaken for a number of years.[39]

In 1931, however, the area immediately west of the Robinson Tract was subdivided by Archie H. Upton into 258 residential lots. *See* Seadrift Reply at 8 and Exh. 9a. Upton's rights to the sandspit were apparently based on the Rancho grants,[40] notwithstanding the decisions in *Upton* v. *Easkoot, supra*, and *Curtis* v. *Upton supra. Id.* at 9 and Exh. 10a. These lots were subsequently sold to third parties.

While the Upton tract was thus being developed, no such development occurred on the lands to the west, apparently out of concerns for the confused state of the land titles. In 1949, the State of California enacted legislation authorizing the initiation of a suit against the State by any person claiming title under patents to TLS Nos. 77, 203, 204, and 205 for the purpose of establishing the boundaries thereof and of quieting title thereto. *See* Title Companies' Response, Exh. 30. Such a suit, styled *William Kent Estate Co.* v. *State of California* (Marin County Case No. 19966), was subsequently initiated by the William Kent Estate Company, successor-in-interest, through mesne conveyance, of William Kent. The State of California stipulated to a disclaimer of interest in the uplands on the sandspit and a decree was issued on February 10, 1950, quieting title in the Estate and enjoining the State of California and anyone claiming under it from asserting any right or interest therein. *See* Seadrift Reply, Exh. 3. However, it is important to note that even appellees admit that this adjudication is not binding on the United States, as it was not a party to the suit, though appellees suggest the State of California, at least, "cannot so easily deny the import of the judgment it agreed to" (Title Companies' Response at 36).

While at least three other State court suits involving the western area of the sandspit have been prosecuted since 1950,[41] none of these actions has any particular bearing on the question of Federal ownership of the sandspit. Rather, the foregoing history, explored above in all its convolutions, represents the factual and legal framework in which the present case arises. It is clear that the single substantive question presented is simply whether the Bolinas Sandspit is or is not owned by the United States at the present time. However, before addressing the substantive issue, it is necessary to briefly deal

[39] There is some evidence that this period of inactivity was directly related to the uncertainty of titles to the sandspit. Thus, in a memorandum written in 1914, Kent, after noting that he had acquired most of the tideland patents and the Rancho's rights to the sandspit, stated that he was "perfectly willing to sit quiet and let somebody else make the next move. * * * [T]here can never be any considerable improvement until titles are definitely determined, which it appears can only result through court decisions, and I for one have had too much litigation in this matter already" (State of California's Additional SOR, Exh. 16).

[40] By 1905, Kent had obtained all rights appurtenant to the grant of the Rancho Saucelito in the area of the arenal. At about the same time, Upton had obtained the rights of the Rancho Las Baulines with respect to the arenal. Apparently in order to resolve any conflicts between them, on Mar. 31, 1910, Upton conveyed to Kent all his interest in the northwesterly 142 acres of the arenal while, on that same date, Kent conveyed all his interest in the arenal southeasterly of the 142 acres. *See* Seadrift Reply, Exh. 10b at 5.

[41] These cases were *People* v. *William Kent Estate Co.*, 242 CA.2d 156 (Cal. App. 1966), *William Kent, III* v. *Wimmer*, No. 66159 (Marin County, Superior Court, July 18, 1973), and *People* v. *William Kent Estate Co.*, 1 Civ. No. 31405 (Cal. App. Oct. 10, 1973).

with various procedural challenges which appellees have made to the instant appeal.

A fair amount of the briefing by all parties has been directed to various procedural challenges made by Seadrift and the Title Companies to appellants' standing to appeal, as well as to the existence of a decision which is properly justiciable. Doubtless, much of this was engendered by this Board's Order of May 9, 1989, in which we specifically requested that the parties address the Board's jurisdiction and the standing of appellants to proceed with their appeals. Pursuant to this order, appellees have argued variously that the State of California and NRDC lack standing to appeal from the decision of the State Director and that, in any event, the decision of the State Director, being merely a reaffirmation of the position taken by the Acting Secretary in the *John Lawler* appeal in 1904, is not such a decision as is subject to appeal at this late date.

[1] As this Board has noted on numerous occasions, in order to have standing to appeal from a BLM decision, an appellant must, in accordance with 43 CFR 4.410(a), be a "party to a case" and have been "adversely affected" by the decision. *See, e.g., Dorothy A. Towne*, 115 IBLA 31, 34-35 (1990); *Colorado Open Space Council*, 109 IBLA 274, 279-80 (1989); *In re Pacific Coast Molybdenum Co.*, 68 IBLA 325, 331 (1982). The first prong of our standing test may be met by a showing that an appellant "actively participated in the decisionmaking process regarding the subject matter of [the] appeal." *Sharon Long*, 83 IBLA 304, 307 (1984). In this regard, we have no difficulty finding that the State of California has been a party to the case within the meaning of our precedents. *See California Association of Four Wheel Drive Clubs*, 30 IBLA 383 (1977). While the status of NRDC is more problematic, we note that it did expressly inform the State Director of its interest in the matter by letter dated October 14, 1988. The failure of the State Director to thereafter communicate with NRDC cannot work to deprive it of consideration as a party to the case. *Cf. Utah Wilderness Association*, 91 IBLA 124 (1986) (failure to protest issuance of applications for a permit to drill held not fatal to appeal from their issuance when BLM failed to notify appellant of their pendency after notice of appellant's interest).

The question whether appellants have shown that they were adversely affected by the decision being appealed is more difficult. Generally, a disclaimer of Federal ownership will not be seen as adversely affecting anyone not claiming an inchoate title through the United States or a right to use the land granted by the United States.[42] The argument of the State (and NRDC) is that if the United States were determined to be the owner of the unoccupied portions of the sandspit fronting the Seadrift Subdivision, citizens of California would have the right of access to those beaches, a right presently

[42] An example of these types of situations would be a Native allotment application for or a mining claim located on lands deemed patented by the United States or a grazing lease or a right-of-way situated on such lands. *See, e.g., Aguilar* v. *United States*, 474 F. Supp. 840 (D. Alaska 1979); *Raymundo J. Chico*, 115 IBLA 4 (1990).

denied them. *See* State of California's Additional SOR at 15-17. Further, the State argues that the effect of the State Director's decision is to hold that the decree of confirmation rather than the patent determines the extent of a rancho grant and that this holding, if applied to other grants within the State, would result in greatly unsettling titles throughout the State.

While these claims of injury are somewhat tenuous, we believe they are sufficient, under our precedents, to establish standing. Thus, in *California State Lands Commission*, 58 IBLA 213 (1981), while rejecting a challenge by the State to inclusion of lands within a wilderness study area on the theory that such action impermissibly limited the exercise of outstanding State lieu selection rights, we nevertheless found that the State possessed standing to appeal, noting that "where, as here, at least colorable allegations of injury exist, the existence of standing cannot be made dependent upon ultimate substantive success on appeal." In a similar vein, in *State of Alaska* v. *Sarakovikoff*, 50 IBLA 284 (1980), we held that the State of Alaska had standing to protest and appeal a decision to grant a Native allotment even though it was admitted that the State could not obtain the actual land embraced by the allotment as it was also within the core township of a village corporation. We noted that if the State were successful in attacking the Native allotment application, the village corporation would be required to select that land which, in turn, would diminish the village's ability to select additional land which the State might determine was suitable for selection under its statehood grant. Such an interest, attenuated though it might be, was, we concluded, sufficient to confer standing on the State. *Id.* at 288. So, too, in the instant case, we believe that the State, as well as NRDC, has made at least a colorable allegation of injury sufficient to establish its standing to appeal.[43]

[43] Our finding herein is fortified by the realization that on Mar. 14, 1990, subsequent to its appeal from the decision of the State Director under review herein, the California State Lands Commission filed a Recreation and Public Purposes (R&PP) application to lease or purchase certain lands on the Bolinas Sandspit. That application was returned to the Commission on the theory that the BLM State Office could take no action at the present time which might disturb the status quo pending IBLA's decision on the instant appeal. BLM noted, however, that the State of California could refile its application after the Board ruled on the matter. *See* Letter of Mar. 29, 1990, from Chief, Branch of Adjudication and Records, California State Office, BLM, to Executive Director, California State Lands Commission.

Leaving aside any question whether the proper procedure for the BLM State Office in the instant case was to suspend consideration rather than return the filing, it is clear that the mechanism exists by which the State can file a formal R&PP application for the land and then, if rejected on the theory that the land is not Federally owned, appeal to this Board, thereby raising the precise issues presently being litigated. Little would be gained by following a course of action of dismissing the instant appeal, without ruling thereon, on the theory that the State has not been adversely affected thereby, only to have a new application for a R&PP lease filed and rejected, which rejection would clearly be subject to review before the Board. *Cf. Beard Oil Co.*, 97 IBLA 66, 68 (1987) (declining to remand a premature appeal on the grounds that it would serve no useful purpose). We note that this consideration applies not only to the question of whether appellants have been adversely affected but also to the question of whether there has been an appealable decision, discussed *infra*.

[2] In appellees' final procedural challenge, they argue that there is no appealable decision for the simple reason that there is no "case."[44] The Title Companies argue that the decision of the State Director merely described actions previously taken. Those substantive determinations, however, were made in 1904. Thus, appellees argue, "[r]eporting upon actions previously taken is in no way equivalent to an initial decision disposing of public lands or granting permission to use it for various statutorily authorized purposes" (Title Companies' Response at 4-5). Seadrift concurs, arguing that the State Director's decision is merely an advisory letter informing the State of California of the result of the State Director's investigation of the matter. *See* Seadrift Reply at 30-31.

Appellees are correct in noting that this Board has, in various decisions, rejected attempts by parties to use a status inquiry as a vehicle to obtain substantive review of a base decision which could have been appealed but was not. *See, e.g., The Wilderness Society*, 106 IBLA 46, 53 (1988); *Utah Wilderness Association*, 65 IBLA 219, 221 (1982). These rulings proceed on the theoretical basis that, since the Department has established an appellate structure to afford aggrieved parties with a forum for review of their complaints, requiring only that they establish their standing to appeal and act to file their appeals in an expeditious manner (30 days from receipt of the adverse decision) to avail themselves of their right to review, those who, through either neglect or choice, fail to timely exercise their right should not be permitted to subsequently raise matters that could have been appealed in the first instance. Allowing parties, through the simple mechanism of making a status inquiry and then appealing the answer, to obtain substantive review of those matters which could have been appealed earlier but were not, would not only make a mockery of the mandatory time limit for seeking review codified at 43 CFR 4.411,[45] but would also be totally disruptive to the proper administration of the public lands.

The problem with applying this rule in the confines of the appeal presently before the Board is that it is clear that the State of California was not a party to the *John Lawler* litigation or to previous Departmental adjudications in which it could have raised the issue of the ownership of the sandspit. The animating principles of the decisions in *The Wilderness Society, supra*, and *Utah Wilderness Association, supra*, are simply not applicable. Accordingly, we must conclude that the decision of the State Director is appealable as a present matter and that nothing in *John Lawler* bars the appellants from seeking review of the State Director's decision. But, what the 1904 decision in *John Lawler* does implicate are questions as to the

[44] We note that, in transmitting the case file to the Board, the California State Director also raised the issue of whether an appealable decision had been made. *See* Memorandum dated May 9, 1989, from California State Director to Board of Land Appeals.

[45] In *Tagala* v. *Gorsuch*, 411 F.2d 589 (9th Cir. 1969), the court agreed with the Department that the timely filing of a notice of appeal was jurisdictional and, hence, a failure to comply with such time limits was preclusive of review within the Department.

applicability of the principles underlying administrative finality to the present case. We turn now to that question and its impact on our resolution of the issue of the Federal ownership of the Bolinas Sandspit.

Were we to consider *de novo* the matters decided by the decision in *John Lawler*, it would be virtually impossible to sustain the conclusion therein espoused. First of all, it seems elementary that the Department, as the custodian of the public domain, should never be in the position of disclaiming title to lands without being able to identify why title had never lodged in the United States or the precise mechanism by which the United States has disposed of the land. To hold, as did both the Acting Secretary and the Commissioner of the GLO in their respective examinations of the *John Lawler* appeal, that the land was part of either the grant of the Rancho Las Baulines or the Rancho Saucelito or were tidelands claimed by the State[46] does not adequately discharge this responsibility.

Moreover, an examination of the separate elements on which the determination that there were no public lands on the sandspit was based leads ineluctably to the conclusion that the uplands portion of the Bolinas Sandspit should have been determined to be public lands in the 1904 decision. That all of the lands on the sandspit were not tidelands is a fact that must have been obvious to the Department since both the decision of the Commissioner, GLO, and the Acting Secretary referenced the decision of the Marin County Superior Court in *Adams* v. *Mulvaney, supra*, which had expressly held that "the *entire* 'arenal', whatever its dimensions may have been, was not in 1850, and never, since, has been, what is known, in the eyes of the law, as tide land" (State of California's Additional SOR, Exh. 18 at 4 (italics in original)).

[3] Nor is there any theoretical basis upon which it could be concluded that the sandspit was conveyed as part of the Rancho Saucelito. As noted above, the plat of the Rancho Saucelito clearly located the northwest boundary of the rancho south of the sandspit, showing it as within the Rancho Las Baulines. Moreover, the field notes of the Rancho Saucelito survey establish that, after locating corner S 58 on the shore of the Pacific Ocean, the surveyor proceeded N. 55¼° E., a distance of 101 chains. This line is clearly a surveyed line, not a meander line. As such, it is a line of boundary and necessarily limits any extension of the Rancho Saucelito northwesterly.

Admittedly, there is some indication from the diseno filed with the application for the Rancho Saucelito that the southern base of the arenal was within that grant. Clearly, however, the survey of the Rancho Saucelito did not include the base. And, to the extent that

[46] Moreover, the mere fact that the State *claimed* the lands as tidelands would never bind the Department or the United States. *See, e.g., Sandra L. Lough*, 25 IBLA 96, 100-101 (1976). *If* the lands were tidelands, title vested in the State upon its admission to the Union, absent a prior appropriation by the United States. But, if the lands were not tidelands, the State's assertion of ownership is a nullity.

appellees' have argued that where a conflict appears to exist between the decree of confirmation of a Mexican concession and the survey thereof, the decree controls over the survey (a theory also espoused by the BLM State Director in his decision below), we agree with the State of California that this position is simply not sustainable under the law.

Thus, as we have noted (*see* note 25, *supra*), while section 15 of the Act of March 3, 1851, limited the conclusive effect of either the decree of confirmation or any patent issued pursuant thereto only to the United States and the claimants, this necessarily established that between the United States and the claimants these documents *were* binding. *See United States* v. *Flint*, 4 Sawy. 42, 49 (cited in *John Adams*, 51 L.D. 591, 593 (1926)). Moreover, while both the decree and the patent were accorded conclusive effect, it is also clear that, should there be a conflict between the two, the patent would control. Thus, the Supreme Court noted in *Dominguez De Guyer* v. *Banning, supra* at 737,

> if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the District Court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent.

Later in its decision, the Court noted:

> We are of opinion that while it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants, and, until cancelled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree. Such is the effect of former decisions of this court.

Id. at 740. To similar effect are the decisions in *Summa Corp.* v. *California, supra*, *United States* v. *Sepulveda, supra* at 109, and *United States* v. *Peralta, supra* at 631. *See also Ben McLendon*, 49 L.D. 548, 552 (1923) (holding that the approval of a survey plat of a Mexican land claim "amounts to a final determination of the exact *situs* of the land involved" (italics in original).

The cases cited by appellees for the proposition that one may look behind the patent to the confirmation proceedings fall, with only one exception, into two general categories rendering them inapposite to the issue. Thus, there are those cases such as *Stewart* v. *United States*, 316 U.S. 354 (1942), and *Rancho Corte de Madera del Presidio*, 1 L.D. 232 (1882), which noted that upon confirmation of a Mexican grant by either the Board of Land Commissioners or the courts, the performance of a survey in accordance with the grant was a purely ministerial act with no discretion to be exercised by the surveyor. All of these cases, however, involved appeals commenced before patent issued and, therefore, are simply not germane to the question of the authority to challenge a patent on the theory that it did not correctly describe the land as confirmed.[47]

[47] It is obvious, of course, that, even in an appeal challenging a survey as not in conformity with the decree initiated prior to issuance of patent, this principle applies only to grants which were deemed grants of description and is totally

The second class of cases involves decisions such as *Thomas B. Bishop Co.* v. *Santa Barbara County*, 6 F.2d 198 (9th Cir. 1938), in which courts have looked to the decree of confirmation as an aid in determining what land the patent actually embraced. In the *Bishop* case, the court was attempting to determine whether a sandspit jutting out from a meandered line was intended to be included in the patent of the Rancho Los Dos Pueblos. Based on the decree of confirmation, the court concluded that the patent was intended to include the sandspit and that the sandspit had not been surveyed because it was deemed "inconsequential." *Id.* at 201. But, while it may be admitted that recourse may be made to the decree of confirmation to determine what the patent actually conveyed where an ambiguity in the patent exists, it is a totally different proposition to suggest that where a patent clearly excludes a parcel of land, recourse may be made to the confirmation decree to contradict and alter the description of lands in the patent. Indeed, the court in the *Bishop* case took special pains to note that "[t]his is not a case of omission from a survey of land that ought to have been surveyed." *Id.* And since, as noted above, the northwestern boundary line of the Rancho Saucelito is clearly not a meander, there is no possibility of applying the principle of the *Bishop* case so as to include the sandspit within the Saucelito grant.

The one case which supports appellees' contention that the description contained in the patent is subordinate to the description contained in the decree of confirmation is the decision of the United States District Court for the District of Columbia in *Pueblo of Taos* v. *Andrus*, 475 F. Supp. 359 (1979). Therein, the court held that boundaries recited in a patent of a confirmed Spanish land grant in New Mexico were not binding because none of the parties to the litigation had relied on the line of survey challenged therein, which line, the court held, was not in accord with the decree of confirmation. We decline to apply this holding to the instant appeal for a number of reasons.

First of all, the court cited no precedents, whatsoever, that supported its conclusion. Indeed, the only cases cited by the court (*Dominguez De Guyer* v. *Banning, supra*, and *Grainger* v. *United States*, 197 Ct. Cl. 1018 (1972)), held to the contrary. It is possible that the court premised its conclusion on the theory that, since the land was held in trust for Indian beneficiaries, the terms of the grant should be liberally construed in their favor. *Id.* at 366. Nevertheless, even granting the trust responsibilities inherent in the relationship between the Department and Native American tribes, it is difficult to reconcile the court's decision in the *Pueblo of Taos* appeal with prior Supreme Court decisions.[48]

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inapplicable to grants deemed grants of *quantity* since, it was only by the survey that the situs of the quantity grants could become fixed within the area described in the decree of confirmation.

[48] We note that in *Pueblo of Sandia Boundary*, 96 I.D. 331 (1988), Solicitor Tarr characterized the decision in *Pueblo of Taos* v. *Andrus, supra*, as "questionably reasoned." *Id.* at 360, note 20. One example of this questionable reasoning

Continued

But, even if we were to concede that the decision in *Pueblo of Taos* was correctly decided, it is clearly distinguishable from the case at bar. Thus, with respect to Spanish and Mexican land claims in New Mexico, Congress did not establish a Board of Land Commissioners as it had in California. Rather, under the Act of July 22, 1854, 10 Stat. 308, the position of Surveyor-General of New Mexico was created, who was charged, *inter alia*, with investigating all claims originating before the Treaty of Guadalupe Hidalgo and reporting thereon to Congress. No time limit, however, was provided for the presentation of claims and, as late as 1885, new claims were being presented and only a fraction of the claims that had been presented had been adjudicated.[49] Frustrated by the slow pace of adjudication, Congress adopted the Act of March 3, 1891, 26 Stat. 854, establishing the Court of Private Land Claims for the adjudication of Mexican or Spanish land claims within the Territories of Arizona, New Mexico, and Utah, and the States of Nevada, Colorado, and Wyoming, and providing 2 years for the submission of these claims.

Section 10 of that Act provided that:

> [W]henever any decision of confirmation shall become final, the clerk of the court in which the final decision shall be had shall certify that fact to the Commissioner of the General Land Office, with a copy of the decree of confirmation, which shall plainly state the location, boundaries, and area of the tract confirmed. The said Commissioner shall thereupon without delay cause the tract so confirmed to be surveyed at the cost of the United States.

Further provision was made for the return of the survey to court for a determination that the survey was "in substantial accordance with the decree of confirmation" which would then serve as the basis for the patent. *Id.* No provision of the Act of March 3, 1891, *supra*, however, replicated section 13 of the Act of March 3, 1851, *supra*, providing for the conclusive nature of the patent when issued. Thus, the legal framework under which the issues in *Pueblo of Taos* arose are sufficiently different as to vitiate any attempt to apply that precedent to cases arising in California under the Act of March 3, 1851, *supra*. Accordingly, we conclude that nothing in the decision of the district court in *Pueblo of Taos* v. *Andrus, supra*, undermines the Board's conclusion that, to the extent that it might be contended that the description in a patent of land issued under the Act of March 3, 1851, does not coincide with the description contained in the decree of confirmation, the description in the patent must be accorded conclusive effect.

Appellees suggest that even if the patent would be construed as conclusive in an adversarial proceeding between the United States and

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is that the court invoked the principle that grants to Indians are favorably construed on their behalf to determine that the surveyor, Walker, had failed to correctly survey the eastern boundary of the Martinez claim, even though Martinez was *not* an Indian. The court justified this result on the theory that the land was subsequently acquired by the United States on behalf of the Pueblo of Taos and the terms of the decree of condemnation should be liberally construed in its behalf. We note, however, that neither of the two cases cited by the court (*Antoine* v. *Washington*, 420 U.S. 194 (1975); *Passamaquoddy Tribe* v. *Morton*, 388 F. Supp. 649 (D. Me. 1975)), remotely supported this novel approach.

[49] *See generally* P. Gates, *History of Public Land Law Development*, pp. 117-18 (1968).

the grantees or those claiming under them,[50] it would not prevent the United States from taking action to reform the patent. But, even if it be admitted that the authority of the Department to correct a conveyancing document provided by 43 U.S.C. § 1746 (1988), would extend to rancho patents, it is obvious that one of the prerequisites of such action would be a showing that an error had, in fact, occurred. Insofar as the patent of the Rancho Saucelito is concerned, there is absolutely no indication, whatsoever, that such is the case. On the contrary, Lewis' testimony in the Bolinas confirmation proceedings discloses that corner S 58 was established with the help of both the son of William Richardson, grantee of the Rancho Saucelito, and Captain Isaac Morgan, who claimed the land adjoining the Saucelito Rancho under a grant from Briones. *See* Tr. 86. Indeed, save for William Kent's singularly unsuccessful attempts to claim title to the sandspit during the State court litigation in the early 1900's, the only attempt to question whether this was the proper point signifying the line of juridical possession was made by the United States in its abortive attempt to challenge the southeastern boundary line of the Rancho Las Baulines as extending too far to the southeast (*see* note 17, *supra*).[51] In short, the record before the Board provides absolutely no basis for concluding that the survey and patent of the Rancho Saucelito was anything other than accurate and that, as surveyed, it did not include the arenal.

Admittedly, the vast majority of appellees' efforts was directed towards showing that the sandspit should have been included within the Rancho Las Baulines, not the Rancho Saucelito. But the foregoing discussion applies with equal force to any theory attempting to challenge the patent of the Rancho Las Baulines by arguing that, since the decree of confirmation included the sandspit, the patent exclusion of the sandspit was an error which is subject to correction at the present time. Moreover, insofar as the Rancho Las Baulines is concerned, any argument as to what land should have been conveyed based on the decree of confirmation is subject to an additional fatal infirmity. Since the concession of the Rancho Las Baulines was adjudged to be a grant of quantity rather than a grant of description, there no possible way to challenge the description of the land conveyed by the patent by appealing to the decree of confirmation since, insofar as quantity grants were concerned, the decree of confirmation only

[50] In *Dominguez De Guyer* v. *Banning*, *supra* at 743, the court quoted the same discussion from *Chipley* v. *Farris*, *supra*, that was approved in *United States* v. *Peralta*, *supra* at 631: "While [a patent] stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent."

[51] It is useful to note that the United States did not take the position that the land which it contended was improperly included in the survey of the Rancho Las Baulines should be treated as part of the Rancho Saucelito. On the contrary, the United States argued that "[i]f the claimants of the Saucelito have seen fit to take less than the area given to Richardson by the officer who gave possession, the surplus reverts to the U.S. and not to Briones" (Tr. 119). This argument is indicative of the contemporaneous views of the Government attorneys that if the land patented was less than the amount confirmed, the patent, nevertheless, controlled.

established the outer boundaries in which the selection was to be made. It did not, and could not, define the selection itself.

As noted above, the area originally surveyed by Matthewson encompassed four square leagues. Since the grant of the Rancho Las Baulines was determined to be a grant of quantity,[52] Briones was properly limited to two square leagues of land. Furthermore, while the practice of the Department and the courts was to allow the grantee to make an initial selection of the lands desired out of the larger tract, the United States was invested with the same right that the Mexican government held of ultimately choosing which lands would be conveyed. As the Supreme Court noted in *United States* v. *McLaughlin*, 127 U.S. 428, 451 (1888):

> [T]he right of location within the larger territory is in the government, and not in the grantee. In such case, the use does not attach to the whole territory, but only to a part of it, and to such part as the government chooses to designate, provided the requisite quantity be appropriated.

Accord Fremont v. *United States, supra.*

Once it was determined that the grant of the Rancho Las Baulines was a grant of quantity, the Government was vested with the right to define the area of the grant within the larger area described. The exclusion of the sandspit, be it intentional or unintentional, is a matter of no moment since it is uncontroverted that Briones received the full two square leagues to which he was entitled.[53] Appellees have no more valid a claim to the sandspit which was excluded from the survey then they do to the land ultimately surveyed as the Rancho Punta de los Reyes (Sobrante) to the northwest. Both were within the description used in the decree of confirmation and neither were included in the land patented. That the exclusion of the former may have been the result of inadvertence while the exclusion of the latter was clearly intended makes no difference. Briones' selection rights, limited as they were to two square leagues, were fully recognized in the patent. Having no ultimate right to select the specific lands conveyed, the failure to include any specific parcel provides no basis for any equitable relief. Accordingly, we hold that, even if it were possible to entertain a challenge to a patent on the basis of the decree of confirmation, such a challenge may not be maintained where the concession, itself, was a grant of quantity and, as such, was fully discharged in the patent which issued.

Nor have appellees' submitted anything that would support a conclusion that, contrary to both the Matthewson field notes and the plat of survey, Matthewson was actually on the Pacific Ocean when he established corner T.B. 208, rather than on the shore of Bolinas Bay. The fact that Matthewson expressly referred to his location as "opposite" the sandspit makes it a virtual impossibility to conclude that

[52] Unlike the grant of the Rancho Saucelito, the grant of the Rancho Las Baulines was clearly held to be a quantity grant. That the grant of the Rancho Las Baulines was correctly so determined to be a quantity grant we believe is well established by the record. *See* note 14, *supra.*

[53] As finally surveyed, the patent to Briones contained a total of 8,911.34 acres, in excess of two square leagues regardless of which of the two values of the vara is used. *See* note 9, *supra.*

he crossed the sandspit and actually located the corner on the Pacific shore. How Matthewson came to be where he was is an unresolvable mystery;[54] that he was on Bolinas Bay rather than the Pacific Ocean is a virtual certainty. Appellees have submitted nothing which would support the conclusion that the sandspit passed under the patent of the Rancho Las Baulines. Thus, were this a matter in which the Board was charged with making the initial Departmental interpretation on the issues before us, we would have no choice but to conclude that that part of the Bolinas Sandspit lying above mean high tide was not included in the patents for either the Rancho Saucelito or the Rancho Las Baulines and remains unappropriated Federal land to this day.[55]

[4] But, as our recitation of the factual construct of the appeal makes clear, and as appellees strenuously argue, this case does not arise as a tabula rasa, uncluttered by prior Departmental pronouncements. On the contrary, the very matters which the appellants seek to litigate were themselves presented to the highest officials of the Department in 1904. That this matter was concluded adversely to the position now advocated by appellants cannot be gainsaid. The fact that we have, in our examination above, found the analysis proffered in the *John Lawler* decision intrinsically flawed does not render the judgments announced therein a nullity. Rather, while that decision stood, it represented the final Departmental word on the matter and was fully binding on all subordinate officials until such time as it was altered or reversed by competent authority.

It is true that, to the extent that this Board has been delegated the full appellate review authority of the Secretary, this Board is vested with authority to reverse prior Secretarial decisions. *See, e.g., Ralph F. Rosenbaum*, 66 IBLA 374, 89 I.D. 415 (1982), *overruling Towl* v. *Kelly*, 54 I.D. 455 (1934) (opinion of First Assistant Secretary Walters);

[54] It is interesting to note, however, that had Matthewson used the diseno for the Rancho Saucelito in establishing the southern boundary of the Rancho Las Baulines he would have located the corner in approximately the same place as indicated on the plat of survey. Moreover, as located by Lewis, the northwestern boundary of the Rancho Saucelito more clearly accords with the diseno which accompanied the request for the grant of the Rancho Las Baulines than the diseno which accompanied the request for the grant of the Rancho Saucelito. This could explain how an apparent overlap between the two disenos became an apparent hiatus after actual survey.

[55] We note that appellees have also argued that title to the sandspit may be deemed to have vested in the private parties because the land was swamp and overflowed land, granted to the State of California by the Act of Sept. 28, 1850, *as amended*, 43 U.S.C. §§ 982-994 (1988). *See* Title Companies' Response at 36-38; Title Companies' Supplemental Response at 9-12. This argument is not tenable for a number of reasons. First of all, it is quite clear that the State never purported to assert a claim to these lands as swamp or overflowed lands (*see* note 30, *supra*). While grants under the Swamplands Act were in the nature of *in praesenti* grants, they required identification by the State *before* legal title could vest thereunder, even though, when title vested, it would relate back to the date of the grant. *See, e.g., Tubbs* v. *Wilhoit*, 138 U.S. 134 (1891); *John Stuart Hunt*, 31 IBLA 304, 84 I.D. 421 (1977). In the instant case, the official survey returns did not show the lands as swamp and overflowed. Nor did the State ever so identify them. Thus, title cannot be said to have passed under the Act of Sept. 28, 1850.

Moreover, to the extent that appellees argue that the land should now be deemed swamp and overflowed because the spit "was subject to at least occasional tidal inundation and thus qualified as 'overflowed' land" (Title Companies' Supplemental Response at 10), they are wrong as a matter of law. It is well settled that the term "overflowed" as used in the Act of Sept. 28, 1850, does *not* refer to land subject to periodic overflows but "has reference to a permanent condition of the lands to which it is applied." *Heath* v. *Wallace*, 138 U.S. 573, 584 (1891); *see also State of California*, 8 IBLA 164 (1972). Finally, absent evidence that the land could be reclaimed for *cultivation*, the sandspit would not be of the character of lands described in the Swamplands Act. *See State of California*, 29 IBLA 132 (1977). Thus, the contention that the lands of Bolinas Sandspit passed to the State of California under the auspices of the Swamplands Act must be rejected.

United States v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974), *overruling Freeman* v. *Summers*, 52 L.D. 201 (1927) (opinion of Secretary Work); *Arizona Public Service Co.*, 5 IBLA 137, 79 I.D. 67 (1972), *overruling in part Keating Gold Mining Co.*, 52 L.D. 671 (1929) (opinion of Assistant Secretary Edwards).[56] But, the mere existence of such authority does not automatically mandate its exercise, even in those cases where it is shown that the original decision was erroneous. On the contrary, reexamination of questions once decided requires a close weighing of jurisprudential considerations relating to the desirability of accurate and correct decisionmaking and the often conflicting need to determine matters with finality so as to avoid endless litigation and the uncertainties which that engenders. Judged in this scale, we must conclude that it is too late in the day to assert Federal ownership to the Bolinas Sandspit.

Admittedly, the decision of the Acting Secretary in *John Lawler* indicated that reconsideration of the opinions therein announced might be entertained if "the result of the litigation referred to [*Adams* v. *Mulvaney, supra*] should furnish any ground for a favorable consideration of his application" (Title Companies' Answer, Exh. A, Subexh. P). This answer paralleled the earlier statement of the Commissioner, GLO, that rejection of Lawler's application "does not preclude him or any other person from applying at any time in due form for the survey of the land, and if it should be hereafter shown that the land is public land of the United States subject to survey and disposal as such, proper action would be taken by this office on such application" (Title Companies' Answer, Exh. A, Subexh. M at 8). But it cannot be seriously contended that either the Commissioner, GLO, or the Acting Secretary contemplated that such action would commence 84 years after their decisions.

There are, it is true, numerous decisions of both the Department and the Federal courts standing for the proposition that the failure of the Government surveyors to extend the lines of the public land surveys over Federal land does not divest the United States of title thereto. *See, e.g., Scott* v. *Lattig*, 227 U.S. 229 (1913); *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978); *Ritter* v. *Morton*, 513 F.2d 942 (9th Cir. 1975); *Exxon Corp.* v. *BLM*, 118 IBLA 38 (1991); *Roland Oswald*, 35 IBLA 79 (1978). Certainly, had there been no Departmental adjudication relating to the question of ownership of the Bolinas Sandspit, the mere passage of time, even if coupled with the general belief of those occupying and improving the sandspit that the land had been patented, would not be sufficient to divest the United States of its title to the sandspit once it were shown that the land had never actually passed from Federal ownership. But, the essential factor which differentiates the instant appeal from the vast majority of other cases involving the question of whether a specific parcel of land is

[56] The authority to overrule prior Secretarial decisions has long been exercised by those invested with the responsibility for conducting Departmental adjudications. *See, e.g., United States* v. *Carlile*, 67 I.D. 417 (1960) (opinion by Deputy Solicitor Fritz overruling decisions by Secretary Hitchcock and Secretary Smith).

Federally owned is the rendition by the Acting Secretary of the *John Lawler* decision, disclaiming any Federal ownership interest in the sandspit.

We recognize that the State of California has argued before the Board that it was not until it raised the question of possible Federal ownership of the sandspit with BLM that the decision in *John Lawler*, which was unpublished, was asserted as evidence of title. *See* State of California's Response at 8, n.3. But the fact that present litigants may have been unaware of the decision in that case does not directly bear on the question whether *past* actions had occurred in reliance on the decision. More fundamentally, the doctrine of administrative finality, like its judicial counterpart res judicata, while related to equitable estoppel, operate independently of any requirement that actual reliance on the decision be established. Rather, administrative finality is grounded in considerations of repose and in the recognition that, as the lapse in time from the initial decision increases, the ability to fairly redetermine the underlying facts becomes increasingly diminished. Thus, the court recognized in *Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37, 41 (D.C. Cir. 1963), a decision affirming the refusal of the Department to reopen proceedings conducted 27 years earlier, which had resulted in a default judgment against various oil placer mining claims:

> There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen the case even though he retains jurisdiction over the land in dispute. This is such a case, for it is now difficult, if not impossible, for the Secretary to determine the facts as to the original abandonment in 1929.

This concern certainly obtains in the present case.

We have noted above that, were we to consider the questions presented in *John Lawler* under a de novo review, we would conclude that the Bolinas Sandspit did not pass under either the grant of the Rancho Saucelito or the Rancho Las Baulines. Such a conclusion, however, would not merely involve the Seadrift development but would almost certainly include some, if not all, of the Upton tract, and, possibly, the Robinson tract as well. Nor would this end the matter. In order to fix the limits of Federal ownership, it would still be necessary to reestablish the precise location of both corner T.B. 208 of the survey of the Rancho Las Baulines and corner S 58 of the Rancho Saucelito. That this might prove to be a difficult task is obvious from a review of the proceedings in *Curtis* v. *Upton, supra*, where the trial court was singularly unable to locate corner T.B. 208. The passage of 78 years since that decision would not work to make such a determination easier. Even assuming that these two corners might be reestablished, the consequences could be far reaching indeed.

In all its pleadings, the State has assumed that corner S 58 is located on the same boundary line as is corner T.B. 208. While it

certainly was the intent of the two surveyors to proceed down the same line, the distance calls of the two surveys are irreconcilable. Thus, Lewis proceeded from the shore of the Pacific Ocean on a bearing of N. 55¼° E. traveling a distance of 101 chains before arriving at what he determined was the southeastern corner of the Rancho Las Baulines. Matthewson, presumably starting from that corner, surveyed his line S. 55¼° W. covering a distance of 119 chains before arriving at Bolinas Bay. It is, of course, an impossibility for Matthewson to travel from the same point and on the same line that Lewis traversed and arrive at Bolinas Bay 1188 feet *beyond* the point where Lewis commenced his line on the shore of the Pacific Ocean. Either one of the distance calls was wrong, or one of the courses was wrong, or the two surveyors started at different points. Unless the error is determined to be in the distance calls, a resurvey would probably result in the location of a hiatus affecting not merely the Bolinas Sandspit but possibly the entire length of the Rancho Las Baulines grant. Needless to say, numerous individuals, total strangers to the instant litigation who never had any reason to doubt that they owned their land, might suddenly find their titles in jeopardy.

It is because of these types of consequences that courts have long recognized that title questions, once decided, should remain so. Thus, the Supreme Court noted:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change * * * [W]here courts vacillate and overrule their own decisions * * * affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Nevada v. *United States*, 463 U.S. 110, 129 n.10 (1983), *quoting Minnesota Co.* v. *National Co.*, 70 U.S. (3 Wall.) 332, 334 (1866). Inasmuch as reconsideration of the 1904 *John Lawler* decision at this late date could have immense consequences, not all of which can be foreseen at the present time,[57] and in recognition of the length of time which has passed since that decision was issued, we think invocation of the doctrine of administrative finality within the context of the present appeal is fully warranted. Accordingly, we will not disturb the determination announced by the Acting Secretary in *John Lawler* that there is no Federal ownership interest in lands on the Bolinas Sandspit.

[57] Thus, while the State of California has suggested that the homeowners on the sandspit could avail themselves of the Color of Title Act, 43 U.S.C. § 1068 (1988), it has, at the same time, pointed to various documents which, it contends, show that the appellees were aware of the Federal interest in the sandspit. *See, e.g.*, State of California's Additional SOR at 84-85. However, a sine qua non for relief under the Color of Title Act, *supra*, is a requirement that the applicant show that the land was acquired and held in good faith, viz., without knowledge of the claim of the United States to the land. *See, e.g., Lawrence E. Willmorth*, 64 IBLA 159 (1982); *John S. Cluett*, 52 IBLA 141 (1981). It is, therefore, by no means clear that all or any of the landowners would qualify under the Color of Title Act, which, in any event, would only permit them to purchase the land at fair market value less such equities as are deemed warranted. *See generally Benton C. Cavin*, 83 IBLA 107 (1984).

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 as modified for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Deputy Chief Administrative Judge

APPEAL OF ROCK POINT COMMUNITY SCHOOL BOARD

IBCA-2953 Decided: *October 29, 1991*

Contract No. CTN35X01101, Bureau of Indian Affairs.

Appeal dismissed.

1. Appeals: Jurisdiction--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

When, in submitting a claim to the contracting officer in excess of $50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

APPEARANCES: Carol L. Barbero, Marsha Kostura, Attorneys-at-Law, Hobbs, Straus, Dean & Wilder, Washington, D.C., for Appellants; Thomas O'Hare, Department Counsel, Office of the Field Solicitor, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

On September 13, 1991, the Rock Point Community School Board appealed to this Board, pursuant to the Contract Disputes Act of 1978, 41 U.S.C. § 601 (CDA), from the contracting officer's failure to render a decision on the contractor's March 25, 1991, $61,650 claim that the Bureau of Indian Affairs (BIA) did not provide full funding for appellant's FY 1991 school transportation program, in alleged contravention of BIA's contractual obligations. The notice of appeal asserted that the claim had been certified properly under the CDA.

The Board received appellant's complaint on October 11, 1991, and the appeal file on October 16, 1991. The appeal file contained a copy of appellant's claim. Upon review, the Board discovered that the claim had not been certified properly in accordance with the CDA and, by order dated October 24, 1991, dismissed the appeal without prejudice, *sua sponte*. So that it may be relied upon by all who appear before us, we have converted that order into this opinion.

Proper certification of claims in excess of $50,000 is a prerequisite to the Board's jurisdiction under the CDA. *United States* v. *Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991); *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *W. M. Schlosser Co.* v. *United States*, 705 F.2d 1336, 1337-39 (Fed. Cir. 1983); *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352 (Ct. Cl. 1982). The certification requirement is strictly construed and is "not a mere technicality." *Fidelity Construction Co.* v. *United States*, 700 F.2d 1379, 1384 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983).

The CDA mandates:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C. § 605(c)(1). To properly certify a claim, a contractor must make all three of the required assertions simultaneously. *W. H. Moseley Co.* v. *United States*, 677 F.2d 850, 852, *cert. denied*, 459 U.S. 836 (1982). "A proper certification either repeats the CDA's wording verbatim or asserts its substantial equivalent." *E. H. Engineering*, ASBCA No. 38783, 90-1 BCA ¶ 22,344.

On March 26, 1991, appellant's chairman certified its claim as follows:

> I hereby certify that this claim for $61,650 under contract no. CTN35X01101 is made in good faith; that the knowledge and belief; that the miles for which funding has been denied is performed pursuant to contract requirements for daily transportation of students from school to home and is eligible for student transportation funding; and that the amount requested reflects the contract adjustment for which the contractor believes the Federal Government is liable.

(Appeal File, Tab B). The majority of the required second element of the certification, that "supporting data are accurate and complete to the best of his knowledge and belief," and the word "accurately" in the third representation, are missing. The former omission alone renders the certification defective and we need not address the impact of the latter.

While we suspect the failure to certify to the accuracy and completeness of supporting data may have been a typographical error, we cannot supply the missing requirement by inference. *Heyl & Patterson, Inc.*, ASBCA Nos. 40604, 42589, 91-2 BCA ¶ 23,972; *B & M Roofing & Painting Co.*, ASBCA No. 37839, 91-2 BCA ¶ 23,975; *Techdyn Systems Corp.*, ASBCA No. 38727, 91-2 BCA ¶ 23,749. The fact that the certification otherwise contains more than is required

does not remedy its defect concerning supporting data. Because of the defective certification, the Board does not possess jurisdiction to entertain this appeal.

DECISION

Accordingly, the appeal is hereby dismissed without prejudice.

CHERYL S. ROME
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

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November 4, 1991

APPEAL OF WHITE & McNEIL EXCAVATING, INC.

IBCA-2448 Decided *November 4, 1991*

Contract No. 4-CC-60-00820, Bureau of Reclamation.

Appeal denied except as remanded.

1. Contracts: Construction and Operation: Actions of Parties

When, after award of a contract to produce riprap from a specified quarry and repair a dam, the contractor inquired about using other than the contract-specified quarry, the Government did not breach its implied duty of good faith and cooperation by advising that approval of an alternate quarry would be virtually impossible.

2. Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Drawings and Specifications--Contracts: Construction and Operation: Duty To Inquire

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

3. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Drawings and Specifications

When a contract provided for "at least 50%" quarry waste, and it was 60 percent, there was no Type I differing site condition. Actual conditions were consistent with those represented. Appellant's interpretation that the quarry would yield about 50-percent waste was found unreasonable. Even if it had been reasonable, or if minimum waste had been understated, appellant did not establish persuasively that it relied upon the waste factor. Quarry geology was not otherwise misrepresented. Because the contract quarry's waste was close to, or substantially less than, other limestone quarries in the area, there was no Type II differing site condition.

4. Contracts: Construction and Operation: Actions of Parties--Contracts: Performance or Default: Compensable Delays

The Board found the Government did not delay in rejecting appellant's nonconforming work and, even if it had, any Governmental delay would have been concurrent with the contractor's delay in meeting in-place testing requirements and not compensable.

5. Contracts: Construction and Operation: Changes and Extras: Contracts: Construction and Operation: Drawings and Specifications

Although one portion of the Government's 36-inch riprap specification was unreasonable, and the Government relaxed it in accepting appellant's rework, the Board found appellant failed to prove the Government's rework requirement was due to the unreasonable part of the specification. Appellant acknowledged that the first two in-place test samples, which led to rejection of its work, were outside the entire required gradation envelope and did not comply with even the relaxed specification. The contract entitles the Government to reject, and to require replacement of, nonconforming work. Moreover, the extent of the rework was due principally to appellant's delay in testing. Thus, the Government was not responsible for the costs of rework. The Board remanded the appeal to the contracting officer, however, to make an adjustment for any payment deduction incorrectly taken based upon the unreasonable portion of the specification.

APPEARANCES: L. H. Vance, Jr., Attorney at Law, Winston & Cashatt, Spokane, Washington, for Appellant; Gerald R. Moore,Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

White & McNeil Excavating, Inc. (WME), appeals from the contracting officer's decision denying its claim, now $351,234, in connection with its $348,900 dike repair Contract No. 4-CC-60-00820 (contract) with the Bureau of Reclamation (BOR). WME claims: (1) BOR wrongfully precluded it from exploring alternatives to the contract-specified quarry; (2) BOR had superior knowledge about alleged quarry deficiencies; (3) the contract misrepresented quarry conditions -- a Type I differing site condition; alternatively, there was a Type II condition; (4) BOR untimely rejected WME's work; and (5) BOR's specifications were defective and its rework demand a contract change. The Government asserts WME's excess costs were due to its failures to comply with the contract and to work efficiently.

The record consists of the appeal file (AF), hearing transcripts (Tr.), Government exhibits (GX), WME's exhibits (AX), deposition transcripts (DTr.) and exhibits (DX), and a predecessor contract (Clark contract).

FINDINGS OF FACT

Background

1. Eastside dikes 1, 2, and 3, and the Westside dike, at Canyon Ferry Reservoir, Montana, constructed in 1972-75 to alleviate dust problems from mudflats, were damaged significantly by repeated storms over the years. BOR sought to protect them with riprap (AX 34).[1]

2. In 1981, BOR contracted with Clark Brothers (Clark) to rebuild all dikes but No. 1 and stabilize them with 24-inch riprap from the Meagher limestone quarry. The contract did not estimate quarry waste or require riprap testing (Clark Contract; Taucher DTr. 27, 31, 35; AX 106).

3. Early on, Clark notified BOR in writing of a differing site condition: the quarry was not yielding requisite riprap. BOR criticized Clark's operations and directed it to discontinue placement until it produced the specified riprap (AX 2, 7).

4. Clark continued to complain in writing and changed its drilling and blasting program to try for better riprap. Its blasting expert and its consultant concluded the Meagher quarry limestone was extremely prone to fragmenting, production of undersized rock, and inordinate waste (AX 8-10, 12-14).

5. BOR eventually found a Type II differing site condition. Meagher never yielded acceptable 24-inch riprap. After specifications were

[1] "Riprap" is the term for rock fragments which protect an embankment against erosion (Tr. 336-37).

relaxed, waste was 74 percent. Absent relaxation, waste could have been 90 percent (AX 14, 16, 38; Taucher DTr. 36, 68-70; Verzuh DTr. 21; Government's Brief (GB) at 3).

6. In July 1983, a storm extensively damaged the dikes -- dike 3 the most. Although the dikes did not present a high hazard to life or property upon the failure of riprap protection, because the protection sought through the Clark contract had failed, BOR was faced with several million dollars worth of structures which were deteriorating and becoming useless. It sought reliable erosion protection, searched for a rock source, and decided to conduct repairs in two stages, beginning in the spring of 1984 (Tr. 696; Clark DTr. 15; AX 23, 34).[2]

Quarry Search

7. BOR's Regional Engineer, James Verzuh, directed its Regional Geologist, Glenn Taucher, to take a "hard look" at "all viable" quarry sites. Two experienced geologists, Frank Calcagno and Lovell Parish, assisted Mr. Taucher. Mr. Calcagno has a master's degree in structural geology. Without objection, he was recognized as an expert on geological characteristics of quarries and their potential for riprap production. Messrs. Calcagno, Parish, and Taucher visited up to 40 sites and gathered information from knowledgeable sources (Tr. 408-10; Taucher DTr. 38, 46-48, 105-06, 128-29, 163-66; Verzuh DTr. 11, 24-26; Calcagno DTr. 8-12).

8. BOR's search narrowed to Radersburg quarry, at the other end of the Limestone Hills from Meagher quarry, in a Devonian Jeffersonian formation of dolomitic limestone, a different rock than the Meagher (Taucher DTr. 48, 79, 211; AX 20, 27, 106).

9. BOR did not consider using an "historical" site 500 to 1,000 feet from Radersburg, because it was in Meagher limestone (Tr. 81, 479-80; Taucher DTr. 62-64; Hunt DTr. 24).

10. In about 1974, around 1,900 cubic yards of riprap were produced from Radersburg under a Soil Conservation Service (SCS) contract to stabilize the Missouri River bank. BOR did not see the contract or know rock sizes required. SCS advised the rock was well-graded; ranged to over 3 feet, with essentially no waste; and was the best it had found in the area (AX 20, 28; GX 51; Taucher DTr. 106-09; Calcagno DTr. 66).

11. In April 1984, Messrs. Calcagno and Parish evaluated Radersburg. The outcrop was on a ridge, demonstrating hardness. The previously worked portion was 50 by 60 feet. They examined much more. The rock supply looked inexhaustible, fresh, and only slightly

[2] BOR conducted a value engineering study and considered alternatives to riprap protection, largely depending upon whether a good quarry could be located within an economically feasible distance from the dikes. BOR also considered a research project using roller compacted concrete, to determine its usefulness in a cold climate, but the project was focused upon Westside dike, never ensued due to lack of funding, and was not envisioned as sites. an alternative to riprap or other types of slope protection at Canyon Ferry (Verzuh DTr. 24-25; Duster DTr. 11-15; McCormick DTr. 38-39; AX 34, 89).

weathered, indicating soundness. There were a few shatter zones, but very minor. Manual tests established the rock would not shatter easily. It appeared the quarry could produce a range of sizes, including large rock (Tr. 413, 424; Calcagno DTr. 9-15, 19-46, 53-66, DX 1).

12. The SCS contractor, Don O'Neil, informed BOR: (1) he had tested several rock sources in the area; (2) only Radersburg could make required sizes; (3) it produced rock masses up to 60 cubic yards that he had to blast secondarily; (4) other than the large sizes, his only waste was an insignificant amount of undersize; (5) there should be no problem producing well-graded rock between 6 and 36 inches; (6) most of the blasted rock was within that range; (7) there was no significant breakdown from hauling; and (8) processing over a grizzly should not be necessary, but he expected only minor breakdown if one were used (AX 28; Taucher DTr. 106-07).

13. Mr. O'Neil had drilled a line of closely spaced horizontal explosive holes at quarry base to form a floor, and a series of widely spaced, randomly located, horizontal holes in the overlying face to topple the vertical beds. The base holes were fairly heavily loaded; the upper holes, lightly loaded. Mr. O'Neil emphasized the quarry floor should be carefully maintained, and that the quarry should be completely cleared between shots so the vertical beds could fall and break along natural weaknesses, rather than shattering previously blasted rock (AX 28).

14. Mr. Taucher visited the SCS site. He saw no breakdown, washing, beaching, or other effects. He saw rock on top smaller than the 3 feet SCS cited, but photographs depicted rock prior to placement, good sized and reasonably well graded. The smaller rock had been placed over the larger.

SCS informed Mr. Taucher that the rock was much larger than its contract required and excellent, with no breakdown problem. In all, it was good sized, suitable for BOR. Mr. Taucher also tested Radersburg rock manually. It did not break down like the Meagher (Tr. 477-78; Taucher DTr. 108-11, 113-14, 159-60).

15. BOR did not test blast at Radersburg. The SCS work served as a test. BOR did drill; it had not at Meagher. It made two horizontal and four vertical holes. Given the quarry's natural configuration, it was not possible for reasonable cost to drill horizontally elsewhere. Because BOR did not know how much rock would be taken or from where, it evaluated the entire exposure, evenly spacing drill holes to get a representative sample. Results were placed in a geologic log. BOR again concluded that Radersburg could produce good rock in several size ranges (Taucher DTr. 138, 153-54; Calcagno DTr. 30, 34, 50-56; AX 20, 27).

16. Mr. Calcagno did not know BOR's specifications. He evaluated the rock based upon BOR standards. He knew it was for the Canyon Ferry dikes and where it was to be placed. He also knew of the prior

problems and sought larger, hard, durable riprap (Calcagno DTr. 62-64).

17. Dennis A. Williams, Clark's consultant, testified for WME concerning quarry conditions. He had extensive geologic experience, but none with 36-inch riprap. Most of the specifications he worked with were graded by dimension, rather than weight. He was not offered as an expert and his report is not part of the record. Mr. Williams did not observe WME's operations. He visited Radersburg, the completed dike 3, and looked at the SCS contract and the surface of the SCS riprap, but did not communicate with the SCS (Tr. 39-43, 50, 57, 74, 91, 98).

18. Mr. Williams judged the SCS riprap was about 24 inches, although larger was present. He concluded one could make the SCS riprap from the bulk of the Radersburg quarry without significant waste. SCS had considerable leeway in allowing fines (small rock). WME's vertical pattern, however, would yield smaller rock than Mr. O'Neil's horizontal one (Tr. 72-76).

19. Mr. Williams opined that BOR should have done more horizontal drilling; half of its vertical holes were, in practicality, duplicates; there was a hard area in the center of the quarry, about 50-55 percent, capable of producing the required gradation, the remainder could not, without excessive waste; contract log descriptions implied fracturing at portions of the quarry was feet apart when it was tenths of feet apart; and the contract's quarry description was not appropriate for the entire area, because it did not adequately identify the degree to which the rock was fractured (Tr. 55-64, 67-69, 80, 114).

20. Expert Calcagno, and Mr. Taucher, refuted Mr. Williams' testimony (Tr. 423-33, 438-39, 455, 473, 478-81; see also Taucher DTr. 80-81, 136-37).

21. The exposed quarry face provided a unique examination opportunity. It was the equivalent of a multitude of drill holes (Tr. 424-25, 478).

22. The Meagher quarry was the worst Mr. Taucher had encountered concerning rock breakage. It was atypical, in a different limestone, and different location, than Radersburg (Taucher DTr. 79, 210-11).

23. Suitability for riprap depends upon limestone type. All rock is laminated, fractured, and weathered -- Radersburg much less than Meagher. Unlike Radersburg, the Meagher rock was clay-banded, crystallized, and subject to thrust faulting pressure, yielding shatter-prone rock. Radersburg was subject to more stress from folding, but to little effect. Its bedding planes were inclined vertically, rendering blasting and production easier than when inclined horizontally, as at Meagher. In Mr. Calcagno's expert opinion, the Radersburg rock was much more durable (Tr. 417-20, 435-38, 488, 508, 521; Taucher DTr. 80-81, 161).

24. Mr. Williams conceded the Meagher rock was more fractured than Radersburg; they were in different locations; limestone is not generic; and the individual source must be examined (Tr. 47, 79).

25. Mr. Williams volunteered that, if one knew about the Clark work, it would be logical to seek information from them (Tr. 113-14).

26. Mr. Williams acknowledged that, based upon his experience, material produced from a blast should be removed before the next blast (Tr. 106-07).

27. Although the specifications offered the opportunity, WME did not examine the drill logs and cores prior to contract award (Tr. 513; AF 2 at 1-6 (Specification (Spec.) 1.3.6)).

28. On June 30, 1984, the dikes sustained more damage. The start date for dike 3 repairs had been changed to September 1984 (AX 35, 38, 41).

29. Prior to August 1984, Mr. Taucher reported to BOR personnel about accumulated quarry data and Radersburg. His notes provide:

14. Recommend

a. Use Radersburg
b. Shoot similar to O'Neil
c. Try on small contract

BOR decided to start with a small contract in case of any quarry problem (Taucher DTr. 146-52, 180; AX 20).

30. By letter dated July 31, 1984, BOR's Project Superintendent, Steven R. Clark, who is not a geologist, advised Montana's Department of Fish, Wildlife and Parks that actual development of Radersburg:

> may result in less than satisfactory materials. An early fall 1984 beginning date is planned for repair activities in order to be able to develop the designated quarry site and determine suitability of rock materials. Should rock sources prove to be unsatisfactory, alternate repair methods may be necessary. It is imperative that we determine this as early as possible.

Mr. Clark's primary purpose was to impress upon the State personnel, concerned about the impact upon waterfowl and hunters during the fall season, the need for BOR to proceed. His comments about Radersburg were not based upon geological data, but upon the fact that nearby Meagher had not produced good rock (AX 38; Clark DTr. 34-39).

31. BOR estimated riprap for all four dikes would exceed 100,000 tons. It concluded development of unlimited Radersburg was necessary to assure availability of sufficient riprap (AX 40; McCormick DTr. 54).

Quarry Waste Percentage

32. In 1979-81, Mr. Taucher began to research waste in riprap jobs, because contractors and courts expected much less than realistic, and there had been many problems, including the Clark job. His October 5, 1981, chart recorded estimated waste from limestone sources: Soldier Creek, 60 percent; Gibson, 50+ percent; and Moronick, 50 percent (Tr. 475, 482-83, 503-04; Taucher DTr. 54-62, 216; AX 6, 116).

33. Mr. Taucher's more refined June 9, 1982, memorandum reported estimated waste at six BOR limestone sources in the West "averaged in excess of 60 percent when vertical shot holes were used." The figures now included Soldier Creek at 72 percent; Meagher, 74 percent; a Utah quarry, over 60 percent; a Colorado quarry, about 80 percent; and Tiber Dam Madison limestone quarry in Montana, 50 percent producing undersized rock, with only a small portion of the remainder producing the maximum size required. The only lower waste percentages occurred at a Leadville limestone project in Colorado, where fragments produced were of small sizes and yielded about 50-percent waste with vertical holes. With horizontal holes, waste was about 20-30 percent, with increased rock sizes and improved gradation. With coyote holes, waste was virtually zero and rock size excellent (Tr. 504; AX 19).[3]

34. Mr. Taucher's study evolved over several years. During 1985-87, he compiled information for a BOR manual, published in 1988. He reported Meagher quarry waste at 75 percent (and Radersburg at 60 percent, *infra*) and stated:

> Adjustments in gradation and/or inspection requirements can drastically alter the waste quantities produced. Except in isolated cases, it becomes more difficult to produce riprap when rock sizes are increased and gradations are tightly controlled.
>
> * * * The most efficient and economical drilling and blasting methods must be determined by trial and error and may not be perfected until much of the quarry operations have been completed.

He concluded limestone waste ranged from 55-85 percent, averaging about 65 percent. He generally had reached his conclusions prior to the WME contract (Tr. 475-76, 502-10; AX 116; GX 51; Taucher DTr. 54-57, 99-102, 216-18).

35. Mr. Taucher was responsible for the contract's provision that at least 50-percent waste could be anticipated. It was intended to be site-specific, based upon his examination of Radersburg and other information. Radersburg and the Toston (or Barnard) quarry from the same rock unit, used in the follow-on contract, were about the best limestone quarries in the West for which he had good data. He expected Radersburg to yield less than average limestone waste because it was better rock. Operating methods will affect waste greatly; he selected a minimum that might be reached by a highly efficient contractor (Tr. 483-84, 515-17, 520-23).

36. Mr. Calcagno was unaware of any limestone quarry generating less than 50-percent waste (Tr. 465).

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[3] The Clark contract, section 3.2.7(b) at page 53, prohibited coyote holes (a "cave cut" form of blasting (Taucher DTr. 100)). There is no such prohibition apparent in WME's contract, which does not specify any drilling or blasting method, but the parties did not discuss coyote holes, and they have not factored into our conclusions about waste.

Riprap Design

37. BOR sought a state-of-the-art riprap design. Clarence Duster, a supervisor at BOR's Engineering and Research Center, Denver (E&R), qualified, without objection, as an expert in riprap design and function on embankments. BOR's regional office had designed the Clark riprap. E&R had not been involved. Due to Clark riprap deficiencies, E&R's expertise had been sought, and Mr. Duster was asked to develop the subsequent protection design. Mr. Larry Armer of the regional office designed the riprap layout on the dike, requiring uniform placement from top to bottom (Tr. 333-36, 369, 390, 398-99; Duster DTr. 8, 10-11, 17; Verzuh DTr. 23).

38. Riprap design involves determining weights and sizes of rock needed to resist the eroding forces of waves, using empirical data, including slope; wave height; and the characteristics of the rock to be placed. The medium-sized (W50) rock necessary is determined. Generally, 50 percent is to be larger, up to a maximum size (Wmax); 50 percent is to be smaller, down to a minimum size (Wmin). The goal is uniform distribution, to achieve stability. To that end, gradation specifications impose limits upon particular sizes of rock (Tr. 337-41, 346-47; AX 34).

39. Mr. Duster developed his 36-inch gradation recommendation after he visited Canyon Ferry, observed the Clark riprap, and took into account, *inter alia*, the location and purpose of the dikes and reservoir, wildlife and environmental concerns, the differing degrees of damage and potential for future damage to the dikes, reservoir depth, wind velocity and persistence, fetch distances, wave height and energy, and the probability of significant storm and flood events. He used BOR source material, United States Army Corps of Engineers, and Department of Commerce references for general information, and relied upon site specific empirical data to the extent available. Although his design was developed prior to contract quarry designation and without information that the rock would be limestone, he used an assumed specific weight of 2.65, a reasonable assumption for most materials, and assumed unit weight of 165 pounds per cubic foot. WME did not prove any of his assumptions to be erroneous. BOR's goal was to design riprap that would provide slope protection with reasonable maintenance, known as a "tolerable damage condition," allowing for some riprap displacement, but no removal of underlying material (Tr. 343-48, 377-78; Duster DTr. 6, 9-11, 16-18, 23-24, 27-30, 39; AX 34).

40. In his January 1984 Technical Memorandum, based upon a 100-year storm, and significant wave height of 6.5 feet, for a 3:1 slope, Mr. Duster reported that W50 should be 770 pounds; Wmax, 3,080 pounds; Wmin, 100 pounds; and riprap thickness, 34 inches. For gradation, he recommended 100 percent of the rock be smaller than 3,500 pounds; 80-95 percent smaller than 3,080 pounds; 40-60 percent smaller than 770 pounds; 10-20 percent smaller than 150 pounds; and 0-5 percent smaller than 100 pounds (AX 34, Tables 3-4; AX 96, Attchs. 1, 4).

41. Mr. Duster suggested contracting officer's approval of a test section of initial riprap placement be required before the contractor could place additional riprap. It was typical in his experience for BOR specifications involving riprap gradation by weight to require in-place gradation tests (Tr. 353; AX 34).

42. BOR modified Mr. Duster's proposed gradation to increase the percentage of large rock. The specification ultimately called for 36-inch riprap,[4] with a 3-inch tolerance. Rock that could be smaller than 770 pounds was reduced from 40-60 to 35-50 percent. The suggested gradation requirements at the lowest end of the weight scale were not altered (Tr. 348-49, 385-86; AX 95, 96, Attch. 1).

43. BOR's use of 36-inch riprap is relatively common (Tr. 336).

44. Although Mr. Duster's Technical Memorandum lists BOR's "Design of Small Dams" manual as a general reference, he did not use it specifically in arriving at his gradation recommendation. The contract specification was not the same as the general one for 36-inch riprap on 3:1 slopes contained in the manual: 0-10 percent less than 100 pounds; 50-60 percent at 100-2,250 pounds; and 40-50 percent less than 2,250 pounds, with a maximum of 4,500 pounds. Mr. Duster did not use it because BOR asked him for site-specific design. His design, the contract specification, and that in BOR's manual, would work about equally well in practice. There are only minor differences among them. The contract specification was fairly close to standard for BOR (Tr. 374, 379, 383, 401-04; AX 34 at References, AX 114 at 263; McCormick DTr. 36, 42).

45. After evaluation and sampling of existing embankment material, BOR determined bedding would not be required. Where still in place, the Clark riprap, significantly smaller for the most part than the contract riprap, would serve (Duster DTr. 21-22, 44-47; AX 34, 96, Attch. 1).

46. No other BOR jobs had the specific gradation limitations contained in WME's contract (Tr. 401-02).

47. The specification required: "When plotted on gradation sheet, all points on individual grading curves obtained from representative samples of riprap shall lie between the boundary limits as defined by curves drawn through the specific grading limits." Government exhibit 2 represents the gradation envelope for the 36-inch riprap specification, the type used by a BOR inspector to determine whether rocks are within specified gradation limits. To do so, riprap is sampled. Its gradation is calculated based upon the sampling and plotted to ascertain if it falls within the bounds defined by the envelope. BOR did not plot the envelope until after in-place tests had begun. There is no

[4] In his deposition, Mr. Duster testified that the 34-inch thickness charted in his Technical Memorandum was changed to 36 inches to ensure that the maximum sized rock could be accommodated and that the rock leading up to it would increase evenly. It was not entirely clear whether he, or other BOR design personnel, had made the change. At hearing, however, Mr. Duster testified that he designed the riprap to have a nominal thickness of 36 inches (Tr. 379; Duster DTr. 29).

evidence that WME attempted to plot it any earlier (Tr. 349-50, 383-85, 688; AF 2 at 3-5 (Spec. 3.3.4 c.)).

Bidding Schedule

48. On August 8, 1984, BOR issued its small business setaside solicitation for dike 3 repair, with Radersburg as sole-source quarry (AF 2 at 1, 3-3 (Spec. 3.3.2a.); McCormick DX 30).

49. The bidding schedule listed six work items:

1. Mobilization and preparatory work -- lump sum,

2. Excavation of existing dike and placing in dike embankment -- estimated 5,000 linear feet,

3. Furnishing and placing 24-inch thick riprap -- estimated 1,780 tons,

4. Furnishing and placing 36-inch riprap -- estimated 23,850 tons,

5. Sampling and gradation testing of riprap prior to placement -- estimated two samples,

6. Sampling and gradation testing of riprap in-place -- estimated one sample (AF 2 at F-1).

50. BOR opened bids on August 28, 1984. WME bid $348,900, including mobilization, $20,000; excavation, $25,000; furnishing and placement of 24-inch riprap, $20,470; 36-inch riprap, $281,430; two quarry tests, $1,000; and one in-place test, $1,000. The next low bidder bid $358,100, at $20,000; $78,000; $17,800; $238,500; $2,000; and $1,000. BOR's estimate was $438,905, at $20,000; $37,500; $24,030; $345,825; $3,300; and $8,250 (AX 42).

51. WME's owner, Steve McNeil, read the solicitation before bidding. In his opinion, the contract stated acceptance of 36-inch riprap would be by visual examination; in-place testing "may" be required, at BOR's option; it was not clear whether a test would be required. He did not request clarification. WME bid $1,000 for in-place testing to cover expenses in case it had to do one (Tr. 129-30, 134, 175-77; McNeil DTr. 23-24).

52. Pre-bid, Mr. McNeil visited the dike and quarry with BOR's Phil Stephenson and, likely, Mike Boylan, WME's project superintendent and authorized representative. Radersburg obviously had been used previously. BOR informed WME of the SCS project, but not about details of prior use or BOR's quarry investigation. The "historical" quarry was apparent; WME may have asked about it. WME knew of the Clark job. BOR showed them Meagher and told them it had produced too small rock, apparent from stockpiles. BOR did not offer information about waste percentage. Mr. McNeil did not inquire further or investigate Radersburg (Tr. 120-26, 166-67).

Radersburg as its quarry. Mr. McNeil relied upon the contract's "at least 50% waste" language only "[t]o a certain extent." He believed actual waste could vary, but not considerably. Post-bid, WME explored using another quarry because it thought: haul conditions at Radersburg were poor, there was rock just as good a lot closer to the job, and Radersburg's owner's royalty fee was too high. WME was not

concerned about rock quality at Radersburg (Tr. 126-27, 184-89; McNeil DTr. 24).

54. On September 22, 1984, prior to formal contract award, Mr. McNeil wrote to Continental Lime, Inc., seeking either of two rock sources -- Dolomite rock of Jefferson deposits, which he described as the same rock specified by BOR and standing the best chance of meeting specifications; or other rock, "not as hard but with some additional sorting time, probably could be made to work" (AX 43).

55. A Bureau of Mines engineer concluded in a report received by BOR on October 5, 1984, that Radersburg: "[O]ffers excellent promise for producing the rip-rap required * * * if appropriate blasting techniques are developed"; it was not possible to recommend an optimum blasting pattern; one would have to be refined empirically; for riprap, spacing should be about equal to the burden, never smaller; each blast should be laid, drilled, loaded, and recorded accurately to facilitate adjustment; single row firing early simplifies adjustment (AX 46).

WME Contract

56. On September 28, 1984, BOR awarded WME the contract for $348,900, issued the notice to proceed, and named William McCormick the contracting officer's authorized representative (AX 45; AF 2).

57. Relevant provisions follow, in pertinent part:

1.3.1 ACCESS TO THE WORK AND HAUL ROUTES

* * * * * * *

The Contractor shall make the Contractor's own investigation of the condition of available public or private roads and of * * * limitations that affect * * * transportation and ingress and egress at the jobsites. The unavailability of transportation facilities or limitations thereon shall not become a basis for claims for damages or extension of time for completion of work. * * *.(AF 2 at 1-4).

1.3.6 QUARRY GEOLOGY

Radersburg Limestone Quarry. - Rock at this quarry is very hard Jefferson Limestone of Devonian age. At this site, the Jefferson Limestone is exposed as a prominent isolated linear ridge with an axial orientation of approximately N.30°W. The northeastern and southwestern sides of the exposure are rather steep and lightly vegetated with sagebrush and native grasses, while the southeastern "nose" is composed of predominantly bare rock which has been partially developed into a quarry face. To the northwest, the outcrop attains a height in excess of 100 feet.

At this site the Jefferson consists of medium grained dolomitic limestone with occasional clay seams (predominantly along bedding). This rock is moderately hard to hard (scratches with knife with moderate to heavy pressure and breaks with moderate to heavy hammer blows). The rock is lightly weathered (partly oxidized, with the rock body usually fresh and oxidation predominantly limited to the surface of, or a short distance from, joints and fractures). The attitude of bedding averages N.15°W., 90° (vertical), and subparallels the axial orientation of the ridge. Bedding is predominantly moderately spaced (from 1 to 3 feet); however, it locally may part into thinner planes. The

dominant joint set has an average attitude of N.75°E., 75°SE (roughly perpendicular to the axial orientation of the ridge) and is closely to moderately spaced (centers range from 0.5 to approximately 3 feet with an average spacing of approximately 2 feet). Minor joint sets are also present with average attitudes of N.75°E., 35°SE and N-S 20°E. Spacing of the two minor sets are each at approximately 0.5 to 6.0 feet (average of approximately 3.0 feet). The combination of bedding with jointing at the site results in the formation of rectangular blocks of rock of varying sizes which preferably break along and perpendicular to the axis of the ridge.

The supply of rock from this site is unlimited.

Investigations:

Radersburg Limestone Quarry. - Six continuous, Nx-size core holes were drilled into the limestone. Drill holes 84-101 and -102 are near horizontal and were drilled to depths of 92.2 and 42.2 feet, respectively. Drill holes 84-103 through -106 are vertical and range from 40.5 to 45 feet deep. Geologic logs and drill core samples are available for inspection at the Bureau of Reclamation's Regional Office in Billings, Montana.

The Government does not represent that the available core samples, logs, and other available geologic information show the conditions that will be encountered in performing the work, and the Government represents only that such information shows conditions encountered at the particular point from which such information was obtained. It is expressly understood that the making of deductions, interpretations, and conclusions from all accessible factual information, including the nature of the rock to be excavated for riprap, the difficulties of making riprap of the required gradations, and the difficulties of doing other work affected by the geology and other subsurface conditions at the site of the work, are the Contractor's sole responsibility. See also Clause H.4 "Site Investigation and Conditions Affecting the Work (Apr. 1984)" of the Contract Documents.

(AF 2 at 1-6).

3.2.1 EMBANKMENT CONSTRUCTION, GENERAL

a. * * * the term "embankment" includes all portions of the dike embankment for the repair of Eastside Dike No. 3. Riprap is also included as an embankment item.

* * * Placing of the material shall at all times be subject to the approval of the Contracting Officer. * * *.

The completed dike embankment shall be to the lines and grades shown on Drawing No. 7 * * *. * * *

* * * * * * *

* * * The embankment foundations above water surface of the lake shall be stripped of vegetation and brush prior to placing dike material as directed by the Contracting Officer. Loose debris such as driftwood and rubbish on top of slopes of the existing dike shall be removed and disposed of * * *.

All cavities, depressions, and irregularities, either existing or resulting from removal of rock fragments found within the area to be covered by embankment, and which extend below or beyond the established lines of excavation shall be filled with embankment materials.

c. * * * The suitability of * * * all materials for use in embankment construction will be determined by the Contracting Officer.

(AF 2 at 3-2).

3.3.1 SLOPE PROTECTION, GENERAL

Portions of the existing riprap slope protection on Eastside Dike No. 3 have been displaced due to the effects of reservoir wave action. Degree of displacement varies from

slight to complete removal of previously placed riprap, and in some locations, removal of dike embankment material has occurred.

The Contractor shall repair the dike embankment in accordance with Paragraph 3.2.1 * * * and shall furnish and place riprap on the dike embankment slope in accordance with Paragraphs 3.3.4 [36 inch] * * * and 3.3.5 [24 inch].

Bedding will not be required for riprap placed on Eastside Dike No. 3.

(AF 2 at 3-3).

3.3.2 QUARRY

a. General. - All riprap material shall be obtained from the Radersburg Quarry * * * approximately 15 miles from Eastside Dike No. 3. Present owner: Daniel Williams, Radersburg, Montana; type of material: Jefferson Limestone of Devonian Age.

The source is approved only for rock quality and durability and not for fragment sizes produced.

* * * * * * *

Tests have not been made to determine the relative difficulty of obtaining rock fragments of the specified sizes for riprap of the various gradations from the quarry. Bidders and the Contractor are cautioned that rock fragments which may be obtained from excavating the above-mentioned source may be variable in quality and sizes; that only selected locations and strata within the source will produce acceptable rock; and that the quantity and percentage of acceptable rock fragments which may be obtained from the source are unknown. It is, however, anticipated that at least 50 percent waste will be incurred from the source when processing for the desired sizes.

* * * * * * *

The Government reserves the right to make inspections of the quarry site. The approval by the Contracting Officer of some rock fragments from a particular area of the quarry site shall not be construed as constituting the approval of all rock fragments taken from that quarry, and the Contractor will be held responsible for the specified quality and gradation of rock fragments delivered to the dike embankment.

* * * * * * *

Prior to any contractor operations in the quarry, the Contractor shall submit to the Contracting Officer for approval, the Contractor's plans for developing the quarry. * * *.

* * * * * * *

The Contractor's methods of removing, processing, sorting, and loading material from the quarry shall be such as to produce riprap of the highest practicable quality, and shall be subject to the approval of the Contracting Officer. Oversized material shall be refractured to proper usable sizes. Processing the material to provide the gradations shown in Paragraphs 3.3.4 and 3.3.5 is required. Processing may be over a grizzly [5] operation having the capability of varying size openings to obtain the desired results or by other approved methods. Determination of acceptability of the material gradation may be through visual inspection by the Project Manager's representative as well as by sampling and testing in accordance with Paragraph 3.3.4(e).

It will be the Contractor's responsibility to use blasting, excavation and removal techniques which will result in satisfactory riprap. * * *.

c. Cost. - * * * Rock materials from quarry operations that are not acceptable for riprap, will be considered waste material, for which no payment will be made.

(AF 2 at 3-3, 3-4).

[5] A grizzly is equipment, with grate-like slats separated from one another by whatever width deemed appropriate, used to sort rock by size (Tr. 445, 657; GX 60, 61).

3.3.3 BLASTING FOR ROCK IN QUARRY

* * * * * * *

c. Blasting plans. - Prior to starting any blasting for rock excavations, the Contractor shall submit to the Project Manager for approval a two-part conceptual blasting plan * * *. The Contractor shall engage the services of a blasting specialist to assist in the development of the conceptual plan and the individual plans.

* * * * * * *

* * * individual shot plans shall be submitted on a day-to-day basis, to the Project Manager's authorized representative for approval so that the plans are received by the Government at least 24 hours before the scheduled time for the drilling provided for in the plan. The Project Manager or his authorized representative will observe the loading of shot holes for test blasting and any excavation blasting to ensure that loading is in accordance with approved plans. * * * No blasting will be permitted until the Contractor's blasting plans for rock excavation have been approved by the Project Manager or his authorized representative * * *.

Blasting shall be controlled so that rock fragments will meet gradation requirements specified in Paragraphs 3.3.4 and 3.3.5 * * *.

In addition to blasting plans, all blasting operations * * * shall be subject to the approval of the Project Manager. * * *

* * * * * * *

d. Cost. - The cost of blasting * * * shall be included in the applicable prices bid in the schedule for riprap * * *.

(AF 2 at 3-4, 3-5).

3.3.4 RIPRAP [36 INCH]

a. General. - Riprap shall be in accordance with this paragraph and Paragraph 3.2.1 * * *.

Riprap shall be furnished and placed to the prescribed outlines and thicknesses for the protection of the dike embankment slope as shown on Drawing No. 7 * * * and elsewhere as directed by the Contracting Officer.

b. Material. - Riprap material shall be furnished from the Radersburg Quarry and shall be processed to the gradations shown in subparagraph c. below.

c. Gradation. - Riprap shall be graded within the limits as shown below.

Riprap Gradation Requirements - Size of Rock Fragments

Nominal 1 Thickness of riprap (inches)					
Percent Smaller (by weight) 2	Size of rock (lbs.)				
	00 percent	80 to 95 percent	35 to 50 percent	0 to 20 percent	0 to 5 percent 3
36	3500	3080	770	150	100

1Riprap will be placed to lines and grades as shown on Drawing No. 7 * * * or as directed. A tolerance of plus or minus 3 inches from the thicknesses shown on the drawing will be allowed on the finished surface of the rock protection.

2Sand and rock dust shall be less than 5 percent, by weight, of total riprap material.

3The percentage of this size material shall not exceed an amount which will fill the voids in larger rock.

When plotted on gradation sheet, all points on individual grading curves obtained from representative samples of riprap shall lie between the boundary limits as defined by curves drawn through the specific grading limits. * * *

d. Placing. - The rock in riprap need not be compacted but shall be placed to grade in a manner to insure that the large rock fragments are uniformly distributed and the smaller rock fragments serve to fill the spaces between the larger rock fragments in such a manner as will result in well-keyed, densely placed, uniform layers of riprap of the specified thickness. * * *.

The intent of these specifications is to require placement of the riprap in a manner that will produce a well keyed and stable mass of rocks including adjusting surface rock and filling voids with smaller rock to provide a dense cover with a finished surface corresponding to the lines and grades shown on drawing No. 7 * * *. These requirements include: (1) placement of the riprap to full layer thickness in one operation in such a manner as to minimize segregation and avoid displacement of underlying materials; (2) the Contractor shall provide laborers during placement for rearrangement of loose rock, "chinking" of void spaces or hand placement to comply with the end-product requirement of a well keyed and stable mass and; (3) the in-place finished riprap shall conform to the gradation specified in subparagraph c.

* * * * * * *

Placement procedures that will not be permitted include: * * * dumping of rock at a higher elevation than the placement area and rolling into place * * *.

e. Contractor's sampling and testing.

(1) Prior to placement on dike - The Contractor shall provide scales, equipment, and facilities for gradation testing and shall perform the tests under the direction of the representative of the Project Manager. The Contractor will be required to perform possibly as many as two satisfactory gradation tests of representative samples (approximately 50,000 pounds, each sample) to demonstrate that riprap meets gradation requirements before placing on the dike.

* * * All rock material not meeting * * * these specifications as determined by tests and/or visual examination will be rejected.

Additional tests represented by each failing test will be performed at the Contractor's expense. All rejected material not meeting gradation requirements shall be reprocessed or disposed of at the expense of and by the Contractor. Reprocessing or disposing of rock materials shall be subject to the approval of the representative of the Project Manager.

* * * * * * *

(2) In-place on dike embankment - During construction, in-place rock materials from the placed and finished riprap will be sampled and tested for gradation as often as deemed necessary by the representative of the Project Manager. The Contractor shall furnish laborers as required to perform the sampling and testing, the necessary equipment and operators for performance of the sampling and testing, and shall be responsible for the satisfactory replacement of rock in the sampled area. * * *.

The in-place gradations and depth checks shall be determined using the following procedure:

(a) Selection of a full thickness sample from 25 lineal feet of placed and finished riprapped dike embankment.

(b) Determination of the weight of the entire sample and average depth of the area from which the sample was removed.

(c) Determination of the weight of each individual piece of rock fragment weighing over the specified minimum size.

(d) Determination of the collective weight of all individual rock fragments weighing less than the specified minimum size. In general, the number of tests that the Government will require will not exceed one; however, only those tests which meet all the specified requirements will be counted. If any test indicates the material or workmanship does not conform to the specifications, the material represented by the test shall be removed and replaced with rock meeting these specifications. Additional tests sufficient to define the area represented by each failing test will be performed at the

Contractor's expense. No additional rock shall be placed until the test section is approved by the Project Manager.

* * * * * * *

Measurement, for payment, of furnishing and placing riprap will be made of the number of tons of riprap placed to the lines, grades and thicknesses shown on Drawing No. 7 * * * or as established by the Contracting Officer.

* * * * * * *

Payment for in-place sampling and gradation testing of riprap will be made at the applicable unit price per sample bid therefor in the schedule, which unit price shall include the cost of all operations to achieve test results in accordance with subparagraph e.

No payment will be made for rock materials from quarry operations that are not acceptable as riprap material.—

(AF 2 at 3-5 - 3-7).

3.3.5 RIPRAP [24 INCH] * * *

* * * * * * *

* * * The Contractor will not be required to perform specific gradation tests on riprap prior to placing on dike or on in-place riprap. Determination of acceptability of the material gradation under this paragraph will be through visual inspection by the Project Manager's authorized representative. All rock material not meeting the gradation as determined by visual examination will be rejected.

(AF 2 at 3-8).

I.1.1 DEFINITIONS (APR 1984)

* * * * * * *

(b) "Contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(AF 2 at I-1).

H.4 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost * * *. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government.

(AF 2 at H-1).

I.3.2 INSPECTION OF CONSTRUCTION (APR 1984)

* * * * * * *

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work called for by this contract conforms to contract requirements. * * *. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not --

(1) Relieve the Contractor of responsibility for providing adequate quality control measures;

* * * * * * *

(3) Constitute or imply acceptance; * * *

* * * * * * *

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. * * *.

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

* * * * * * *

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction.

(AF 2 at I-10, I-11).

I.3.3 WARRANTY OF CONSTRUCTION (APR 1984) ALTERNATE I (APR 1984)

(a) In addition to any other warranties in this contract, the Contractor warrants * * * that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

* * * * * * *

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. * * *.

* * * * * * *

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government * * *.

(AF 2 at I-11, I-12).

I.4.2 SUSPENSION OF WORK (APR 1984)

* * * * * * *

(b) if the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay or interruption * * *. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor * * *

(AF 2 at I-13).

I.4.5 DIFFERING SITE CONDITIONS (APR 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; *provided*, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer. [Italic in original.]

(AF 2 at I-14).

I.4.7 CHANGES (APR 1984)

(a) The Contracting Officer may, at any time * * * by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

* * * * * * *

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided*, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated a change order under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" * * * based on defective specifications, no proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20

days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting [to] comply with the defective specifications. [Italics in original.]

(AF 2 at I-14, I-15).

Contract Performance

58. WME received the notice to proceed on October 1, 1984. The contract completion date was January 29, 1985 (AX 53; AF 2).

59. Post-award, WME asked BOR to consider other quarries, including Continental Lime, in Madison limestone. BOR's investigations had revealed the Madison produced little usable rock in larger sizes. It advised alternate quarry approval was virtually impossible. It needed the riprap; testing would be required, including freeze-thaw, which could take 60 days; permits might be required; good fall weather, and WME's short performance time, would expire. BOR did not perform a freeze-thaw test on Radersburg because it had empirical information on rock quality. WME abandoned its quest (Tr. 127-29, 149, 183-84, 494-95, 634-35, 685-86).

60. On October 6, 1984, WME submitted its quarry operations and blasting plans to BOR. Archie Johnson, who had considerable experience, was its blasting expert. WME stressed it would welcome blasting recommendations and that it would alter its plans if they did not produce riprap meeting specifications (AX 47, 48).

61. Mr. McCormick accepted the plans, stating:

I would suggest that you evaluate your hole layout on your first plan. The burden and spacing appear to be reverse of good blasting practice (the spacing should be equal to or greater than the spacing [*sic*]). The proposed 8' by 6' pattern in the more weathered surface rock will probably produce a high percent of undersized rock. A wider pattern such as 8' by 10' would probably take advantage of the rock bedding and may be easier to adjust to make riprap that meets the specified gradation.

(AX 51; Tr. 278-79).

62. Mr. McCormick agreed the most efficient blasting method may not be determined until project completion (Tr. 657, 670-71).

63. Mr. Clarence Volk, who had 36 years experience with BOR, was its construction field representative. Mr. Stephenson, or another inspector, worked with him. Normally Mr. Volk was at the quarry and the other inspector at the dike, but Mr. Volk would visit the dike periodically. Generally they each completed an Inspector's Daily Report (IDR) for Mr. McCormick, with whom Mr. Volk communicated regularly. Mr. Volk had no 36-inch riprap experience as an inspector. Mr. McCormick had considerable experience with 36-inch riprap, some involving limestone (Tr. 131, 275, 526J-28, 568-69, 594, 626; McCormick DTr. 10-11).

64. Mr. Volk was on the Clark job. He observed the Meagher rock was fractured with inherent flaws and would break down in handling.

The Radersburg was good, hard rock producing requisite sizes (Tr. 526K-29).

65. Mr. McNeil read the contract to mean that, after a passing quarry test, riprap grading would be visual. He said no one from BOR told him an in-place test was mandatory, but acknowledged that, after WME started the job, BOR said it would have to perform an in-place test (Tr. 131-34).

66. WME's Mr. Boylan recalled conversations about in-place testing in mid to late November, 1984, and that BOR wanted a test done soon (Tr. 291).

67. The weight of the evidence is that BOR informed Mr. Boylan about the need for an in-place test at the outset of the job and many times thereafter (Tr. 550-53, 556-57, 563, 580-82, 587-89, 591, 639-41; GX 27).

68. WME did not challenge the test requirement contemporaneously (Tr. 551-52, 639-41).

69. In October 1984, WME mobilized, performed excavation, and preparatory work and drilled in the quarry (AF 15 at 18, 19, Exh. A).

70. WME did not submit blast plans to Mr. Volk prior to its shots. He was present for most drilling (Tr. 283, 285, 323, 538, 656, 675).

71. Mr. McNeil conceded BOR may have provided information to WME about blasting on the SCS contract; BOR did not provide a test plan (Tr. 144).

72. Prior to its first blast, WME removed large boulders from the quarry toe in an area shot by the SCS contractor, and attempted to drill three horizontal holes. They collapsed, so Mr. Johnson shot a vertical pattern he had already established. WME did not remove other previously shot material remaining by the quarry face (Tr. 530-34).

73. WME's first shot was on October 30, 1984. Despite BOR's advice, Mr. Johnson used his 8- by 6-foot pattern. He told WME the blast should produce at least half the rock required. After the blast, surface material looked good. Farther in, it became smaller. After hauling a few days, WME was out of rock and knew something was wrong. The blast produced less than a third of the necessary rock (Tr. 189, 281-82; AF 15 at 19; AX 54).

74. To meet deadline, WME's biggest concern was quarry work and getting material hauled. It believed it could "catch up" on placement (Tr. 297).

75. BOR approved WME's sorting plan, including use of a skeleton rock bucket[6] (Tr. 153).

76. WME changed the second blast to 8 by 8 foot and the third to 9 by 9 foot, and loaded the holes differently, to little effect (Tr. 283-84).

77. Again, surface rock was good. Progress slowed when WME got deeper. It continuously failed to remove shot material from the quarry face, which impeded release of blast pressure, causing interior rock to

[6] A skeleton rock bucket is attached to a truck. The bucket, which is slatted, picks up and retains larger rock and allows smaller rock to fall through the bottom (Tr. 153-54; GX 48B).

break up. Rock built up within the quarry and would not shoot free. Mr. Volk discussed the problem with Mr. Boylan (Tr. 531-35, 542, 604-10, 614-15; GX 25).

78. WME's hole spacing occasionally was uneven (Tr. 536-37, 613).

79. Before WME could haul, it had to conduct the in-quarry test. It did so in early November 1984. It was not able to obtain scales. BOR agreed to testing at a grain yard, which had a large platform scale. The test failed initially, containing too many fines and too much large rock. BOR allowed removal of some of both. Remaining rock met specifications. At BOR's direction, WME painted each rock's weight on it and used the sample as a visual example. BOR did not require another test because it was difficult to weigh at the grain yard. Mr. Volk showed WME the too small and too big rock to avoid (Tr. 130-33, 285-86, 542-44, 637-38, 682-84, 695; McCormick DTr. 93; AF 15 at 19, Exh. A).

80. WME began placing riprap on about November 10-13, 1984. At first, its trucks would dump rock on top of the dike, then push it over the edge, causing smaller rock to remain on top, while the larger rolled to the bottom. This uneven placement would not meet specifications. Mr. Volk instructed WME in placement. Then, it deposited rock at the top of the dike and placed it individually with equipment. Mr. Volk also instructed WME in sorting rock at the quarry to remove fines in order to meet gradation requirements (Tr. 157, 547-48, 642; GX 16, 19; AF 2 at 3-5 - 3-7 Spec. 3.3.4d.).

81. If there was not enough riprap to haul, WME would stockpile it at the quarry. WME's loader operator and BOR's inspector would examine the riprap visually before it was hauled (Tr. 154-55).

82. Mr. Volk's and Mr. Stephenson's IDR's record some concern about hauling fines. To Mr. Volk, "fines," here, meant 8-inch rock or less. (A 10-inch rock weighs about 100 pounds) (Tr. 447-48, 546, 548; GX 17, 18, 20, 23, 24.)

83. WME also was concerned about fines but believed the material actually placed would meet specifications. BOR never rejected any loads, directed WME to cease placement because of fines, or stated the fines would thwart a passing in-place test (Tr. 287-88, 615-16).

84. On November 21, 1984, after WME had been hauling for somewhat over a week, Mr. McCormick and Mr. Volk reminded Mr. Boylan of the need for the in-place test. Mr. McCormick stated specifications required that, if the test failed, the tested rock must be removed (Tr. 551-52, 639-41).

85. WME kept hauling, stating the rock was good. BOR advised it could not determine that until there was a test (Tr. 616; McCormick DTr. 96).

86. According to Mr. McNeil, the rock kept breaking up and WME had a hard time making riprap from Radersburg. Still, it was hauling

enough to complete the contract on time (Tr. 141-42, 160, 189-91, 284, 286-87).

87. According to Mr. Taucher and Mr. McCormick, breakage of the Radersburg rock in handling was insignificant (Tr. 487-88; McCormick DTr. 93).

88. Mr. McNeil said he orally expressed concern to Mr. Volk about the rock. Mr. Boylan admits he did not, but thought problems were evident (Tr. 181, 315-16, 324-29).

89. Mr. Volk said WME advised him of concern about the blast shots and that it would adjust to try for better results (Tr. 553).

90. There were ultimately five or six quarry blasts. The pattern was changed repeatedly to try to get more usable rock. Mr. Johnson got another drill and driller, which speeded procedures (Tr. 284, 331-32).

91. Throughout, there was a lot of oversized rock produced that WME had to drill to reduce. Approximately 10 percent of the rock had to be blasted secondarily (Tr. 528-29; GX 17, 19, 22, 25, 26, 28, 29, 32-35, 51).

92. Mr. Boylan acknowledged that BOR advised him that the rock was skip-graded -- too much small and too much big rock, not enough in between -- not increasing regularly by increments. Rock that is skip-graded does not meet specifications and is not a good riprap product (Tr. 288-89, 644-45; McCormick DTr. 97).

93. Mr. Boylan acknowledged BOR advised him there were swales in the placement, meaning the surface was uneven; there were voids (Tr. 289).

94. BOR directed placement of graded rock to bring the dike to a uniform surface. It did not direct placement of "fines." Mr. Boylan interpreted BOR's instruction to mean graded 300-pound rock and below, did not dispute it, and placed the additional rock. Mr. McNeil was not present and had no firsthand knowledge about the nature of BOR's direction. It was a good, common practice to make a surface free of voids (Tr. 162, 289-90, 310-13, 315, 330-31, 548-50; Boylan DTr. 95-96; McCormick DTr. 55-56; AF 7).

95. On December 10, 1984:

> [Mr. Volk] finally struck home and convinced [Mr. Boylan] that there absolutely had to be an in-place test taken and that if he didn't get started on it soon * * * McCormick and I would have to do something * * * to get something done, job shutdown or whatever, because we couldn't continue * * * at his rate because he wasn't getting the equipment to do the test.

(Tr. 292-94, 556-57, 580-82; GX 27).

96. WME's delay in starting testing was due to its inability to get adequate scales. BOR was sympathetic at first but, by December 10, had serious concerns about WME's failure to test (Tr. 292-93, 588-89).

97. BOR had considerable interest because the project was a "redo job." Personnel visited who indicated WME was doing a good job and the quality and size of rock being placed was good (Tr. 140-41, 171-73, 192, 288).

98. To Mr. Volk, WME improved with experience, and placement and uniformity of distribution looked good (Tr. 595-96).

99. Mr. Volk found WME cooperative (Tr. 588).

100. Without a gradation test, however, it was not possible to determine by visual means whether riprap in place met specification requirements. WME itself emphasized several times that it was hard to determine the proper size and grade of rock by visual means (Tr. 147-48, 288-89, 313, 353, 554, 591-92, 616, 641; GX 37, 39).all amount of the 24-inch riprap had been hauled but none had been placed prior to the first in-place test (Tr. 616-17).

102. WME started the test on December 13, 1984 (Tr. 294, 575; GX 29).

103. To test, BOR selected a dike section. WME had to remove and weigh each rock. It had small scales to weigh smaller rock. It hauled larger rock to the grain yard and used their scales; it tried, with difficulty, to get scales to weigh it on site (Tr. 134, 137, 295, 557-58).

104. BOR's inspectors assisted WME as a courtesy. BOR could compare the weight of the smaller rock to what it should have weighed theoretically. Without the other rock weighed, though, the test sample's total weight was unknown and relative percentages of rocks could not be derived. As the smaller rocks were weighed, because of their quantity, it appeared to Mr. Volk the sample would not pass the test. He so informed Mr. Boylan in the first few days of the test. He did not direct WME to stop work (Tr. 597-99, 601).

105. On December 19, 1984, WME was still working on the test. It did not work from December 20-25. Its holiday shutdown was planned to last 2 weeks. BOR's inspectors took leave, but Mr. Volk advised he would return whenever WME called that it was ready to continue with the test; he received no call. Instead of shutting down 2 weeks, WME recommenced quarry work and hauling on December 26. While the inspectors were gone for 2 weeks, WME was not allowed to place riprap (Tr. 295-96, 562, 578, 600-601, 621, 643; GX 30, 31).

106. By mid-January the test still was not complete. Mr. McCormick notified Mr. McNeil that if WME continued to haul and place rock on the dike it was doing so at its own risk and might have to redo the job. Mr. McNeil thought the test had been completed. WME completed it on January 15, 1985, 2 days after Mr. McCormick spoke to Mr. McNeil. Prior to then, Mr. McNeil had been on site infrequently (Tr. 135-37, 166-70, 173, 192, 563).

107. To then, there were more riprap production costs than anticipated, but Mr. McNeil did not consider this a major problem, or of sufficient concern to complain in writing to BOR; while the job might not have been particularly good costwise, it was not especially bad (Tr. 185, 191-92).

108. WME admitted the in-place test took so long because it did not have the right scales for the larger rock (Tr. 134, 294-95; see also Tr. 620-21).

109. On January 16, 1985, WME was still drilling, loading and hauling riprap. The test results were evaluated that day. The test sample failed to meet specifications (GX 32).

110. Before January 1985, BOR did not reject any rock produced from the quarry for riprap or any load placed on the dike (Tr. 136).

111. Prior to January 1985, BOR did not advise WME to cease hauling riprap or to cease production from the quarry (Tr. 136).

112. BOR paid WME through the December progress payment. It paid because WME had submitted its weight tickets for payment, gradation and testing was the contractor's responsibility and, until the in-place test, BOR did not know the riprap did not meet specifications (Tr. 616, 642-43, 685).

113. WME conceded in its claim that it was "abundantly clear that the test failed in respect to both oversized rock and to an excessive amount of fine material" (AF 15 at 23; see also GX 52; AX 62; McCormick DTr. 91-92).

114. WME did not change its method of operations after the first in-place test failed. It largely continued to blast, drill, sort, load and haul (Tr. 601-02; GX 32, 33, 35).

115. WME thought the test unrepresentative. On January 17-18, 1985, it conducted another one, in an area it selected from a general region designated by BOR. The test sample failed because of too many fines and oversized rock (AX 62; McCormick DTr. 91-92; GX 33-35, 52).

116. On both tests one and two, the majority of the rock, 80-85 percent, was outside the gradation envelope. The test results reflected skip-grading (Tr. 645-46; GX 52).

117. Prior to failure of the two in-place tests, WME did not allege to Mr. McCormick that there was a differing site condition at the quarry. Afterwards, it asserted difficulties and excessive fines (Tr. 661).

118. On January 25, 1985, Messrs. McCormick, Volk, Boylan, and McNeil had a meeting. BOR summarized its understanding of an "agreement" reached at the meeting in its January 28, 1985, letter to WME: The rock placed was out of specification; WME would drill and shoot oversized rock in excess of 3,500 pounds at the dike, to reduce it to required gradation; there was 18.35 percent more rock than allowed in the 100-pound (or less) category; WME would attempt to eliminate the excess; after rock available between stations was processed to get rid of oversized and undersized, it would be "sweetened" with rock in the larger size range, 1,500-3,500 pounds, to be hauled from the quarry (amounting to about 20 percent of the rock already hauled); all rock already placed would be processed with a grizzly or mechanical separator to eliminate undersized, and heavier rock from the quarry would be incorporated; and waste or undersized rock could be used for the 24-inch riprap if it met gradation requirements. By that time, WME had placed most of the 36-inch

riprap and hauled most of the 24-inch rock. Approximately 90 percent of the total dike work had been completed. BOR agreed to pay WME's January voucher, with a deduction for nonspecification rock (TR. 159, 247, 644; AF 15, Exh. A; AX 62).

119. BOR granted a 5-week extension, to March 3, 1985, without liquidated damages, in an effort to assist WME, because it would take time to assemble equipment, reservoir level was low and, except for extra costs of inspection, BOR would not be damaged (AX 62; McCormick DTr. 98-100).

120. On January 31, 1985, WME responded. It agreed with the stated work procedures, the extension, and the basis for payment, but contended: BOR was directing additional work; there was not 18.35 percent excess rock in the 100-pound (or less) category; it would take tests elsewhere to determine a more accurate percentage to be eliminated, because tests had been in areas where BOR had directed placement of fines; the scale was inaccurate; the out-of-specification condition was not its fault; and it was not waiving claims. WME planned to acquire a grizzly and start work when weather permitted (AF 4).

121. BOR required that WME remove all rock placed, resort it, haul more to replace that rejected in sorting, and place the rock back on the dike. Over 20,000 tons was involved. WME understood its placed riprap had not met specifications. It was not sure the designated rework was necessary to correct the problem (Tr. 139-40, 159; McNeil DTr. 51-53).

122. When BOR drew the gradation curves during the in-place tests, it discovered a 5-percent "gate," "bottleneck," or "wasp waist" the contractor had to negotiate, created by the requirement that 10-20 percent of the rock weigh 150 pounds or less, and 0-5 percent, 100 pounds or less. The 100-pound category had been included because it was one-eighth of the medium-sized rock, a typical standard for selecting the minimum-sized. The requirement for the 150-pound rock had been to ensure rock of sufficient size to protect against erosion of underlying material. Although it had a logical design basis, the conjunction of the two requirements was unreasonably difficult in practice, because the rocks were very close in size and hard to distinguish (Tr. 146-48, 224, 229-31, 236-37, 355, 359-60; GX 52; McCormick DTr. 43, 59-60).

123. In February 1985, Mr. Duster and Mr. McCormick discussed whether the 100-pound rock, including its 0-5-percent limit, was necessary to provide adequately sized riprap with a uniform distribution of particle sizes. Because the 100- and 150-pound rocks were very close in size, Mr. Duster and Mr. McCormick concluded that, as long as specification limitations were met for the 150-pound rock, and for the other size requirements, the 100-pound category was not necessary to satisfy design intent. BOR had not recognized this

when it issued the solicitation. Mr. Duster discussed this with Mr. Armer of BOR's regional office in March 1985. They reached the same conclusion; there is no evidence BOR advised WME of it. In Mr. Duster's expert opinion, except for the 0-5-percent limit, the gradation limits were reasonable (Tr. 354-56, 359-60, 383-88; Duster DTr. 36-37).

124. Claims consultant Terry Threlkeld, who had a bachelor's degree in civil engineering, some construction experience with riprap, and other contracting experience, testified on behalf of WME concerning the 36-inch riprap specification. He was not offered as an expert. He volunteered that, when he was a contractor, he typically would plot a gradation curve to determine degree of difficulty and to see if there were a chance of modification if there were areas of concern. At a minimum, he would be aware of concerns. He, and Mr. McCormick, described the 36-inch riprap specification as a performance, end-product, specification (Tr. 200-03, 218-19, 228-29, 641).

125. Mr. McCormick replied to WME's January 31, 1985, letter on February 7, 1985, stating BOR was not directing additional work. Rather, per contract section I.3.2, it had approved a possible procedure for correcting work rejected because it did not comply with specifications. He stated all specification requirements were still in effect. The record does not reflect whether the letter was before his discussion with Mr. Duster. It was before Mr. Duster's March discussion with Mr. Armer (AF 5).

126. By letter dated February 18, 1985, WME requested a 2-week extension, to March 17, 1985, due to equipment repairs delayed by extremely cold weather. It asserted in-place tests had included Clark fines; they had been taken where BOR had directed placement of fines; and Radersburg was unsuitable, resulting in twice WME's anticipated reject (AF 6).

127. Mr. Volk observed the entire dike length involved in WME's contract before it placed new riprap. In cleaning the embankment, WME had used a dozer to remove branches, debris, etc., likely resulting in removal of some remaining Clark riprap. After the embankment had been cleaned, WME had used a backhoe to bring it to grade (Tr. 558-60).

128. Mr. Volk did not see Clark fines on the dike's surface when WME was ready to place new riprap. By the time the embankment was sloped, they had been worked into the underlying bedding material, making a smooth surface. He did not think Clark fines were included in the two failing tests. That rock was a different color; WME could have eliminated it; if there were any, its quantity would have been minute. He did not recall any complaint during the tests about Clark fines. There is no evidence of any complaint at that time (Tr. 561-62).

129. According to Mr. Boylan, the Clark riprap was blended in, incorporated into the job, and included in the tests (Tr. 303-04).

130. On February 25, 1985, inspector Stephen Bareis (Mr. Volk had retired on February 1, 1985) notified WME that too much over-sized

material, in excess of 3,500 pounds, was being re-placed. Mr. McNeil responded it was difficult visually to determine the difference between 3,500- and 4,000-pound rock. The inspector noted there were several rocks placed between 4,000 and 6,000 pounds. Mr. McNeil asked how strict BOR would be on oversized material. Mr. Bareis said he would check concerning the 3,500-4,000-pound rock, but that any over 4,000 pounds definitely would cause a test sample to fail. He cautioned that specifications for all rock sizes remained in effect, and that WME should not expect allowances on either end of the scale (Tr. 526J; GX 39).

131. On March 1, 1985, BOR met on site with WME and discussed the contractor's February 18 letter. BOR's March 6, 1985, letter apparently summarizes matters discussed: the March 17 extension was satisfactory, but BOR was concerned about WME's ability to meet it; BOR wanted to know whether WME planned multiple shifts; BOR believed a grizzly would greatly assist in sorting fines (which it defined as minus-100-pound rock) and provide better riprap consistency; regarding WME's plan for additional tests, because it disputed the accuracy of the percentage of fines (PF) in the first two, a minimum of two PF tests would be required, possibly three, if there were a significant difference between them; Clark rock could be eliminated by careful removal of new riprap so as not to disturb bedding; BOR had not directed placement of "fines"; rather, there were areas of low spots requiring placement of smaller rocks meeting the specified gradation limits; Radersburg was not unsuitable (AF 7).

132. On March 1, 1985, WME ran test 3, on re-placed riprap. It was substantially within the gradation envelope. BOR accepted the test as passing. Because the first two in-place tests had failed, however, BOR required additional in-place tests in different areas, where material looked like it might be out of specification (Tr. 647, 701, 715-16; AX 72; GX 53).[7]

133. From March 2-11, 1985, PF tests were run. PF-1 measured minus-100-pound rock at 16.67 percent; PF-2, about 20.2 percent. On March 5, inspector Bareis informed WME that a third test might not be necessary. At its request, however, a third was taken, at a station between the first two, where new riprap had been placed on a Clark remnant. The test did not establish that Clark rock had caused WME to be out of specification on the lower end of the gradation scale, because minus-100-pound rock totalled 21.9 percent without any Clark rock (26.9 percent when it was included) (AX 73-75).

134. For rework, WME changed from a series blast with various rows of holes, which produced too many fines, to drilling a single row of vertical holes, collecting the yield, cleaning up, and drilling another row as needed. It ultimately obtained two grizzlies to aid in sorting,

[7] A Construction Summary (CS), part of AX 96, states tests 1, 2, and 3 showed riprap did not meet requirements and only tests 4, 5, and 6 passed. All other evidence of record is that BOR accepted test 3 as passing.

one at the quarry and one at the dike. BOR did not require two, but time constraints did. There was a work shutdown due to severe weather in February and early March. WME had not used a grizzly prior to rework. BOR conceded that on a small contract a contractor would more likely use a rock bucket than a grizzly (Tr. 145-46, 158, 499, 657-58; AX 96, CS).

135. From March 12-14, 1985, because it questioned tests 1 and 2, WME ran test 4, on riprap placed prior to rework. It was substantially within the gradation envelope, although still contained too many small rocks (minus-100-pound rock was at 13.9 percent) and was somewhat out in the mid-size area. BOR considered it passing (Tr. 223-24; AX 77, 96, CS; GX 52).

136. On March 15, 1985, BOR extended the contract deadline to April 12, 1985, but warned it would assess liquidated damages thereafter (AF 8).

137. As of March 5, although some of its personnel occasionally worked 9-10 hour days, WME had not yet begun to work extra shifts (GX 37-41).

138. As of March 19, 1985, WME's personnel were working extended hours, including around-the-clock shifts (Tr. 160; GX 42; AX 96, CS).

139. In-place test 5 occurred about March 21, 1985. It was slightly out of specification on the upper and lower end of the weight scales. BOR accepted it, subject to WME's breaking up oversized material and placing 150-pound rock in voids (Tr. 647, 701-04; GX 43, 53).

140. Test 6, on April 10, 1985, was substantially within the envelope and considered passing (Tr. 647; GX 53; AX 80, 96, CS).

141. In accepting the riprap, BOR relaxed the 36-inch riprap specification by eliminating the 100-pound criteria (Tr. 707-08; McCormick DTr. 58-59).

142. In-place tests 1 and 2 would not have satisfied the relaxed specification in any case. The samples contained material smaller than required through, or between, the 150 pound size and approximately the 2,000-2,500 pound sizes, and material beyond the maximum. The riprap represented by the tests was not acceptable, principally because the contract required that only 35 to 50 percent of the rock be smaller than the 770 pound medium, and tests 1 and 2 had approximately 60 percent smaller, rendering the riprap subject to potential instability and displacement (Tr. 233-35, 357-59; AX 105; GX 52).

143. Tests 1 and 2 would have failed even if Mr. Duster's original design had not been modified; they would not have complied with the design contained in BOR's "Design of Small Dams" manual, which, overall, required coarser rock than WME's contract; and they would not have satisfied the follow-on contract's specifications (Tr. 222-23, 233-36, 400, 405-06; see also FF 156).

144. None of the tests, whether on riprap placed prior to or after rework, including those accepted by BOR, precisely complied with the contract's 36-inch riprap specification (Tr. 237, 681-82).

145. Theoretically, a single oversized rock or an extra wheelbarrow of small rocks could throw a test section out of specification. WME did not present any evidence that this occurred. BOR exercised judgment, based upon degree of noncompliance, in ultimately waiving strict compliance and accepting the riprap (Tr. 351, 370-71, 682, 699-700).

146. WME experienced some equipment problems which delayed some operations both before and during rework (Tr. 182, 555; GX 17, 19-22, 29, 37, 40, 42; AF 6).

147. BOR accepted the contract as substantially complete on May 7, 1985, 25 days past the extended April 12, 1985, due date, and assessed $9,500 in liquidated damages (AX 87).

148. Although relaxed for purposes of acceptance, the 36-inch riprap specification apparently was not relaxed in determining pay quantities. In July-August 1985, BOR and WME agreed:

1. 11,319.78 tons were hauled in specification and face no reduction in quantity due to excessive fines.

2. 22,643.96 tons were hauled with the in place gradation tests revealing excessive fines.

3. gradation tests revealed the average percentage of fines was 20.46%. Specification 3.3.4-2 allows 5% fines, so the percentage of excess fines was 15.46%.

(AX 97, 98).

149. Without benefit of the relaxed gradation, WME computed the acceptable 36-inch riprap hauled to be 30,024.51 tons, a 26-percent increase over the contract's 23,850-ton estimate. It reserved other claims and sought an additional, 31-day extension, to May 13, 1985, and an increased unit price, under the contract's variation in estimated quantity (VEQ) clause. It did not pursue its VEQ allegation in its certified claim (AX 88, 97; AF 15).

150. BOR responded that WME had understated nonpay quantities, because not all acceptable hauled material had been placed. Some passed through the grizzly and other was stockpiled. BOR agreed to pay for 27,592.26 tons of 36-inch riprap, and denied the time extension. In total, BOR paid WME $349,559 (AX 98; GX 70, Appendix at 1).

151. WME again reserved claim rights (AF 10).

Post-Work Evaluation of Dike 3 Specifications and Performance

152. BOR calculated waste at approximately 60 percent, including correction for an insignificant survey error and "minor amounts" of usable rock left at the dike toe and some left at the quarry.[8] Albeit speculating about the possibility of other survey error, which he did not prove, WME's consultant concluded BOR was "essentially correct" (Tr. 84-87, 111, 449-50; AX 81, 85; GX 51).

[8] Prior to hearing, BOR examined leftover waste piles. It calculated a "theoretical" waste factor of about 50 percent, assuming WME could have placed all the rock, which Mr. Calcagno acknowledged was impossible. Also, there was no evidence WME could have placed the rock and stayed within gradation limits (Tr. 439-53, 457-65).

153. In June and July 1985, senior BOR personnel evaluated dike 3 riprap to determine adequacy of design requirements, placement procedures and appropriateness for repair of the other dikes:

[C]oncern had been expressed about the adequacy of the recently placed riprap on dike No. 3. The contractor had been required to rework much of the area where a 36-inch riprap thickness had been placed in order to make the material pass specifications gradation requirements. It was felt that riprap now in place either met or very nearly met specifications gradation requirements. The concern expressed related to existing voids extending through the riprap thickness and the resulting possibility that foundation material may be removed through the voids by wave action.After "close examination," BOR concluded:

[C]onstruction procedures had resulted in a well placed riprap blanket containing a uniform distribution of rock fragments. The specified gradation had resulted in some voids extending through the entire blanket thickness as a result of a slight lack of sufficient quantities of small sizes with which the voids between large particles could be filled. Existing voids are not extensive.

The product was "as good as should be expected using the specified riprap sizes"; reprocessing had been effective in increasing average particle size; design requirements for size and gradation were fully met; there appeared to be enough coarse material in the underlying fill, including Clark riprap, to limit the anticipated loss of some finer material through wave action; the riprap should perform satisfactorily with minimal maintenance; gradations in the follow-on contract should perform satisfactorily; in future construction, BOR should ensure that underlying material was coarse enough to prevent excessive loss (AX 95).

154. Elimination of the 100-pound category, when rock is well-graded, would not affect the void situation. It only eliminated the narrow band between the 100- and 150-pound rock. It had not been a design intent that voids be filled with minus-100-pound material. There would always be some voids. Bedding status had been evaluated to ensure that removal of the underlying material through any voids present would not be a problem (McCormick DTr. 87; Duster DTr. 37-38).

Specifications For Follow-On Contract

155. In June 1985, BOR issued the solicitation for the remaining repairs, calling for about 120,000 tons of riprap, compared to 24,000 for dike 3. It eliminated the 100-pound category for 36-inch rock, made the minimum 150 pounds, and allowed 10 to 20 percent smaller. Maximum weight increased to 4,000 pounds (Tr. 707-08; AX 95, 110; GB 50).

156. The change in the specifications made it easier to comply with them, but WME's consultant, Mr. Threlkeld, admitted, and demonstrated graphically, that WME's tests 1 and 2 would not have satisfied the new specifications. Most of the test sections still would have been out of specification (Tr. 222-23, 228, 233-36; AX 105).

157. Radersburg and Brownstone were approved quarries, with "at least" 50- and 60-percent waste disclaimers, respectively. The contractor could propose others, after testing. Freeze-thaw was not among tests listed, although BOR could require more. Testing would not extend contract time. Use of a rock bucket was not an approved processing method (AX 110).

158. The contractor would be required to perform as many as three gradation tests before hauling; scales and equipment were to be at jobsite whenever riprap was hauled or placed; in-place rock was to be "sampled and tested for gradation as often as deemed necessary" by the Project Manager's representative; once an in-place test was requested, it was to be accomplished within 5 working days; if results were not available after that period, no additional riprap could be placed until they were available. More tests were required on the follow-on job because there was more rock than in WME's job (AX 110; McCormick DTr. 60).

159. BOR awarded the contract to Barnard Construction Co. It proposed Toston quarry, in the same limestone unit as Radersburg, farther away from the dikes. BOR allowed bidders quarry options because it had developed a good source at Radersburg if the dikes needed future repairs; Radersburg's owner had increased his price; the most damaged dike area had been repaired; and more time was available for the remaining repairs and quarry approval, including testing and compliance with environmental and state regulations (Tr. 151-52, 489-90, 499-500; Taucher DTr. 226-28).

160. The final waste figure from Toston was 55 percent (Tr. 492-93).

The Claim

161. On May 27, 1987, WME submitted its certified claim, in the amount of $463,998. At BOR's request, on October 15, 1987, WME segregated pre-rework and rework costs. The revised claim totalled $451,234. On November 12, 1987, the contracting officer denied the claim. At the hearing, WME reduced its claim by $100,000 (Tr. 250; AF 1, 15, 16, 24; AX 113).

Discussion

[1]WME alleges BOR breached its implied contractual duty of good faith and cooperation when, in response to the contractor's informal post-award inquiry, BOR advised it would be virtually impossible for WME to obtain approval of a quarry other than Radersburg. To prove breach of the implied duty, WME must establish that BOR willfully, negligently, or unreasonably interfered with, or hindered, its performance. *Blaze Construction Co.*, IBCA-2863, 91-3 BCA ¶ 24,071. There is no hint of any such action by BOR. The contract, sections 3.3.2 and 3.3.4,[9] named Radersburg the sole source quarry, selected after extensive search. Once it was established as a known, good source, the follow-on contract allowed for quarry alternatives, subject to testing. The immediacy of dike 3's repair needs, testing and potential permit requirements, and weather and contract time constraints, precluded consideration of another quarry there. WME

[9] All referenced contract provisions may be found at FF 57.

properly was bound to the rock source it contracted to use (FF 6, 59, 159; generally, 7-31).

[2] WME complains that BOR failed to disclose superior knowledge about (1) alleged Radersburg deficiencies and (2) difficulties inherent in the 36-inch riprap gradation specification; resulting in constructive contract changes. The Government's failure to disclose superior knowledge will constitute contract breach, or entitle a contractor to an equitable adjustment under an appropriate clause, only in limited circumstances. This was reinforced recently in *GAF Corp.* v. *United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), when the United States Court of Appeals for the Federal Circuit declined to apply the doctrine, reiterating criteria established by the Court of Claims in *American Shipbuilding Co.* v. *United States*, 654 F.2d 75, 79 (Ct. Cl. 1981):

> (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied mislead the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.The Government must possess the "vital knowledge" in question before the doctrine is potentially applicable. *See Petrochem Services, Inc.* v. *United States*, 837 F.2d 1076 (Fed. Cir. 1988); *H. N.Bailey & Associates* v. *United States*, 449 F.2d 376 (Ct. Cl. 1971). Even if it has "vital" knowledge, "the Government is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere." *Id.* at 383. If the Government discloses pertinent information, the burden normally shifts to the contractor to inquire further. *Petrochem*, 837 F.2d at 1079-80.

First, as to Radersburg, BOR did not possess superior, relevant, "vital" knowledge. "[B]y designing an embankment requiring certain sizes and types of stone and then selecting a quarry source for their production the Government convey[s] its belief that the source [will] be adequate." *Stock & Grove, Inc.* v. *United States*, 493 F.2d 629, 645 (Ct. Cl. 1974). WME asserts, however, that BOR suspected Radersburg might prove deficient. We find the record firmly establishes that, while BOR could not be certain, all of its personnel with geologic expertise rationally believed, based upon empirical evidence, that Radersburg, in a different limestone and different geologic location than the "faulty" Meagher, would yield the riprap required. Dispositively, unlike Meagher and the *Stock & Grove* quarry, which rendered disastrous amounts of waste and never produced the specified rock, Radersburg did yield the requisite riprap, in all size ranges, with less waste than average for limestone sources (FF 5, 7-30, 34, 64, 152, 153).

Even if BOR's experience at Meagher were relevant, WME has acknowledged that it knew about the Clark job pre-bid, and that BOR informed it, pre-bid, that Meagher had produced too small rock, which also was apparent to WME from stockpiles. WME's own consultant, Mr. Williams, volunteered that it would be logical to seek information from Clark; there is no evidence that WME did. BOR also informed WME that Radersburg had been used by the SCS, but WME did not inquire of the SCS, or conduct any independent investigation. Even knowing Meagher had failed, there is no evidence WME asked about BOR's reason for choosing Radersburg; whether BOR had made any

comparative evaluation of the two quarries; or the genesis of BOR's waste estimate (FF 25, 52).

Further, BOR did not have vital superior knowledge that Radersburg would produce any given amount of waste and its waste specification was not misleading. Prior to WME's contract, Mr. Taucher, responsible for its "at least 50% waste" language, had concluded, generally, that limestone waste ranged from 55 to 85 percent, averaging about 65 percent. BOR was not required to volunteer general information from this still evolving waste study, however. Mr. Taucher intended the contract's waste language to be site-specific. He had reports, albeit rare, of limestone waste at about 50 percent or less. While the contract was not particularly illuminating, because most limestone quarries yield at least 50-percent waste, Mr. Taucher expected Radersburg to yield less than average. His information indicated it was one of the best quarries in the West. He selected a site-specific minimum he believed could be reached by a highly efficient contractor. Indeed, as we discuss further below, the phrase "at least 50-percent waste" was obviously a minimum and should have alerted WME to inquire further if it had an interest in the waste question (FF 32-36).

Second, as to difficulties inherent in the 36-inch riprap specification, again, BOR did not possess any vital superior knowledge. Although BOR wanted to ensure that its design was "state of the art," and no other BOR jobs shared the specification's particular gradation limitations, we have found that it was fairly close to standard for BOR (FF 37, 44, 46). The only arguably "vital" information was that the gradation contained a bottleneck at its lowest level. There is no evidence that WME was unaware of this pre-bid; there is direct evidence that BOR was unaware.

BOR did not identify the bottleneck until after WME began its long delayed in-place test and the gradation envelope was plotted. With the unfortunate omission of any citation to the record, BOR asserts in briefing that a "gradation envelope graph is not typically prepared until an in place test is performed, and it is only prepared then because it readily shows whether tested riprap meets gradation requirements" (GB 25). Though not conclusive, we find Mr. Duster's testimony at hearing supports the assertion; the wording of the contract's 36-inch riprap gradation provision, that "all points on individual grading curves obtained from representative samples of riprap shall lie between the boundary limits as defined by curves drawn through the specific grading limits," links the gradation envelope to in-place testing, and WME did not challenge BOR's statement it in its reply brief (FF 47, 122, 123; Spec. 3.3.4c.).

Even if BOR had known, or should have known, about the bottleneck, there is no reason it should have been aware that WME had no knowledge of it, or could not discover the difficulty for itself. The specification's gradation chart clearly contained both the 100- and

150-pound weight requirements and restrictions. WME's other claims consultant, Mr. Threlkeld, volunteered that, when he was a contractor, he would evaluate riprap gradation requirements at the outset, to educate himself about their degree of difficulty. BOR could reasonably expect its bidders to do the same (FF 124).

[3] WME seeks recovery under part (1) of the differing site condition clause, which calls for prompt notice to the contracting officer of "subsurface or latent physical conditions at the site which differ materially from those indicated" in the contract, even though, at 60 percent, WME did produce "at least 50%" waste (FF 152).

It is clear that, prior to failure of the first two in-place tests, WME's authorized representative, Mr. Boylan, did not allege a differing site condition; any intended notice from Mr. McNeil was oral, to inspector Volk, who did not interpret it as notice of a differing site condition; WME did not allege such a condition to Mr. McCormick, the contracting officer's authorized representative; and its actions were in sharp contrast to Clark Brothers' early written notice (FF 3, 4, 88, 89, 117).

We need not decide the notice issue, however, because, to establish a Type I differing site condition, a contractor must prove "contract indications 'induced *reasonable reliance* by the successful bidder that * * * conditions would be more favorable than those encountered.' [Italics added.]" *Gerald Miller Construction Co.*, IBCA-2292, 91-2 BCA ¶ 23,829, *quoting Pacific Alaska Contractors, Inc.* v. *United States*, 436 F.2d 461, 469 (Ct. Cl. 1971). WME has not shown that to be the case.

If a contract is "reasonably susceptible of more than one interpretation, it is ambiguous." *Edward R. Marden Corp.* v. *United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). Mr. McNeil's somewhat tentative interpretation of the contract to mean Radersburg would yield about 50-percent waste, FF 53, is not reasonable. The contract's "at least 50%" waste factor was patently a minimum; in effect, a disclaimer. Regardless of the parties' debate over WME's efficiency, the actual 60-percent waste factor was consistent with the contract minimum.

Even if Mr. McNeil's reading were reasonable, WME could not satisfy the reliance element necessary to a Type I differing site condition. Mr. McNeil testified that he relied upon the 50-percent waste figure only "[t]o a certain extent." In fact, WME sought an alternate rock source both before and after contract award, including one with rock less hard than that at Radersburg, but which it guessed "with some additional sorting time, probably could be made to work." This undermines a claim of detrimental reliance, and we have not found evidence of any (FF 53, 54, 59).

We also have not found any evidence that WME relied upon other geologic information in the contract. Although available to it, WME did not even look at drill core logs until after award. In any case, BOR's expert testimony, and the balance of the evidence, establish that

pertinent geologic information was not misrepresented (FF 8, 10-24, 27, 64, 87).

In the alternative, WME has alleged that it is entitled to compensation under part (2) of the differing site condition clause, which calls for prompt notice and proof of "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract." Its burden of proof is even higher than that for a Type I condition. *Charles T. Parker Construction Co.* v. *United States*, 433 F.2d 771, 778 (Ct. Cl. 1970).

Leaving aside the questions of notice; what WME should have "known" based upon a site inspection and information BOR provided in the contract and otherwise; and WME's alleged lack of efficiency; appellant did not present any evidence that physical conditions affecting the production of riprap at Radersburg were unusual or worse than those normally encountered in the area, a prerequisite to recovery. *Continental Drilling-U.S.*, AGBCA 81-182-1, 84-3 BCA ¶ 17,649 at 87,946. Indeed, the evidence is to the contrary. Limestone sources average 65-percent waste. The follow-on Toston quarry yielded 55-percent waste from the same type of limestone, close to Radersburg's 60 percent. WME itself emphasized that the relatively nearby Meagher quarry's waste could have been as high as 90 percent if specifications had not been relaxed; it was ultimately 74-75 percent (FF 5, 33-36, 159-60).

[4]Appellant contends BOR was equitably estopped from rejecting its work because BOR's actions in allowing only one quarry gradation test, rather than the contract-estimated two; accepting an initially failing quarry test as satisfactory after it was modified to comply with specifications; purportedly delaying in demanding an in-place test; failing to reject any load of rock prior to failure of the first in-place test; and failing to withhold contract payments; all allowed WME to complete 90 percent of the dike work before BOR rejected it, and induced reliance by WME that its work was satisfactory.

As a predicate to estoppel: (1) the party to be estopped must know the facts; (2) it must intend that its conduct be acted on, or must so act, that the party asserting estoppel has a right to believe that it is so intended; (3) the latter must be ignorant of the true facts; (4) it must rely upon the former's conduct to its injury; and (5) when estoppel is sought against the Government, the conduct or representations relied upon must be made by Government officers acting within the scope of their authority. *Essen Mall Properties* v. *United States*, 21 Cl. Ct. 430, 446 (1990). WME faces a great hurdle in attempting to prove estoppel against the Government. The Supreme Court recently made this very clear in *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2470 (1990), in which it noted it had

"reversed every finding of estoppel that we have reviewed." Even if the estoppel challenge were not so difficult, WME would not be in contention under the circumstances of this case.

The contract made the contractor responsible for conducting the quarry and in-place gradation tests, including providing adequate scales, equipment and facilities. With respect to the quarry test, the bid schedule's estimate of two potential tests was not binding. The reason BOR did not require two tests was out of consideration for WME's problems in testing offsite at a grain mill -- problems occasioned because the contractor did not provide adequate scales on site. Moreover, BOR did not accept a failing quarry test; it accepted the test sample only after it was modified to comply with specifications. Finally, at the quarry, proper gradation could be determined visually, as well as by testing (FF 49, 79; Specs. 3.3.2, 3.3.4e.).

Regarding an in-place test, WME alleges the contract did not absolutely require one; BOR delayed in informing WME that one would be necessary; and, thereafter, delayed in requiring a set test date. As to contract provisions, quarry and in-place testing accounted for one-third of the six bid items, which should have alerted WME to their importance (FF 49). Visual inspection alone was to govern 24-inch riprap (Spec.3.3.5). In contrast, for 36-inch riprap in-place, the contract provides: "During construction, in-place rock materials from the placed and finished riprap *will* be sampled and tested for gradation as often as deemed necessary by the representative of the Project Manager." (Italics added.) It supplies detailed testing criteria and continues: "In general, the number of tests that the Government *will* require will not exceed one; however, only those tests which meet all the specified requirements will be counted" (Spec. 3.3.4 e.(2) (italics added).

Mr. McNeil testified he interpreted the contract to mean acceptance of 36-inch riprap would be by visual examination. In-place testing "may" be required, but not necessarily. He bid $1,000 to cover test expenses, though, FF 51, suggesting he did not rely heavily upon his interpretation. Lack of reliance in bidding precludes recovery. *Fruin-Colnon Corp.* v. *United States*, 912 F.2d 1426 (Fed. Cir. 1990). Regardless, WME's interpretation is unreasonable. The contract notes more than one test could be required, not that a contractor might escape testing. Any ambiguity would be patent and resolved against WME anyway, because it did not meet its duty to inquire about it, pre-bid. *Volk Construction, Inc.*, IBCA-1419-1-81, 87-3 BCA ¶ 19,968 at 101,135.

Apart from the controlling fact that the contract told it so, testimony conflicted as to precisely when BOR informed WME that in-place testing was required. We have found that BOR warned WME's authorized representative, Mr. Boylan, about the need for an in-place test at the outset of the job and many times thereafter, and that neither he, nor Mr. McNeil ever challenged WME's duty to test. Designer Duster had recommended that approval of a test section of

initial riprap placement be required before a contractor could place additional riprap. The contract, though, did not implement his suggestion. There was no testing deadline, or placement restriction prior to test, that bound BOR to prevent WME from continuing (FF 41, 67, 68).

Mr. McCormick reminded WME of specification requirements, of the possibility that nonconforming rock would have to be removed, and that it was proceeding at its own risk (FF 84, 106). Even if he had not done so, the 36-inch riprap specification is explicit:

> If any test indicates the material or workmanship does not conform to the specifications, the material represented by the test shall be removed and replaced with rock meeting these specifications. Additional tests sufficient to define the area represented by each failing test will be performed at the Contractor's expense.

(Spec. 3.3.4 e.(2)(d)).

The inspection and warranty clauses also require remedy, including replacement, of nonconforming work at the contractor's expense.

The inspection clause provides the Government "shall perform all inspections and tests in a manner that will not unnecessarily delay the work." It was not BOR's conduct of inspection or supervision of testing, however, that delayed WME. It was WME's own admitted delay in acquiring adequate scales. BOR was lenient for a while in allowing WME to postpone the in-place test, because it was sympathetic with its scale difficulties. WME, though, is responsible for its own election to continue to quarry, haul, and place (while inspectors were present[10]), both prior to and during the prolonged test. Even if BOR had had any duty to demand a test by a date certain, and we do not find that it did, any BOR delay in effecting the testing requirement would have been concurrent with WME's delay and not compensable. *See* the suspension of work clause and *Blinderman Construction Co.* v. *United States*, 695 F.2d 552, 559 (Fed. Cir. 1982) (FF 65-68, 84, 85, 96, 103-06, 108).

As the contract's inspection clause and caselaw make clear, inspection is for the Government's benefit. Relaxation in inspection requirements, or failure to reject work prior to completion, will not relieve a contractor of its duty to comply with specifications or estop the Government from requiring corrective work. *Penguin Industries, Inc.* v. *United States*, 530 F.2d 934, 936-37 (Ct. Cl. 1976); *Red Circle Corp.* v. *United States*, 398 F.2d 836, 840 (Ct. Cl. 1968); *Panhandle Grading & Paving, Inc.*, ASBCA No. 38539, 90-1 BCA ¶ 22,561 at 113,225.

The court of appeals has recognized an exception in extreme circumstances, amounting to breach of good faith by the Government, when it knowingly permits a contractor to proceed with defective work. *Malone* v. *United States*, 849 F.2d 1441 (Fed. Cir. 1988). The rare

[10] Contrary to WME's contention in its reply brief that BOR inspectors allowed riprap to be placed during their annual leave, Mr. Boylan testified WME was not allowed to place riprap during that period (FF 105).

exception does not apply here. In fact, WME has stressed that it, and the Government, believed its dike work looked good. Through the December 1984 progress payment, BOR continued to pay WME in accordance with its weight tickets. BOR did not cease payment prior to the first in-place test because it did not know the rock did not meet specifications. Both parties agreed it was difficult to assess visually whether the riprap met the various weight requirements and limitations. BOR informed WME that it could not determine whether the rock met specifications until it had the results of the in-place test (FF 83, 85, 97, 98, 100, 104, 112).

[5] WME has alleged that BOR's 36-inch riprap specification was defective, amounting to a constructive contract change and rendering BOR responsible for WME's rework costs. We conclude BOR is not liable for those costs, for the following reasons.

The Government is entitled to insist upon strict compliance with its specifications, even if they are difficult, redundant, exceed what is required for a satisfactory result, or differ from common practice. *R. B. Wright Construction Co.* v. *United States*, 919 F.2d 1569 (Fed. Cir. 1990); *Graham Contracting, Inc.*, ASBCA No. 37641, 91-2 BCA ¶ 23,721, *aff'd on reconsideration*, 91-2 BCA ¶ 23,856; *John H. Moon & Sons*, IBCA-815-12-69, 72-2 BCA ¶ 9601. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U.S. 132, 136 (1918).

Nonetheless, under the *Spearin* doctrine, when the Government provides design specifications, it impliedly warrants that if a contractor adheres to them, the product will be adequate, and the contractor will not be responsible for "the consequences of defects" in the specifications. 248 U.S. at 136, 137. Here, although both parties testified at hearing that the 36-inch riprap specification was a performance, rather than a design specification, FF 124, appellant contends in briefing that it was a design specification. We find it hybrid, containing performance and design aspects. Those portions that allow the contractor to determine how to produce the required rock are of the performance variety; those that require placement of rock from a specified sole source, according to particular weight requirements and limitations, with set tolerances, to a fixed slope grade, and which provide for inspection and quarry and in-place testing during construction to ensure compliance, are inherently design in character (FF 37-42, 44, 46). *See Monitor Plastics Co.*, ASBCA No. 14447, 72-2 BCA ¶ 9626 at 44,971; *Dynalectron Corp.-Pacific Division*, ASBCA Nos. 11766, 12271, 69-1 BCA ¶ 7595 at 35,275. The particular bottleneck in question was the result of design. Although it had a logical design basis, it was unreasonable in practice (FF 122).

Despite the bottleneck in one part, the evidence is that BOR's 36-inch riprap specification otherwise was reasonable, and the riprap product adequate (FF 123, 153). There is no evidence that, if the

specifications had not been relaxed, WME never could have complied with them, or that the riprap would have been in any way inadequate. We need not broach the thorny "impossibility" of performance aspect of *Spearin* and subsequent cases, however, because WME has not proved BOR's rework order was "the consequence of" the one unreasonable part of the specification. *Spearin, supra; Gerald Miller, supra.*

It is clear from all aspects of WME's claim that its central problem was not BOR's specifications, but its failure to read the contract carefully, or at least to take seriously what it required, including with respect to riprap placement, which it took somewhat cavalierly. For instance, regardless of the contract's prohibition against dumping riprap on top of the dike and pushing it over the edge (Spec. 3.3.4 d.), WME began its placement work doing just that (FF 80). Its main interests were quarrying and hauling, believing it could "catch up" on placement to meet contract deadline (FF 74).

In fact, the great majority of the rock represented by in-place tests 1 and 2, 80-85 percent, was outside the entire required gradation envelope, reflected skip-grading and riprap subject to potential instability and displacement, and would not have satisfied the specification's requirements even if the specification had been relaxed earlier to eliminate the bottleneck. WME's claims consultant Threlkeld graphically demonstrated at hearing that those tests did not comply with the follow-on contract's relaxed specification either. Most of test samples 1 and 2 still would have been out of specification (FF 113, 116, 142, 143, 156).

WME disputed the accuracy of the test results on the lower end of the scale, although it never proved them inaccurate. In fact, its own test on a Clark remnant still resulted in about 22-percent fines when the Clark rock deliberately was excluded, more than even the relaxed specification would allow. Also, WME never contested the fact that its riprap did not satisfy the remainder of the gradation, and conceded in its claim that it was "abundantly clear that the test failed in respect to both oversized rock and to an excessive amount of fine material." The contractor's March 12-14, 1985, test on riprap placed prior to rework, which reflected rock substantially within the original gradation envelope (although minus- 100-pound rock was still 13.9 percent and the test was somewhat out in the mid-sized area), came almost at the expiration of the second contract extension, and does not diminish the fact that the first two tests did not pass (FF 58, 113, 119, 133, 135).

As we noted above, under the unequivocal terms of the 36-inch gradation specification, as well as the general inspection and warranty provisions of the contract, BOR was entitled to have the nonconforming rock removed and replaced after the first two failed tests. *See also Clark Brothers Contractors*, AGBCA No. 87-340-1, 91-3 BCA ¶ 24,211; *COAC, Inc.*, IBCA-1004-9-73, 74-2 BCA ¶ 10,982. We find that the

extent of the rework requirement principally was due to WME's own prolonged delay in commencing and completing in-place testing, and its election to continue to place rock before test results were determined. We can reasonably infer from the record that, if appellant had tested its placement earlier, the bottleneck in the specification would have been eliminated earlier.

Nevertheless, although the bottleneck did not cause BOR to be liable for WME's rework costs, it was unreasonable, as established. Therefore, any payment deduction for placed quantities that did not satisfy the unreasonable restriction would itself be unreasonable and not within BOR's contract rights, under the inspection clause and other provisions, to deduct or refuse to pay for nonconforming work. If there was such a deduction, and there appears to have been, FF 148-50, the parties are to calculate the appropriate upward adjustment, including interest, within 90 days of the date of this decision, and BOR promptly is to pay WME accordingly. Once payment is made, or if there was no deduction, BOR is to file a motion to dismiss this appeal with prejudice in accordance with this opinion.

DECISION

Accordingly, the appeal is denied, except to the extent of any payment adjustment necessary in accordance with this opinion, and is remanded to the contracting officer.

CHERYL S. ROME
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

BERNARD V. PARRETTE
Administrative Judge

STAR LAKE RAILROAD CO.

121 IBLA 197 Decided *November 13, 1991*

Appeal from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management, transferring administration of a portion of Federal right-of-way NM-29324 to the Navajo Tribe of Indians.

Set aside and remanded.

1. Conveyances: Interest Conveyed--Conveyances: Reservations--Federal Land Policy and Management Act of 1976: Conveyances--Federal Land Policy and Management Act of 1976: Rights-of-Way--Indians: Lands: Rights-of-Way--Indians:

November 13, 1991

Lands: Trust Patent--Patents of Public Lands: Reservations--Patents of Public Lands: Suits To Cancel--Public Lands: Disposals Of: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, *as amended*, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

APPEARANCES: Jerome C. Muys, Esq., and Thomas W. Wilcox, Esq., Washington, D.C., and Jeffrey T. Williams, Esq., Santa Fe Southern Pacific Corp., Chicago, Illinois, for appellant; Anthony Aguirre, Esq., Window Rock, Arizona, for the Navajo Tribe; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

The Star Lake Railroad Co. (Star Lake)[1] has appealed from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management (BLM), dated May 18, 1988, transferring jurisdiction over a portion of its railroad right-of-way, NM-29324, from BLM to the Navajo Tribe of Indians (Tribe) because the underlying land had earlier been patented to the Tribe.

On December 5, 1979, BLM issued a 20-year right-of-way grant to Star Lake for the construction and operation of a 12.29-mile-long railroad on "public lands and reservations" in McKinley and San Juan Counties, New Mexico, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), *as amended*, 43 U.S.C. §§ 1761-1771 (1988). The record indicates that BLM's right-of-way grant encompassed part of a planned 114-mile-long railroad, which was designed as a spur line branching off of the main line of the Santa Fe Railroad to carry coal from proposed mines in the San Juan Basin in northwestern New Mexico. In addition to public lands and reservations, the spur line would cross Indian lands, both those lands held in trust for the Tribe and those allotted to individual Indians. The grant provided that construction of the railroad could not begin under the grant until BLM issued a notice to proceed, and that such a notice would not be issued until a right-of-way had been granted across Indian lands.

[1] Star Lake is a subsidiary of the Atchison, Topeka, and Santa Fe Railway Co. (Santa Fe).

Despite negotiations with the Tribe and individual Indian allottees and various administrative and judicial proceedings, as of May 1988, Star Lake had been unable to begin construction of the railroad under the right-of-way grant. Consequently, BLM granted Star Lake one 5-year extension of its initial 5-year period to allow it to submit proof of construction under the grant. *See* 43 U.S.C. § 1766 (1988).

On July 22, 1986, BLM issued a decision (later published in the *Federal Register* on July 31, 1986 (51 FR 27467)), providing that, pursuant to section 11(a) of the Act of December 22, 1974, *as amended*, 25 U.S.C. § 640d-10(a) (1988), it had determined that 34,593.68 acres of public lands qualified for selection by the Tribe and could be conveyed to the Tribe and held as part of the Navajo Reservation.[2] The affected lands included all of secs. 23 and 24, T. 23 N., R. 13 W., New Mexico Principal Meridian, in McKinley and San Juan Counties, New Mexico. BLM's decision stated that those sections could not be conveyed until revocation of a withdrawal previously effected by Public Land Order No. (PLO) 6525 (49 FR 8250 (Mar. 6, 1984)). The decision stated that all of the identified land would "be conveyed subject to prior existing rights including * * * rights-of-way." 51 FR 27468 (July 31, 1986).

On September 15, 1987, evidently following revocation of the PLO 6525 withdrawal, the United States issued patent No. 30-87-0085, conveying 3,115.28 acres in trust for the Tribe. Among the patented lands was a portion of the land encompassed by Star Lake's right-of-way grant (NM-29324), to-wit, the N½S½ of sec. 23 and the S½N½, NW¼SW¼, and NE¼SE¼ of sec. 24. Patenting of these lands affected a 2.104-mile segment of the planned railroad. The patent expressly provided that it was "subject to" several prior existing rights-of-way, including "New Mexico 29324 (PART)." The patent was silent as to the disposition of the right of the United States to enforce the terms and conditions of the rights-of-way.

In its May 18, 1988, decision, which was directed to Star Lake, BLM stated that "[t]his document is to inform the right-of-way holder and the new land owner that jurisdiction of a portion of right-of-way NM 29324 is hereby transferred to the Navajo Tribe of Indians as a result of Patent Document No. 30-87-0085," to-wit, those portions of secs. 23 and 24 that had been patented to the Tribe. BLM explained that it henceforth would not administer the right-of-way and, specifically, would not collect rentals or approve renewals, amendments, relinquishments, or assignments. Instead, BLM advised that Star Lake should negotiate these questions with the Tribe. The May 1988 BLM decision reflects that a copy of the decision was mailed to Star Lake and the Tribe. On June 20, 1988, Star Lake timely appealed from the decision.[3]

[2] Sec. 11(a) of the Act of Dec. 22, 1974, as amended, "authorized and directed" the Secretary of the Interior to transfer not to exceed 250,000 acres under BLM's jurisdiction to the Tribe. 25 U.S.C. § 640d-10(a) (1988). For the sake of simplicity, we shall refer to the Act of Dec. 22, 1974, as amended, as "the Act of Dec. 22, 1974."

[3] By order dated Dec. 14, 1990, we denied BLM's motion to dismiss the appeal as untimely and for failure to serve the Tribe with appeal documents. This order incorrectly implied that the time for appealing commenced upon Star

In order to have standing to appeal, an appellant must be a "party to [the] case" and "adversely affected" by the BLM decision being appealed, in accordance with 43 CFR 4.410(a). *See In Re Pacific Coast Molybdenum Co.*, 68 IBLA 325, 331-33 (1982). There is no question that Star Lake is a party to the present case, as it involves the transfer of administration over Star Lake's right-of-way to the Tribe. *See Edwin H. Marston*, 103 IBLA 40, 42 (1988). BLM expressly recognized Star Lake as such by directing its May 1988 decision to it. Moreover, Star Lake is adversely affected by transfer of administration of its right-of-way to the Tribe under the supervision of the Bureau of Indian Affairs (BIA). Such transfer determines which entities will have the final authority with regard to such matters as setting rental rates and deciding whether to renew or cancel the right-of-way. We have previously accorded standing to the holder of a right-of-way to challenge BLM's transfer or waiver of administration over the right-of-way even though the conveyance of the underlying land was made subject to the right-of-way. *See City of Las Cruces*, 105 IBLA 50 (1988); *State of Alaska*, 86 IBLA 268 (1985). Accordingly, we conclude that Star Lake has standing to pursue the instant appeal.

We reject the Tribe's arguments to the contrary. It notes that we previously held in *State of Alaska, supra*, that the transfer of jurisdiction over a right-of-way does not deprive the right-of-way holder of the "complete enjoyment of all rights, privileges, and benefits granted to him." It argues that this holding indicates that Star Lake has not been injured by BLM's decision. However, *State of Alaska, supra*, concerned whether a transfer comported with specific language of section 14(g) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1613(g) (1988), which provided that a conveyance patent had to contain provisions making it subject to the right-of-way holder's right "to the complete enjoyment of all rights, privileges, and benefits thereby granted to him." This is a different question than that presented here, which is whether Star Lake is "adversely affected" under 43 CFR 4.410(a) by the decision to transfer. The Board concluded that the transfer of administration did not in that case impair or diminish the right-of-way holder's "complete enjoyment" of its right-of-way, so that there was no violation of ANCSA. Significantly, however, the Board did not dismiss the State's appeal for lack of standing. Thus, it implicitly concluded that, although it was not deprived of its "complete enjoyment" as that term was used in ANCSA, the State was nevertheless "adversely affected" by the transfer, such that it enjoyed standing to appeal to the Board. Star Lake also has standing to appeal.

Lake's receipt of notice of issuance of the patent. We agree with Star Lake that patenting the land did not effect a transfer of jurisdiction to the Tribe, and that the transfer did not occur until issuance of the May 1988 decision presently under appeal. Star Lake was not adversely affected as to its interest in the right-of-way until issuance of that decision and only then had the right to appeal to the Board. Thus, its appeal was timely.

[1] Star Lake contends that BLM improperly transferred administration over the subject right-of-way without considering whether retention of administration was necessary in the public interest, in violation of its duty under section 508 of FLPMA, 43 U.S.C § 1768 (1988). BLM argues that this section does not govern, and that, as a matter of law, it was required to waive administration of the right-of-way.

Section 508 of FLPMA provides:

> If under applicable law the Secretary [of the Interior] * * * decides to transfer out of Federal ownership any lands covered * * * by a right-of-way, * * * the lands may be conveyed subject to the right-of-way; however, if the Secretary * * * determines that retention of Federal control over the right-of-way is necessary to assure that the purposes of [Title V of FLPMA] will be carried out, the terms and conditions of the right-of-way complied with, or the lands protected, he shall (a) reserve to the United States that portion of the lands which lies within the boundaries of the right-of-way, or (b) convey the lands, including that portion within the boundaries of the right-of-way, subject to the right-of-way and reserving to the United States the right to enforce all or any of the terms and conditions of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

43 U.S.C. § 1768 (1988). Thus, if section 508 of FLPMA applies, BLM has discretion to convey the lands subject to the right-of-way while reserving to itself the right to enforce its terms. This is what Star Lake asserts BLM should have done instead of transferring administration to the Tribe.[4]

In the past, provision for what happened to a right-of-way when the underlying land was transferred out of Federal ownership was made either in the common law or pursuant to the applicable statute or regulation. *See Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 330 (1924); *Energy Transportation Systems, Inc.* v. *Union Pacific Railroad Co.*, 453 F. Supp. 313, 317 (D. Wyo. 1977), *aff'd*, 606 F.2d 934 (10th Cir. 1979); *State of Wyoming*, 27 IBLA 137, 142-45, 83 I.D. 364, 367-69 (1976), *aff'd, State of Wyoming* v. *Andrus*, 436 F. Supp. 933 (D. Wyo. 1977), *aff'd*, 602 F.2d 1379 (10th Cir. 1979); *Godfrey Nordmark, supra* at 304-05. More recently, provision for this situation has been made in applicable statutes.[5] However, we find nothing in section 11 of the Act of December 22, 1974, specifically governing whether a transfer is to be subject to a pre-existing right-of-way or specifying where administration of such a right-of-way will reside following issuance of the patent.[6] We can only conclude that section 11

[4] Again, this issue is distinct from that presented in *State of Alaska, supra*, which dealt with different statutory language.

[5] That is illustrated by sec. 14(g) of ANCSA, stating that a transfer will be subject to a pre-existing right-of-way and that, although a transferee will succeed the United States as the grantor under that right-of-way after the land has been conveyed out of Federal ownership, the United States will still retain administration unless it is expressly waived. 43 U.S.C. § 1613(g) (1988).

[6] Although sec. 11(a) of the Act of Dec. 22, 1974, states that a transfer pursuant to that statutory provision will be "subject to existing leasehold interests" under the Mineral Leasing Act, a right-of-way is not such a leasehold interest. 25 U.S.C. § 640d-10(a) (1988). We do not, however, interpret that language as restricting BLM's authority to make the transfer to the Tribe subject to other non-fee interests such as rights-of-way. Rather, we attribute the narrow reference to "leasehold interests" to the fact that the Act itself refers only to situations where the United States must transfer its interest as a "lessor" of lease interests under the Mineral Leasing Act, in order to emphasize that the transfer to the Tribe would be made subject to any existing leases of those interests. *See* 51 FR 27468 (July 31, 1986). The Act does not expressly address the status of the transfer of other non-fee interests.

of that Act is not inimical to making such a transfer subject to a pre-existing right-of-way or reserving administration of the right-of-way to BLM. Moreover, we find nothing in section 11 of the Act of December 22, 1974, precluding the operation of section 508 of FLPMA. The Act is silent as to what happens to rights-of-way on lands transferred to the Tribe.

Section 508 of FLPMA was intended to apply in cases of transfers of land out of Federal ownership pursuant to statutory authority other than FLPMA. The legislative history of that section states that it "does not provide new authority for transfer of * * * lands out of Federal ownership" (S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975)), thus strongly suggesting that it was intended to apply to other statutes providing for such transfers. Moreover, by its very terms, this section applies broadly to all cases involving a transfer of land out of Federal ownership pursuant to any "applicable law." 43 U.S.C. § 1768 (1988). Section 11(a) of the Act of December 22, 1974, 25 U.S.C. § 640d-10(a) (1988), "authorize[s] and direct[s]" the Department[7] to transfer up to 250,000 acres of land in Arizona and New Mexico under the jurisdiction of BLM to the Tribe, with title to be "taken by the United States in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation." We are aware of nothing that would remove section 11 of the Act of December 22, 1974, from the term "applicable law" authorizing the "transfer out of Federal ownership [of] any lands covered * * * by a right-of-way" as used in section 508 of FLPMA.

BLM contends that section 508 of FLPMA only applies where the Department has a choice whether to transfer land out of Federal ownership, focusing on the language therein providing that the Department may convey land subject to a right-of-way "[i]f * * * the Secretary * * * decides to transfer [land] out of Federal ownership" (BLM Answer at 9). BLM states that the Department is bound by section 11 of the Act of December 22, 1974, to convey land which meets the selection criteria and, thus, does not have the choice whether to transfer selected land out of Federal ownership. *See* 51 FR 27468 (July 31, 1986) (stating that the language of the Act of December 22, 1974, "authorizes and mandates the Secretary of the Interior to transfer qualifying public lands, making this a non-discretionary action").

We can find no basis for limiting the applicability of section 508 of FLPMA to situations where BLM has a choice whether to transfer land out of Federal ownership. The language in section 508 of FLPMA to the effect that it applies where the Department "decides to" effect a transfer does not mean that the Department must have the authority to decide not to transfer at all times until the transfer is effected. The

[7] We recognize that the statute actually expressly delegates the authority to the Department. However, the Department has redelegated this authority to authorized officers of BLM. It is hence more accurate to refer to the Department as exercising the authority granted by the statute at issue here.

Department, even though charged with the duty to transfer, must still ensure that the requirements of the enabling statute have been met. Thus, the language at issue may simply cover the situation where, as here, the Department has decided that the land qualifies for selection by the Tribe, has been duly selected, and is thus subject to transfer to the Tribe.

BLM's interpretation would rule out the applicability of section 508 of FLPMA in cases where the entrant or claimant has earned the right to a patent and all that remains is the ministerial act of conveying the land. We do not think that this is what Congress intended when it enacted section 508 of FLPMA. The legislative history of section 508 of FLPMA supports a broad reading of that section, stating that it "covers the various situations that can arise where a tract of land which has a right-of-way on it is conveyed out of Federal ownership." S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975). In addition, the Departmental regulation implementing section 508 of FLPMA, 43 CFR 2803.5(b), which BLM is bound to follow, broadly applies wherever "public lands * * * are transferred out of Federal ownership."

BLM argues that it cannot apply section 508 of FLPMA because section 11 of the Act of December 22, 1974, is special legislation. BLM indicates in its Answer that, in announcing the impending transfer of the subject land to the Tribe in the *Federal Register*, this fact led it to state therein that the "usual and general requirements of FLPMA * * * did not apply" (Answer at 8-9).

We do not accept BLM's assertion that it stated in the *Federal Register* that section 508 of FLPMA did not apply. BLM stated as follows in this notice: "Cultural resources will be protected by the Bureau of Indian Affairs who have the same responsibilities as BLM with respect to 36 CFR Part 800. * * * The special legislation that authorizes this selection precludes the need for a planning amendment, environmental analysis and grazing notification requirements." 51 FR 27468 (July 31, 1986). Nothing in the notice expressly indicates that BLM regarded section 508 of FLPMA as not applicable to the transfer.[8] In any event, we are not persuaded that BLM could avoid its responsibility to comply with section 508 by announcing in the *Federal Register* that it would not do so. Even assuming that section 11 of the Act of December 22, 1974, is "special legislation," this would not preclude application of section 508 of FLPMA, as that section (as noted above) has a broad application in the case of any transfers out of Federal ownership under "applicable law." 43 U.S.C. § 1768 (1988).

Accordingly, as we can find no evidence that Congress intended to override the dictates of section 508 of FLPMA in the case of transfers pursuant to section 11 of the Act of December 22, 1974, we decline to read that statute as precluding the application of section 508 of

[8] The *Federal Register* notice did reject the need to do a "planning amendment." As noted below, the BLM Manual may have allowed BLM to address the question of whether to retain administration through the process of land-use planning. However, this was not the only decisionmaking process available to BLM for review of this question. Thus, BLM's announcement that it would not do a planning amendment cannot be regarded as an announcement that it would not comply with sec. 508 of FLPMA.

FLPMA. *See Watt* v. *Alaska*, 451 U.S. 259, 267 (1981). In amending the Act of December 22, 1974, in 1980, Congress expressly exempted transfers of public land pursuant to that statute from only two provisions of FLPMA, not including section 508. *See* 25 U.S.C. § 640-26(b) (1988). Thus implicitly, section 508 of FLPMA was viewed as applicable. *Cf. Santa Fe Pacific Railroad Co.*, 90 IBLA 200, 216-17 (1986). In the absence of express authority in section 11 of the Act of December 22, 1974, governing whether a transfer pursuant to that statutory provision is to be subject to a pre-existing right-of-way, or any language governing where administration of such a right-of-way is to reside, we must turn to section 508 of FLPMA.

As explained in the legislative history of section 508 of FLPMA, that section was intended to provide the United States with alternatives for protecting its own and the public's interest in existing rights-of-way where the underlying land is conveyed out of Federal ownership:

> Normally, under common law, the new landowner becomes the landlord of the lease and assumes the position of the prior landlord, in this case, the United States. This presents few or no problems with roads and other small rights-of-way, but power transmission lines, pipelines, and *other large projects* are vastly different. In such cases, continued Federal ownership or control may be necessary for environmental, national defense, or a multitude of other reasons. Because the cases will vary with the precise situations involved, *the section allows the Secretary to choose the appropriate form of retention or disposal of the right-of-way*. (The choices are conveying the land subject to the right-of-way, reserving only the right-of-way, and conveying [all of] the land subject to the right-of-way while reserving the right to enforce terms and conditions for the right-of-way.) [Italics supplied.]

S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975).

Under section 508 of FLPMA, the Department must first determine whether "the retention of Federal control over the right-of-way is necessary to assure that the purpose of [Title V of FLPMA] will be carried out, the terms and conditions of the right-of-way complied with, or the lands protected." Right-of-ways for railroads are authorized by Title V, as are such other necessary transportation systems which are in the public interest. 43 U.S.C. § 1761(a)(6) and (7) (1988). If the answer is negative, the Department may convey the lands, simply making the conveyance "subject to the right-of-way." If the answer is affirmative, BLM has two options: it may reserve to the United States the lands lying within the boundaries of the right-of-way, or it may convey the lands, including the lands lying within the boundaries of the right-of-way, but reserving to the United States the right to administer the right-of-way, consisting of the right to enforce all or any of the terms and conditions of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

Star Lake argues that BLM failed to fulfill its duty under section 508 of FLPMA by not expressly determining pursuant to appropriate proceedings whether retention of administration of the subject right-of-way is necessary in the public interest. We agree. As Star Lake points out, the procedure specified in the BLM Manual generally tracks this

provision. BLM is required to determine whether the public interest will be served by various options, including divesting the United States of right-of-way ownership and administration, retaining the lands covered by the right-of-way in public ownership and administration, and patenting the lands but reserving right-of-way administration to BLM. Reading this provision in connection with the statute, more specific criteria are evident. BLM may divest the United States of both ownership and administration only if it determines that retention of Federal control is not necessary to assure (1) that the purpose of Title V of FLPMA will be carried out, as determined by its judged effect on the public interest, (2) that the terms and conditions of the right-of-way will be complied with, or (3) that the lands will be protected. If any of these three conditions is not met, BLM may not divest the United States of both ownership and administration, as it announced its intention to do in the May 1988 decision.

The BLM Manual in effect in 1987 and 1988 provided that the conveyance of land having an existing right-of-way involved the exercise of discretion by BLM pursuant to section 508 of FLPMA. Section 2801.62 (Rel. 2-229 (June 30, 1986)) provided that, where land is "proposed for patenting," BLM had to determine whether the United States should divest or retain ownership and administration of the land or patent the land and reserve administration. The Manual stated that the preferred alternative was to patent the land "subject to the right-of-way grant, which conveys administration of the grant to the patentee." *Id.* That is what BLM did here. However, the Manual set forth exceptions to the preferred alternative, including the situation "where the public interest would be best served by retaining right-of-way administration." *Id.*

The most current BLM Manual prescribes "processes" that determine how the public interest will best be served, including encouraging the parties to reach an independent agreement or patenting the public lands but reserving right-of-way administration to BLM. BLM Manual, Section 2801.62A. (Rel. 2-270 (Nov. 6, 1990)). We find these provisions to be a reasonable interpretation of section 508 and that they should therefore be applied. Where BLM adopts agency-wide procedures in its Manual that are reasonable and consistent with the law, the Board will not hesitate to follow those procedures and require their enforcement. *Beard Oil Co.*, 105 IBLA 285 (1988). Therefore, BLM should have considered whether retaining administration over the right-of-way would serve the public interest.

BLM argues that it was not required by section 508 of FLPMA to determine whether retention of administration was in the public interest because such retention is intended to benefit the United States and the public, but not the right-of-way holder (Answer at 10). It is enough to point out that the record does not show whether BLM determined that retention of administration was in the interest of the United States and the public, if not the right-of-way holder. Further, in this case, Star Lake is proposing to construct a railroad, an

endeavor that promises some degree of public benefit. Thus, we are not persuaded that BLM is not obliged to consider whether giving up administration over the lands was not in Star Lake's interests, as any adverse effects on its operations might also indirectly adversely affect the public.

The Tribe argues that, although the transfer document purports to transfer administrative control to it, this was "simply a mistake in draftsmanship," and the transfer was "in effect * * * really a transfer to the Bureau of Indian Affairs, a federal agency." The result, the Tribe contends, is that BLM Manual section 2801.61 (governing transfer of jurisdiction over public lands administered by BLM to another Federal agency) mandates transfer of administrative control.[9]

We are unwilling to attribute the transfer of administration to the Tribe to a mistake in draftsmanship. The simple fact is that BLM's decision does not transfer administration to BIA. Therefore, we are unpersuaded by the Tribe's suggestion that transfer of administration was mandatory. In any event, the most current provisions of BLM Manual section 2801.61 (Rel. 2-270 (Nov. 6, 1990)), expressly provide that BLM has the authority not to transfer administration if doing so would "diminish the rights of the holder." Thus, transfer of administration to BIA is not mandatory, but also requires a reasoned consideration of effects of the transfer by BLM.

Star Lake contends that, prior to the transfer of administration of the subject right-of-way to the Tribe, it was entitled to a formal administrative hearing concerning whether BLM should have retained administration of the right-of-way pursuant to section 506 of FLPMA, 43 U.S.C. § 1766 (1988). That section authorizes the Department to terminate a right-of-way for noncompliance with Title V of FLPMA, Departmental regulations, or the terms and conditions of the right-of-way only "after due notice to the holder of the right-of-way and * * * an appropriate administrative proceeding pursuant to section 554 of Title 5 [of the United States Code]." 43 U.S.C. § 1766 (1988). Thus, termination of a right-of-way must be preceded by a formal administrative hearing. *See* 43 CFR 2803.4(e); *Western Aggregates of Mineral & Rock, Inc.*, 34 IBLA 164, 166 (1978). According to Star Lake, transfer of administration to the Tribe was tantamount to termination of that right-of-way. *See* Statement of Reasons at 14-16.

We decline to order such a hearing, as the transfer of administration of the subject right-of-way to the Tribe did not amount to a termination of the right-of-way. Although Star Lake was adversely affected by the transfer of administration to the Tribe, the patent to the Tribe was made subject to the right-of-way. Thus, the right-of-way, with all of its

[9] This provision states:

".61 *Change in Federal Jurisdiction.* If jurisdiciton over public land administered by BLM is transferred to another Federal agency and a right-of-way * * * is involved, the authorized officer shall transfer administration of the right-of-way * * * also, unless, as determined by the authorized officer, the transfer would diminish the rights of the holder." BLM Manual sec. 2801.61 (Rel. 2-270 (Nov. 6, 1990)).

attendant rights, continued even after issuance of the patent. *Compare State of Alaska, supra* at 272, *with The Cities of Aurora & Colorado Springs, Colorado*, 18 IBLA 51, 52 (1974).

Star Lake contends that section 508 of FLPMA "recognizes the long established rule that where lands are transferred out of federal ownership subject to an existing right-of-way the Secretary retains administration of the right-of-way *even without an express reservation in the patent*" (Statement of Reasons at 8 (italics added)). While Star Lake cites various cases in support of the "long established rule," it cites no cases directly interpreting section 508 of FLPMA. Our reading of that provision and its legislative history does not support the interpretation advanced by Star Lake.

Rather, we hold that section 508 of FLPMA provides only that the Department "may" first decide whether to convey land subject to a right-of-way. 43 U.S.C. § 1768 (1988). Accordingly, making a transfer subject to a particular right-of-way is not automatic or even mandatory.[10] The legislative history of section 508 acknowledges that the Department may, in the case of "roads and other small rights-of-way," decide not to convey land subject to a pre-existing right-of-way, as would be the case under the common law. S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975).

Section 508 of FLPMA provides that the Department is required either to expressly reserve the land encompassed by the right-of-way or reserve administration of the right-of-way only where it determines that the retention of administration is necessary. Further, the Department has the option to convey land only subject to the right-of-way, without "reserving to the United States the right to enforce all or any of the terms and conditions of the right-of-way." 43 U.S.C. § 1768 (1988); *see* S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975). Retention of administration is not automatic, but rather contingent on a finding by the Department.[11] Therefore, we reject Star Lake's argument that, by conveying land subject to a right-of-way, the Department automatically reserves administration of the right-of-way without the need for an express reservation in the patent.[12] Rather, this question is a matter for the exercise of the Department's discretion. *See City of Las Cruces, supra* at 51.

There is nothing in the May 1988 BLM decision or elsewhere in the record suggesting that BLM considered whether retention of administration of the subject right-of-way was necessary in the public interest. Rather, it appears that BLM has proceeded as though it

[10] By contrast, sec. 14(g) of ANCSA provides that, upon issuance of a patent pursuant to that statute, "the patent shall contain provisions making it subject to the * * * [existing] right-of-way." 43 U.S.C. § 1613(g) (1988).

[11] By contrast, sec. 14(g) of ANCSA provides that, upon issuance of a patent pursuant to that statute, where the underlying land is subject to a pre-existing right-of-way, "administration of such * * * right-of-way * * * *shall* continue to be by the * * * United States, unless the agency responsible for administration waives administration." 43 U.S.C. § 1613(g) (1988) (italics added). Under this statute, the retention of administration is the automatic result of issuance of a patent unless the United States expressly waives such administration. *See State of Alaska, supra* at 272 ("[U]pon conveyance of the land * * * [t]he United States retains * * * the right to administer such third-party interests").

[12] This is supported by sec. 2801.6 of the BLM Manual (Rel. 2-229 (June 30, 1986)), a copy of which is appended to Star Lake's Statement of Reasons and which states that BLM prefers to "patent the public land subject to the right-of-way grant, *which conveys administration of the grant to the patentee*." (Italics added.)

lacked jurisdiction to retain administration of the right-of-way because the patent did not expressly retain such authority. By holding that section 508 of FLPMA applies, allowing BLM authority to consider whether administration should be retained, we have necessarily rejected this position.

In the absence of a basis for determining whether BLM properly exercised its discretionary authority under section 508 of FLPMA, it is appropriate to set aside the May 1988 BLM decision and remand the case to BLM for reconsideration of its decision to issue the instant patent only subject to Star Lake's right-of-way. Should BLM conclude that its decision was proper, it should issue a decision setting forth a full explanation for that decision as required by the BLM Manual. That decision will again be subject to appeal to the Board by Star Lake or any adversely affected party.

In view of the apparent absence of any prior BLM determination of whether retention of administration was necessary in the public interest, we need not address other matters raised by the parties at this time.

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 set aside and the case is remanded to BLM for further action as described above.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

EXXON COMPANY, U.S.A., CHEVRON U.S.A., INC.

121 IBLA 234 Decided *November 15, 1991*

Appeals from a decision of the Director, Minerals Management Service, denying appeals from a letter decision requiring lessees to bear the costs of treating gas produced from lease No. OCS-P 0441. MMS 87-0335-OCS and MMS 87-0321-OCS.

Affirmed.

1. Oil and Gas Leases: Royalties: Processing Allowance--Outer Continental Shelf Lands Act: Oil and Gas Leases

The term "treatment," as identified in 30 CFR 250.42 (1987), is the removal or extraction of chemical impurities or contaminants that must be removed in order for the gas to be of marketable quality or to place the gas in a marketable condition. "Sour gas" is gas contaminated by hydrogen sulfide or other sulphur compounds, which must be removed before the gas can be used for commercial and domestic purposes. The sulphur

contaminants are not liquid hydrocarbons, so that their removal is not "processing" under 30 CFR 206.152 (1987). Removing the hydrogen sulfide (sweetening the gas) is "treatment" within the meaning of the regulations.

2. Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

The costs of "treatment" or other costs necessary to place the gas in marketable condition are not deductible or chargeable against the Federal royalty interest. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. MMS' decision barring lessees from using an 88-percent price-reduction factor in the computation of royalty on natural gas will be affirmed where costs represented by the factor were incurred in the process of extraction of hydrogen sulfide (sweetening), which was necessary to place the natural gas in marketable condition.

APPEARANCES: Salvatore J. Casamassima, Esq., Houston, Texas, for Exxon Co., U.S.A.; Cynthia A. Norris, Esq., San Francisco, California, for Chevron U.S.A., Inc.; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

Exxon Co., U.S.A. (Exxon), and Chevron U.S.A., Inc. (Chevron), have filed separate appeals from a December 18, 1987, decision of the Director, Minerals Management Service (MMS), denying their appeals from letter decisions of the Chief, Royalty Valuation and Standards Division, prohibiting the inclusion of an 88-percent price-reduction factor in the computation of royalties on natural gas produced from lease No. OCS-P 0441.[1] Because these cases present similar factual and legal issues, we have consolidated them.

Union Oil Co. of California (Union) is a working interest owner in, and the designated unit operator of, the Point Pedernales Unit (Unit), Santa Maria Area, offshore California. That Unit embraces several leases, including OCS-P 0441. Union is not a party to these appeals. Chevron and Exxon, along with other parties, are co-lessees and nonoperating working interest owners in the Unit. The Unit produces oil and "sour" natural gas, that is, gas containing a high percentage of hydrogen sulfide as well as other sulphur compounds.[2]

The facts giving rise to the present appeals are not substantially in dispute. Prior to the commencement of initial production from the Unit, Union, as unit operator, advised MMS:

[1] Chevron appealed to the Director from a June 1, 1987, letter decision and Exxon from a June 5, 1987, letter decision. Exxon's appeal from the Director's Dec. 18, 1987, decision was docketed as IBLA 88-233 and Chevron's as IBLA 88-234.

[2] "Sour gas" has been defined by Williams and Meyers as "[n]atural gas contaminated with chemical impurities, notably hydrogen sulfide or other sulphur compounds, which impart to the gas a foul odor. Such compounds must be removed before the gas can be used for commercial and domestic purposes." *Accord Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 59 n.3 (1937) (referring to sour gas as "gas contaminated by sulphur compounds").

Natural gas produced from the Unit is transported from the Platform Irene, the Unit production platform, via undersea pipeline to the Lompoc Heating, Separating and Pumping facilities (Lompoc H.S. & P.). The custody transfer point for natural gas is located at the Lompoc H.S. & P. and is the gas measurement meter (FE-640) downstream of the gas pipeline Inlet Scrubber (Vessel V-100) and downstream of the three inch (3") piping connection which delivers associated gas evolved off of the Lompoc H.S. &P. gas handling facilities into the gas pipeline. [Footnote omitted.]

(Feb. 16, 1987, Letter at 1).

Union stated that it was responsible for the delivery of all "unitized hydrocarbon substances" to the designated custody transfer points for receipt by the working interest owners and/or royalty interest owners as might be necessary: "Each working interest owner and/or royalty interest owner receives its share of natural gas in kind at the custody point and is responsible for disposition of the gas thereafter."

Union described how its own undivided working interest share of gas produced from the Unit was handled:

Union intends to receive its share in kind of the Unit produced gas, including the royalty portion thereof, at the custody transfer point and transport the gas via a Union owned pipeline to Union's Battles Gasoline Plant [(Battles Plant)] for treating and processing. The Unit produced gas contains significant amounts of CO2 [(carbon dioxide)] and H2S [(hydrogen sulfide)] and is *not of a marketable quality without treating*. The residue gas remaining after treating for CO2 and H2S content and processing for liquid hydrocarbon recovery will be retained by Union for internal disposition as fuel gas for Union's plant and field facilities. [Italics supplied.]

(Feb. 16, 1987, Letter at 2).

In this letter Union proposed, for purposes of computing royalty on gas production from the Unit, "to establish the value of the natural gas based upon the price provisions and price which the Southern California Gas Company (SoCalGas) [was then] currently offering in new gas purchase contracts in the Southern California area," which was: "Price, $/MMBtu = (0.60 X SACOG) X 0.88."

The "SACOG" is the Southern California Gas Co.'s monthly average cost of gas, expressed on a dry unit heating value basis, that is determined by SoCalGas for 6 months ending June 30 and December 31 of each contract year by reference to the actual average cost per decatherm, weighted by quantity, of all gas purchased by SoCalGas during the 6 months preceding the date of such determination. The SACOG was inclusive of all gas purchased by SoCalGas and delivered into SoCalGas gas distribution and transmission facilities in the State of California for such applicable period.

Sixty percent of the SACOG (0.60 X SACOG) represented the pricing provision established by SoCalGas for new gas purchase contracts in the Southern California area. Sixty percent was the "discount factor" then being offered by SoCalGas. This discount factor is not in dispute in this appeal.

The 88-percent factor (0.88) was described as "a processing factor to account for plant fuel and plant losses incurred in the treating and

processing at Union's Battles Plant." It is this factor that is at issue in these appeals.

Pursuant to gas purchase contracts dated March 2 and April 8, 1987, respectively, Chevron and Exxon agreed to sell their working interest shares of the Unit gas to Union at the custody transfer point at the same price identified by Union and described above. The gas purchase contracts each provided that sellers (Chevron and Exxon) had to deliver their working interest shares of gas in its "natural state" to the "[d]elivery point."[3] Chevron and Exxon do not deny that their working interest share of gas was sour in its natural state. Nor do appellants deny that their respective working interest share of gas was being sweetened at the Battles Plant.

The price provisions in Union's respective gas purchase contracts with Exxon and Chevron refer to the same 88-percent factor identified by Union above. Union's gas purchase contracts with Chevron and Exxon refer to the 88-percent factor as a "processing factor to account for plant fuel and loss for which Buyer is liable" (Chevron-Union Gas Purchase Contract at 7; Exxon-Union Gas Purchase Contract at 13).

MMS' Royalty Valuation and Standards Division, in letter decisions dated June 1, 1987, to Chevron, and June 5, 1987, to Exxon, instructed that, in computing royalty on gas, Chevron and Exxon "may not include the factor of 0.88 or any other factor which represents a price reduction for costs to place the gas in marketable condition." Supporting this determination MMS attached "Findings and Conclusions," stating:

> The Unit gas contains high amounts of CO2 and H2S and is not of marketable quality without treating. Unit gas is expected to contain 10 to 11 percent CO2 by volume; the Amine treatment unit at the Battles plant will lower this percentage to 7.5 percent. An "iron sponge" absorption system will be utilized for partial removal of the H2S and other contaminants; the resulting chemical effluent will then be disposed of. The residue gas remaining after treatment and processing at the Battles Plant is to be retained by [Union] for use as fuel gas in its plant and field facilities.

(Findings and Conclusions Attachment to June 1, 1987, Letter to Chevron and June 7, 1987, Letter to Exxon). MMS stated further that the 88 percent "represents [Union's] costs at the Battles Plant to upgrade the gas so it is usable in Union's plant and field facilities." *Id.* Chevron and Exxon both appealed to the Director, MMS.

On May 14, 1987, MMS transmitted a similar letter to Union outlining the facts referenced above and additionally stating that gas plant liquids were to be sold to third parties at posted prices, and that no marketing of the removed CO2 was planned. Union evidently did not appeal.

Union, while not a party to Chevron's and Exxon's appeals pending before the Director, submitted a letter to the Director, dated August 10, 1987, in support of Chevron's Notice of Appeal, stating:

[3] The "delivery point" is Union's gas sales meter (FE640) downstream of the gas pipeline Inlet Scrubber (Vessel V-100) and downstream of the 3-inch connection which delivers associated gas off of the Lompoc Heating, Scrubbing and Pumping Facility. This delivery point is the same as that identified by Union for receipt and metering of its own working interest share of gas.

Union wishes to advise that the principal contaminant at this time *which makes the gas unmarketable is H2S rather than CO2.* Nonetheless, the gas as received by Union at the custody transfer point, must be processed even for use as fuel gas due to the high H2S content, otherwise burning as fuel gas would result in violations of prevailing Air Pollution Control District permit conditions. The Unit gas contains approximately 1300 ppm of H2S which is considerably greater than the gas sales contract specification limits of 20 grains or 318 ppm. However, *Union has agreed to continue to purchase the high H2S content gas so long as sufficient capacity exists at its Battles plant facility to safely remove and handle the H2S.*

* * * * * * *

MMS states that the "0.88 is a price reduction included by [Union] to reflect its cost at the Battles Plant to upgrade the gas so it is usable in [Union's] plant and field facilities." Union wishes to advise the MMS that the 0.88 factor is not related in any way to processing, treating or upgrading the Unit gas but is in fact a reduction factor to offset costs incurred by Union in gathering and compressing the gas to move it into, and through, Union's Battles Plant and also to account for metering, handling losses and pipeline losses for the pipelines, facilities and plant. On a historical basis, Union's compression, plant and field fuel consumption average 9% for each MMBtu of gas handled in Union's Battles Plant field and plant facilities. Unaccounted for losses such as metering, handling and pipeline usually average 3% for each MMBtu of gas handled in Union's Battles Plant field and plant facilities. The total of these two items, 12%, is the basis for the 0.88 factor (1.00 - 0.12 = 0.88). At the time the gas sales contracts were negotiated with the Unit working interest owners this derivation and justification for the 0.88 factor was relayed to each of the parties and under no circumstances were the charges ever implied to be, or justified as, processing and/or treating costs. In fact each of the gas sales contracts between Union and the other working interest owners defines the 0.88 factor as "processing factor *to account for plant fuel and loss* for which Buyer is liable for." [Italics supplied.]

On December 18, 1987, the Director, MMS denied appeals filed by Chevron and Exxon, finding:

> While it is not entirely clear from the record whether the 0.88 price reduction factor was attributable to costs associated with treatment of the gas, or to line losses or gathering costs, or to some combination thereof, the result is the same. Under the regulations, none of the above are allowable deductions for royalty valuation purposes.

(Director, MMS, Decision at 8). From the Director's decision, these appeals ensued.

[1] The pre-1988 offshore regulations provided at 30 CFR 250.42 (1987): "The lessee shall put into marketable condition, if commercially feasible, all products produced from the leased land. In calculating the royalty payment, the lessee may not deduct the costs of treatment."[4] Thus, the lessee, in calculating royalty, may not deduct costs of "treatment" in determining the royalty basis of production from the lease. In contrast, the pre-1988 offshore regulations did provide an allowance for expenses incurred when "gas is processed for the

[4] Except for a change of section number, that provision has remained substantially intact since it first appeared in the first set of offshore regulations effective May 10, 1954. In 1954, 30 CFR 250.41 provided pertinently: "(b) The lessee shall put in marketable condition, if commercially feasible, all products produced from the leased land and pay royalty thereon without recourse to the lessor for deductions on account of costs of treatment." 19 FR 2658 (May 8, 1954).

recovery of constituent products." 30 CFR 206.152 (1987).[5] Viewed against this background, it is evident that the distinction between "processing" and "treatment" is critical in calculating royalty due.

We note that the distinction between "treatment" and "processing" has significance only in the Federal royalty context. In private leases, while the royalty owner is not typically required to bear any production costs (except as otherwise provided by contract), the royalty interest does bear a proportionate share of the costs to market the lease products, including the costs of placing the gas in a marketable condition, be those costs "treatment" or "processing" costs. Hence, in the private lease context, so long as the royalty interest shares in post-production or marketing costs, it is immaterial as to how those costs are classified. 3 Williams and Meyers, *Oil and Gas Law* §§ 642, 642.3, 645, 645.2 (1990). Because the classification of such costs is largely immaterial in the private lease context, cases employing these terms employ them interchangeably and accordingly provide little aid in distinguishing them as they are used in Federal lease matters.

According to one respected authority, the terms "processing" or "manufacturing," under the pre-1988 Departmental regulations, plainly contemplated the removal or extraction of liquefiable hydrocarbons from wet gas or casinghead gas. 8 Williams and Meyers, *Oil and Gas Law* § 750-1 (1987). The "constituent products" referenced in the "processed gas" regulation are those liquid hydrocarbons separated or extracted out (by means beyond normal lease or field separation) from the dry natural gas stream (methane), that is, "natural gasoline, butane, propane." 30 CFR 206.152(a)(2); 250.63(a) (1987).[6]

The 1974 Conservation Division Manual (CDM) provided a similar definition of "processing":

> The term "manufacturing" is synonymous with the terms "extraction" or "processing." A manufacturing allowance is proper for most processes which are designed to extract *hydrocarbon liquids* from a natural gas by altering pressures, temperatures, or introducing extraneous material, (including absorption, adsorption, refrigeration, or combinations thereof). [7; italics supplied.]

CDM 647.3.3 (5-17-74 (Release No. 12)). Based on the above, we conclude that "processing," as it was used in the pre-1988 regulations, embraced only the removal of hydrocarbon liquids from the natural gas stream.

In reaching this conclusion, we find it significant that MMS deemed it necessary to modify the definition of "processing" in January 1988 to include the extraction of non-hydrocarbon substances. *See* 30 CFR 206.101 (1988) and 30 CFR 206.151 (1988); 8 Williams and Meyers,

[5] The pre-1988 onshore regulations are more specific, providing for an allowance for the extraction of "casing-head or natural gasoline, butane, propane, or other liquid hydrocarbon substances extracted from the gas produced on the leasehold." 30 CFR 206.106.

[6] The Director held that what distinguishes treatment and processing is the creation of "a new, chemically distinct product." While MMS' assertion may be in concert with post-1988 regulations, we can find no support for this interpretation in regulations in effect in 1987, the Conservation Division Manual, or Board precedent.

[7] The CDM goes on to state that "natural condensate (drip gasoline) or other liquids recovered from the natural gas stream in normal lease separators, heaters, scrubbers, dehydration units, or other facilities designed for separating the gas from produced crude, condensate or water, is not entitled to a manufacturing allowance." It is unnecessary to consider this restriction in the present dispute.

Oil And Gas Law § 154 (Supp. 1990). In proposing the new definition of "gas," which was later incorporated into the new definition of "processing," MMS stated:

> Existing valuation regulations[, that is, those operative in 1987 and applicable in this case,] were written to deal primarily with hydrocarbon gas streams. This was especially true when dealing with processed gas. In the last decade, the existing regulations proved difficult to administer when handling gas mixtures of diverse content. Gas plants have been constructed to process gas mixtures where some gas plant products may not be a hydrocarbon. In order to accommodate processing plants that process and sell nonhydrocarbon production, the term "gas," will commonly apply to the total gas mixture as it enters the plant. The term "residue gas" will refer to gas consisting principally of methane resulting from processing gas. The term "gas plant products" will refer to natural gas liquid products collectively, (ethane, propane, butane, pentane, etc.) and other products also produced by a processing plant (carbon dioxide, sulfur, nitrogen, etc.).

(Revision of Gas Royalty Valuation Regulations and Related Topics, Notice of Proposed Rulemaking, 52 FR 4734-35 (Feb. 13, 1987)). Thus, MMS indicated that the pre-amendment regulations did not consider "processing" to include removal of nonhydrocarbons.

Comparing the post-1988 and pre-1988 regulations, MMS expressly observed that the removal of H2S from a natural gas stream is not "processing" (and therefore not deductible) under the old regulation: "Paragraph (d) would set forth the long-established principle that no processing cost deduction would be allowed for the costs of placing lease products in marketable condition. For example, if hydrogen sulfide is removed from a gas stream and flared, no processing cost deduction would be allowed." *Id.* at 52 FR 4740. The new regulations adopt a new rule only if the hydrogen sulfide is processed into sulphur and sold, or "processed into a gas plant product." *See Id.*; 30 CFR 206.158(d)(1) (1988).

"Treatment" of production connotes the removal or extraction of chemical impurities or contaminants in the gas stream that must be removed to render gas of marketable quality or place it in a marketable condition. Commentators have recognized that "impurities are often associated with petroleum (the sulfur compound that contaminates sour gas and oil is one), and these should be removed prior to marketing the product." 1 Williams and Meyers, *Oil And Gas Law* § 101 (Supp. 1990). As noted above, "sour" gas is natural gas contaminated with chemical impurities, notably hydrogen sulfide or other sulphur compounds. Hydrogen sulfide is not a liquid hydrocarbon, as it is composed of more than "only hydrogen and carbon." *See A Dictionary of Mining, Mineral and Related Terms* 562 (1968). Thus, its removal does not fall within the meaning of the term "processing" as it is used in the pre-1988 regulations. We hold that sweetening natural gas to remove hydrogen sulfide is not processing, but is rather treatment.

Appellants employ the term "purifying" or "purification" to describe the removal of H2S, rather than "treatment." They have not shown, however that employment of those terms would necessitate a different

result. There is no doubt that hydrogen sulfide is an "impurity." "Purification" and "treatment" are synonymous in that both contemplate the removal of impurities or contaminants. *See, e.g.*, 18 CFR 201.356 and 201.363.

The argument that the 88-percent adjustment represents plant fuel and losses is unavailing. The Unit operator has represented that the "principal contaminant at this time [that made] the gas unmarketable [was] H2S rather than CO2" and stated that the gas had to be processed even for use as fuel gas due to the high H2S content. Appellants do not contend that the costs represented in the 88-percent factor were incurred as a result of "processing," that is, extracting natural gas liquids products from the natural gas in its natural state. To the contrary, the opposite conclusion is warranted. Chevron and Exxon's respective gas purchase contracts with Union do not authorize Union to extract liquefiable hydrocarbons from wet gas or casinghead gas (*i.e.*, to process the gas). Nor does the price provision in the respective contracts detail separately a price for the sale of extracted liquid hydrocarbons.

[2] In any event, any plant fuel and losses costs at the Battles Plant would appear to have been incurred in connection with treating the natural gas to reduce the H2S concentration so that the treated gas could be used in Union's facilities. Because the costs are incurred as a result of treating the natural gas to remove the H2S, they cannot be deducted nor can an allowance be granted therefor. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition.

Appellants assert that their gas is marketable in its unconditioned state and, thus, it is not necessary to place it into a marketable condition prior to sale (Chevron Statement of Reasons before the Director of MMS at 6-7). Appellants reason that, if the gas is marketable in an unconditioned state when it is passed to Union at the custody points or "at the well," the costs of removing hydrogen sulfide cannot properly be deemed costs of placing it in a marketable condition.

Appellants have submitted no evidence in support of their assertion that the gas is actually being marketed in its unconditioned state, and statements by Union representatives to MMS (quoted above) directly contradict such assertions. It is irrelevant that Union, rather than appellants, actually performed the treatment necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. Union purchased the gas from appellants on condition that Chevron and Exxon pay for placing it in a marketable condition. Clearly, in these circumstances, appellants cannot be said to have been marketing the gas in its unconditioned state.

Relying on *United States* v. *General Petroleum*, 73 F. Supp. 225 (S.D. Cal. 1947), appellant Exxon contends that royalty must be based on the "value at the well" and avers that the sale to Union occurred "at the well" because title passed at the custody transfer point or at the well, prior to desulphurization and purification (Exxon Statement of Reasons at 5-6). An agreement between buyer and seller on a place for title to pass (while effectively passing title) is not conclusive for the purposes of laws extrinsic to the contract. *Piney Woods Country Life School* v. *Shell Oil Co.*, 726 F.2d 225, 233 (5th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985); *see also Arco Oil & Gas Co.*, 109 IBLA 34, 39 (1989) (holding that the point of transfer of title to a pipeline was not the "first available market opportunity").[8] Thus, in the instant case, it cannot be said that the transfer of title to the sour gas while it was still in its untreated condition meant that appellants were marketing the untreated gas. Although title may have passed and metering may have occurred before the gas went to the Battles Plant for sweetening, the fact that appellants bore the costs of sweetening meant that they were effectively marketing sweetened gas.

Appellants, noting that the gas was not required by contract to be "suitable for pipeline transmission" or of "pipeline quality," assert that the gas met contract specifications in its natural state (Chevron Statement of Reasons before the Director of MMS at 7-8; Exxon Statement of Reasons at 3-4). As a result, they contend, the instant case is distinguishable from *California Co.* v. *Udall*, 296 F. 2d 384, 388 (D.C. Cir. 1961), where the gas was not required to meet pipeline transmission specifications. In that case, certain costs were disallowed as deductions from the amount on which Federal royalty was calculated as costs of placing the gas in a marketable condition. *See id.* at 387-88.

We note initially that we are not persuaded that the sole basis for MMS' authority to disallow costs of sweetening is provided by *California Co.* v. *Udall, supra*. The regulations at 30 CFR 250.42 (1987) provide that authority. Thus, any differences between the facts in *California Co.* and the instant case do not render MMS' decision unsupported by authority.

The issue of what constitutes "treatment" in a Federal royalty context and MMS' authority regarding the allocation of the costs of

[8] In *Piney Woods*, the Fifth Circuit recognized that a reference in a lease to the term "sold at the well" need not be controlled by the point at which title passes in the sales contract and concluded that gas sold by Shell was not "sold at the well," even though the sales contracts provided that title to the gas passed on or near the leased premises. Pivotal to the court's holding was the finding that, although title passed and metering occurred in the field, the seller bore the cost of sweetening the sour gas, so that the buyer effectively only paid for the cost of sweet gas. *Id.* at 231. In other words, if the seller bears costs beyond those associated with production, such as for transportation or treatment, the gas is not being sold "at the well." Here, the price paid by Union was not merely for unrefined production; it included adjustments for the costs of treatment. Chevron and Exxon, as sellers, bore these costs, so that the sale cannot be regarded as having been "at the well."

Because *Piney Woods* involved a private lease not governed by 30 CFR 250.42, the questions of the distinction between "treatment" and "processing" and the lessor's obligation to share in costs of same did not arise. The consequences of the court's holding regarded "sale at the well" were entirely different, arising as they did from construction of private lease royalty provisions different from those at issue here.

treatment was recently reviewed by the Fifth Circuit Court of Appeals. The court concluded that "measuring, gathering, compressing, sweetening, and dehydrating" constitute "treatment" and that MMS' requirement that costs of such treatment be excluded from the computation of royalty is "entirely reasonable and permissible." *Mesa Operating Ltd.* v. *U.S. Department of the Interior*, 931 F.2d 318 (5th Cir. 1991).

In any event, we do not find that the record supports the assertion that the gas as produced met contract specifications. Appellants were required under the gas purchase contracts in this case to "deliver the gas to the delivery points in its natural state." Union was not obligated to accept deliveries of gas not meeting standard quality specifications and could refuse deliveries of same (Chevron-Union Gas Purchase Contract at 3; Exxon-Union Gas Purchase Contract at 4). However, the record discloses that Union elected to take the gas even though these specifications were consistently not met. Union has made it clear that the gas in fact fails to meet gas quality specifications in the contract, and that it cannot use the gas in its natural state. Evidently owing to its ability to sweeten the gas at its plant (at appellants' expense), Union has agreed to accept deliveries of gas notwithstanding its sour state. The fact that Union does accept the gas does not show that the gas meets the quality specification or that it is marketable in its natural state; it merely means that Union has not exercised its right to reject the gas. *See* Chevron-Union Gas Purchase Contract at 4; Exxon-Union Gas Purchase Contract at 5.

Exxon's reliance on *General Petroleum, supra*, is misplaced. That case did not specifically deal with the "treatment" of production, it dealt with a classic example of "manufacturing" or "processing," for which an allowance is permitted. Acceptance of the principles established in this case without distinguishing between costs of "treatment" and "processing" would require this Board to disregard 30 CFR 250.42 (1987), barring the Government from sharing in the cost of treatment. Duly promulgated regulations have the force and effect of law and are binding on the Department and this Board. *Conoco, Inc. (On Reconsideration)*, 113 IBLA 243, 249 (1990), and cases cited.

Chevron argues that MMS should not look beyond the terms of the sales contract with Union, noting that the post-1988 regulations require acceptance of proceeds under arm's-length contracts as the basis for establishing the value of production for royalty purposes (Chevron Statement of Reasons before the Director of MMS at 2-6). The Director's decision was properly predicated on the application of the regulation in effect in 1987. The post-1988 regulations are not applicable retroactively. *BWAB, Inc.*, 108 IBLA 250, 257 n.2. (1989); Revision of Gas Royalty Regulations and Related Topics, Final Rule, 53 FR 1230 (Jan. 15, 1988).

Chevron also cites 30 CFR 206.150 (1987), which requires that MMS give due consideration to several factors, including price received by

lessee. The Department's acceptance of gross proceeds or the price received by lessee as the selected method for valuation under 30 CFR 206.150 (1987) must be construed in concert with 30 CFR 250.42 (1987), also in effect during the relevant period. The fact that MMS may have accepted as "value" proceeds received under an arm's-length contract under the pre-1988 regulations does not make an otherwise nondeductible cost deductible.

In summary, we hold that where the Federal lessee directly or indirectly bears the costs of "treatment," it is irrelevant that such treatment is performed by someone other than the lessee (*Placid Oil Co.*, 70 I.D. 438 (1963)), or that title has passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. *Big Piney Oil & Gas Co.*, A-29895 (July 27, 1964). Costs of "treatment" are not deductible from the amount on which royalty is calculated or otherwise chargeable against the Federal royalty interest. 30 CFR 250.42 (1987).

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

DAVID L. HUGHES
Administrative Judge

I CONCUR:

JAMES L. BYRNES
Administrative Judge

BENSON-MONTIN-GREER DRILLING CORP. *v.* ACTING ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

21 IBIA 88 Decided: *December 18, 1991*

Appeal from a determination that three tribal oil and gas leases had expired by their own terms because of failure to produce oil and/or gas in paying quantities.

Affirmed.

1. Indians: Leases and Permits: Generally--Indians: Leases and Permits: Cancellation or Revocation--Indians: Mineral Resources: Oil and Gas: Generally

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

3. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

APPEARANCES: R. Charles Gentry, Esq., Austin, Texas, for appellant; Robert C. Eaton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Area Director; Wayne H. Bladh, Esq., Santa Fe, New Mexico, for the Jicarilla Apache Tribe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

INTERIOR BOARD OF INDIAN APPEALS

Appellant Benson-Montin-Greer Drilling Corp. seeks review of a December 14, 1990, decision of the Acting Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that Jicarilla Apache Tribal Oil and Gas Leases 200, 403, and 408 (leases 200, 403, and 408) had expired by their own terms because of failure to produce in paying quantities. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is present assignee of leases 403 and 408 and assignee of operating rights under lease 200, all issued under authority of the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396f (1988).[1] The three leases cover a total of approximately 6,600 acres of tribal land in T. 27 N., R. 1 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico, on the Jicarilla Apache Reservation. The lease term for each lease is "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." All three leases are in their extended terms.

Appellant also has interests in leases of Federal land in the Canada Ojitos Unit, which adjoins the tribal leases. Appellant has sought since about 1980 to have the tribal leases added to the unit. The

[1] Lease 200 was approved by BIA on June 12, 1957, with Honolulu Oil Corp. as lessee; on Feb. 9, 1968, BIA approved assignment of operating rights under lease 200 to appellant. Lease 403 was approved by BIA on Jan. 12, 1968, with Tom Bolack as lessee; on Sept. 9, 1977, BIA approved assignment of lease 403 to appellant. Lease 408 was approved by BIA on Dec. 18, 1967, with James C. Vandiver as lessee; on Jan. 23, 1976, BIA approved assignment of lease 408 to appellant.

Jicarilla Apache Tribe (Tribe), however, has not consented to the unitization of its leases.[2]

On July 1, 1986, appellant applied to the Bureau of Land Management (BLM) for permission to vent gas from the wells on the tribal leases, on the grounds that marketing the gas would be uneconomic and that, once the leases were added to the Canada Ojitos Unit, the gas could be gathered through the unit's gas gathering system. BLM approved the application for 1 year.[3] Appellant reapplied and was approved on an annual basis during succeeding years. In 1990, appellant's application to vent gas was approved "until the market conditions or the regulations change." March 15, 1990, BLM letter to appellant.

In June 1989, the Area Director requested BLM to make "paying-well" determinations as to the three leases, as well as Jicarilla Tribal Oil and Gas Lease 404, not at issue in this appeal. The Area Director apparently requested that the determination be made for the period January through May 1989. BLM sought information from appellant for the purposes of making this determination.[4] By memorandum of August 18, 1989, BLM advised the Area Director that it had studied the leases over a 2-year period, January 1987 through December 1988, and found that the wells on leases 200, 403, and 404 were producing in paying quantities but that the well on lease 408 was not.

By three letters dated June 21, 1990, the Superintendent, Jicarilla Agency, BIA, advised appellant that leases 200, 403, and 408 had expired by their own terms. The letters stated that production records showed no commercial production for lease 200 since July 1989, for lease 403 since October 1989, and for lease 408 since July 1986.

Appellant appealed these letters to the Area Director. While the appeal was pending, BLM conducted a paying-well determination for leases 200 and 403 for the period January 1, 1989 through

[2] Under 25 CFR 211.21(b), tribal consent is required before tribal leases may be included in a unit. This section provides:

"All such [tribal oil and gas] leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected."

[3] BLM approval is indicated by a stamp on appellant's letter of application. A handwritten note on the letter reads: "Must pay royalties, Approved until 7/2/87, BIA Dulce."

Appellant's 1986 application stated that it had been venting gas since 1984, apparently without approval. There is an indication elsewhere in the record that the 1986 BLM approval included retroactive approval of the earlier venting, but this is far from clear.

[4] No copy of the BIA request to BLM is included in the administrative record. However, in apparent reaction to the BIA request, BLM sought information from appellant concerning the period January through May 1989. Appellant's response indicated that it did not believe paying-well determinations could be made "from the operating history of a few randomly selected months; so we are submitting information covering a longer, and more representative, time period - two years, being calendar years 1987 and 1988" (Appellant's July 28, 1989, Letter to BLM at 1).

An attachment to appellant's letter showed that, during the period January through May 1989, lease 200 produced for 4 days, lease 403 produced for 0 days, and lease 408 produced for 3 days. Appellant contended: "Clearly production for those months is not representative of either the wells' abilities to produce nor their actual production rates over extended time periods. Analyses for paying well determinations for this (January through May) time period would be grossly in error" (Attachment 2 to appellant's July 28, 1989, letter).

December 31, 1989.[5] By memorandum of August 31, 1990, BLM reported: "A negative net income of $-436.00 was obtained for [lease 200], which, in our view is uneconomic (marginally). Therefore, [lease 200] *does not* have a well on the lease producing in paying quantities." (Italics in original.) The memorandum does not report any determination with respect to lease 403.

In a decision issued on December 14, 1990, the Area Director stated:

The facts of this case clearly indicate that there was no commercial production from the leases during the following periods:

Lease	*No Production Months*
Jicarilla 200	February, March, April, and November 1987. January, February, March, July, August, October, November, and December 1988.
Jicarilla 403	January, February, March, April, May, June, July, and September 1987. January, February, April, July, August, October, November, and December 1988.
Jicarilla 408	January, February, March, April, May, June, July, August, September, October, November, and December 1987. January, February, March, April, May, June, July, August, September, November, and December 1988.

Although identifying periods of nonproduction different from those identified by the Superintendent, the Area Director affirmed the Superintendent's determinations that the leases had expired because of failure to produce oil and/or gas in paying quantities. The Area Director relied explicitly on the Board's decision in *Mobil Oil Corp.* v. *Albuquerque Area Director*, 18 IBIA 315, 97 I.D. 215 (1990).

Appellant's notice of appeal from the Area Director's decision was received by the Board on January 11, 1991. Appellant, the Area Director, and the Tribe filed briefs.

Discussion and Conclusions

Appellant argues: (1) the agency should have afforded appellant a hearing under 25 CFR 211.27 before cancelling its leases; (2) BIA's requirement of "continuous" production in the extended term of a lease is an invalid, unpublished rule; (3) *Mobil* was incorrectly decided;

[5] It is not clear what prompted this action by BLM. However, by memorandum of July 23, 1990, the Area Director had sought a BLM State Director's review of BLM's earlier paying-well determinations. The Area Director expressed dissatisfaction with the manner in which BLM had handled the determinations. He stated in part:

"In calculating the production in paying quantities, if the operator shuts in a well and only produces said well for a couple of days per year, he could easily make enough production to pay his operating cost because he has minimal costs associated with a shut in well. * * * The BLM continues to allow [appellant] to shut the wells in and say that [it] has production in paying quantities. The Tribe received $3,000 from this lease instead of $14,000 if [appellant] would have produced the wells each month for the 24 months of the paying well determination study.

* * * * * * *

"When a producing well determination is requested, we are asking that you not only look at the information submitted by the operator and act in the operator's interest but that you fulfill your fiduciary responsibility and give a determination that is in the best interest of the Indians. If during the paying well determination BLM finds that the operator has shut the well in for extended periods of time with no approval, we would ask that instead of telling the operator that his leases are in good standing that you provide the BIA with a recommendation that the leases have expired under their own terms." (Area Director's July 23, 1990, memorandum at 1-2).

(4) whether production in paying quantities has been achieved should be determined in accordance with principles from state and Federal case law concerning oil and gas leasing of non-Indian lands; and (5) "continuous" production would be of no additional benefit to the Tribe.

The Area Director and the Tribe argue, *inter alia*, that this case is controlled by *Mobil*. Further, they argue, *Mobil* was correctly decided and should not be disturbed.

[1] With respect to appellant's first argument, *Mobil* is only one of several decisions in which the Board has stated that no "cancellation" occurs when BIA determines that an oil and gas lease has expired by its own terms. The Board has consistently held that BIA is not required to follow the cancellation procedures in 25 CFR 211.27 in these circumstances. *See, e.g., Duncan Oil, Inc.* v. *Acting Navajo Area Director*, 20 IBIA 131, 137 (1991); *Mobil*, 18 IBIA at 323, 97 I.D. at 219; *Bekco Oil & Gas Corp.* v. *Acting Muskogee Area Director*, 18 IBIA 202, 204 (1990). Appellant has failed to show that the Board's prior holdings on this point are in error. Its first argument is therefore rejected.

[2] Appellant's second argument is also rejected. As discussed at length in *Mobil*, 18 IBIA at 322-26, 97 I.D. at 219-21, the "rule" that a lease of Indian land in its extended term expires upon cessation of production is a self-executing statutory rule, derived from the IMLA. Insofar as officials of the Department of the Interior have undertaken to interpret this provision of the statute, they have done so through issuance of a legal opinion and through adjudications, rather than through rulemaking. See further discussion below. In short, it is not by any rule of the Department of the Interior, valid or invalid, that leases expire upon cessation of production but, rather, by operation of the statute.[6]

Appellant's principal argument is that *Mobil* was incorrectly decided. Appellant contends that

> [m]ost jurisdictions that have addressed the proper determination of "production in paying quantities" have now adopted what is effectively a two-pronged test. First, they apply as an objective standard a mathematical calculation of profitability, meaning revenue sufficient to repay costs of operation and marketing and produce a profit, however slight. * * * Second, and only if profit is *not* found by the objective test, a subjective standard is then used to determine whether a prudent operator would continue to operate the lease for a profit and not for mere speculative purposes. [Italics in original.]

(Appellant's Opening Brief at 16-17).

Appellant concedes that lease 408 fails to meet the objective portion of the test which it urges the Board to adopt; it contends, however, that

[6] The appellant in *Mobil* made a somewhat different argument that an invalid rule had been promulgated. Mobil contended that the Superintendent, Southern Ute Agency, announced a rule of his own devising when he stated that "production in paying quantities is judged on a monthly cycle." The Board found that the Superintendent's statement was not a rule and that, even if error, it was harmless error under the circumstances. 18 IBIA at 333, 97 I.D. at 224.

the "legitimate prospect of unitization which would include this Lease fully satisfies the subjective portion of the test" (Appellant's Opening Brief at 21). Lease 403, appellant contends, meets the objective portion of the test, and lease 200 is "very close to being profitable," even under BLM's paying-well analysis, which appellant contends is flawed because only 1 year was studied[7] (Appellant's Opening Brief at 20).

[3] In *Mobil*, the Board discussed the principles of Federal Indian law which preclude the mechanical application to Indian oil and gas leases of rules developed for non-Indian oil and gas leases. 18 IBIA at 323-31, 97 I.D. at 219-23. Under that decision, any tests for paying quantities, such as those advocated by appellant, would require analysis, in the context in which they are sought to be applied, to ensure that there is no conflict with the overriding principles of Federal law governing oil and gas leases of Indian land.

Appellant's position appears to be that these principles must give way if they appear at all inconsistent with the tests it advocates. Certainly, appellant makes no attempt to demonstrate that its position may be squared with *Mobil* but, instead, bluntly urges the Board to reverse that decision. Nothing in appellant's argument, however, persuades the Board that its holding in *Mobil* was erroneous.

Appellant further contends that, even if *Mobil* was correctly decided, its holding should not be applied to existing leases because it is a newly announced rule. Contrary to appellant's contention, *Mobil* did not announce either a new "rule" or a new interpretation of the IMLA. Rather, it relied upon and essentially reaffirmed a Department of the Interior Solicitor's Opinion published in *Interior Decisions* in 1942. *See* 18 IBIA at 324, 97 I.D. at 219-20, 58 I.D. 12 (1942). The holding in *Mobil* is consistent with the legal position taken by the Department of the Interior for at least the last 49 years. *See, e.g., Administrative Appeal of Continental Oil Co.*, 2 IBIA 116, 80 I.D. 786 (1973); *The Superior Oil Co. & The British-American Oil Producing Co.*, 64 I.D. 49 (1957).[8] The Board finds that *Mobil* is applicable to appellant's leases.

In *Mobil*, there was no factual dispute concerning production; Mobil conceded that its leases had not produced for a period of at least 6 months. 18 IBIA at 322, 97 I.D. at 218. Here, appellant contends that

[7] Appellant appears to be referring here to BLM's second paying-well determination, which concerned 1989. In fact, for 1987 and 1988, the years at issue in this appeal, BLM determined that lease 200 was producing in paying quantities.

Appellant contends that a 1-year period is too short a period in which to determine whether a well is producing in paying quantities.

[8] In *Superior Oil Co.*, the Assistant Secretary of the Interior held, as did this Board in *Mobil*, that a provision contained in the statute and regulations governing leasing of public lands, but absent from the statute and regulations governing leasing of Indian lands, could not be invoked to extend a lease of Indian lands. 64 I.D. at 51. The provision at issue in *Superior* was one authorizing the Secretary to approve suspensions of operations.

An apparent aberration from this line of authority is an Interior Board of Land Appeals (IBLA) decision cited by appellant. In *Hoover & Bracken Energies, Inc.*, 71 IBLA 220 (1983), IBLA reviewed a 1979 decision of the Acting Deputy Commissioner of Indian Affairs concerning expiration of an oil and gas lease of Indian land. (Apparently, between 1975 and 1981, IBLA and this Board shared jurisdiction over appeals of this nature. *Cf.* 43 CFR 4.351 (1980) with 43 CFR 4.330 (1981).) *Hoover & Bracken* is, however, of limited authority because it analyzed the issue before it under the wrong statutory provisions, *i.e.*, 30 U.S.C. § 226(f) and (j) (1976), which apply to public lands but not to Indian lands. In fact, the decision fails even to mention the statutes governing oil and gas leasing of Indian lands. As discussed in both *Mobil* and *Superior*, there are significant differences between the statutes governing oil and gas leasing of public lands and those governing oil and gas leasing of Indian lands. 18 IBIA at 323-26, 97 I.D. at 219-21, 64 I.D. at 51.

leases 200 and 403 were producing in paying quantities during 1987 and 1988.

The record contains three sources of information concerning production and/or sales from the leases during 1987 and 1988. The first is the Tribe's tax ledger for appellant's leases, showing production for each month as reported by appellant. The second is a Minerals Management Service (MMS) report titled "Royalty Management Program, State and Tribal Support System, Royalty Details History - Lease, Sales Date, Revenue Source." The MMS reports show sales quantities for each month during 1987 and 1988, as reported to MMS by appellant. The third source is a report of monthly production which was provided by appellant to BLM pursuant to BLM's June 1989 request for information upon which to base a paying-well determination.[9]

Under the Tribe's Oil and Gas Severance Tax Ordinance and Oil and Gas Privilege Tax Ordinance, operators are required to report production for each month. As to each tax, tribal law provides:

> Within forty-five (45) days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas, and condensate and BTU of gas produced from each well on Tribal lands for such calendar month and the amount of tax due.

Jicarilla Apache Tribal Code, Title 11, Chapter 1, section 6, and Chapter 2, section 5. The General Instructions to operators state that "[e]ach operator must report *all* of his production each month." (Italics in original.)

Under 30 CFR Part 210, sales must be reported to MMS. 30 CFR 210.52 provides: "A completed Report of Sales and Royalty Remittance (Form MMS-2014) must accompany all payments to MMS for royalties * * * Completed Form MMS-2014's * * * are due by the end of the month following the production month."[10]

The Board recognizes that sales data for a given month is not necessarily an accurate reflection of production for that month. In this case, however, according to appellant's production reports to the Tribe and its sales reports to MMS, production and sales were identical for each month during 1987 and 1988. The tribal and MMS reports are entirely consistent with each other. Appellant's 1989 report to BLM shows different, in some cases markedly different, production figures from those shown in the tribal production data and MMS sales data.

[9] There is also a BLM report covering part of the period at issue here. The figures in the BLM report are identical to the figures in appellant's 1989 report to BLM.

[10] Under MMS regulations promulgated in 1986, now 30 CFR Part 216, operators must also make reports of production to MMS. Operators were made subject to this requirement as they were individually notified by MMS. *See* 30 CFR 216.20. It is the Board's understanding that appellant became subject to the requirement in 1989; MMS production reports for 1989 are included in the record for this appeal.

The regulations in 30 CFR Part 216 were intended to provide a means of cross-checking production and sales data under a comprehensive accounting and auditing system developed by MMS in response to concerns about, *inter alia*, the lack of ability within the Department to verify production data submitted by operators. *See e.g.*, 51 FR 8168 (Mar. 7, 1986); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757 (1988); H.R. Rep. No. 859, 97th Cong., 2d Sess. (1982).

The record indicates that BIA relied on the tribal and MMS data and that it considered the figures in appellant's report to BLM inaccurate. See Dec. 10, 1990, Memorandum to Files from Chief, Minerals Section, Albuquerque Area Office. In deciding whether BIA reasonably relied on the tribal and MMS data, in preference to appellant's 1989 data, the Board takes into consideration that: (1) appellant was the source of information for all three reports; (2) appellant submitted consistent reports to the Tribe and MMS; and (3) appellant did not, before the Area Director, and does not now contend that it erred in reporting production to the Tribe or that the Tribe erred in recording it. Indeed, appellant has put forth no challenge in this appeal to the accuracy of the data relied upon by BIA.

Further, appellant has acknowledged that the wells on the leases did not produce every month. In its July 28, 1989, letter to BLM, at pages 1-2, appellant stated:

> [I]t is necessary to vent gas in order to produce the wells; so in order to conserve gas pending their inclusion in the adjoining Canada Ojitos Unit, they are produced only part time. We consider the wells as being "on" and "off" production for any given month. During "off" months a pumper ordinarily will run the equipment for a few hours on one, or possibly two, days during the month just to keep the machinery lubricated and operating; and may recover a few barrels of oil in so doing - but for practical producing considerations, the well is "off" to conserve gas.
>
> When these wells are included in the Canada Ojitos Unit, the unit's pipeline systems will be extended to collect the gas and reinject it in the unit. The wells will then be produced continuously.
>
> Although the well on the 408 lease would not be considered a "paying well" under the present method of operation; it could very well be a useable well once the Jicarilla lands are brought into the unit; so the well has not been plugged, but is being held for future use under unitization.

In its July 16, 1990, letter to BLM, concerning leases 200 and 403, appellant repeated the first two paragraphs of this statement.

For the reasons discussed, the Board accepts the tribal and MMS data as accurate and finds that it was reasonable for the Area Director to rely on it. This data supports the Area Director's conclusions, quoted above, concerning the lack of production during certain months in 1987 and 1988. It shows that, as to lease 200, there was no production for a 3-month period in 1987 and for two 3-month periods and one 2-month period in 1988; as to lease 403, there was no production for a 7-month period in 1987, and two 2-month periods and one 3-month period in 1988; and, as to lease 408, there was production in only 1 month, *i.e.*, November 1988, during the entire 2-year period.

In its filings with the Board, appellant gives no explicit reasons for the periodic shut-ins. Although it asserted in its July 28, 1989, and July 16, 1990, letters to BLM that it shut in the wells to conserve gas, it makes no such assertion before the Board.[11] In fact, that assertion appears to be contradicted by certain contentions appellant makes in this appeal, specifically its contention that "continuous" production

[11] The Board has held that, under certain circumstances, where a lessee shuts in a well in the reasonable belief that a shut-in is necessary to avoid waste or damage to the trust property, such as would be caused by an oil spill, the lease does not expire. *Duncan Oil, Inc.* v. *Acting Navajo Area Director, supra.*

would not benefit the Tribe.[12] Moreover, in this part of its argument, appellant appears to concede that it shut in the wells for the purpose of reducing its operating costs.[13]

Appellant's reason for shutting in the wells would clearly be relevant under the body of law appellant urges the Board to adopt. Under that body of law, the question of whether a cessation of production is "permanent," resulting in expiration of the lease, or "temporary," not resulting in expiration, is determined by, *inter alia*, the reason for the cessation. While mechanical and production breakdowns appear to be commonly recognized as resulting in temporary cessations, cessations from other causes are not so consistently accepted as temporary. *See, e.g.*, 3 Williams and Meyers, *Oil and Gas Law* § 604.4 (1991); Hemingway, *Law of Oil and Gas* 291-304 (2d. ed. 1983); 32 Rocky Mtn. Min. L. Inst. § 14.06 (1986). Appellant has not cited any authority for the proposition that shut-ins for the purpose of reducing operating costs are recognized as temporary under this body of law. Accordingly, appellant has failed to show, even under the body of law it relies upon, that its shut-in periods should be deemed temporary.

Moreover, whether or not appellant's "objective" and "subjective" tests should be applied to Indian leases in other circumstances, their application to leases which have been shut in is problematical. Use of appellant's "objective" test, for instance, would result in the dilemma described in the Area Director's July 23, 1990, memorandum, quoted at footnote 5, *supra*.[14] A lease with minimal production might be able to "pass" this test, if shut in for part of the time period studied, simply because operating costs are negligible during the shut-in period.[15] While low revenues, when accompanied by low operating costs, might be entirely satisfactory from the operator's perspective, they are presumably less so from the perspective of the Indian landowners. In fact, this kind of "on and off" operating method would appear, on its face, to be detrimental to the right of the Indian landowners to receive the maximum benefit from their trust property.[16]

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[12] Appellant contends that the same amount of overall production is obtained by periodically shutting in the wells as would be obtained from continuous production. It has not, however, produced any evidence to support this contention and thus has failed to show that "continuous" production would not benefit the Tribe.

From the production reports included in the record, it clearly appears that gas production from appellant's wells increases as oil production increases. Accordingly, it appears that, if oil production would be the same by either production method, as appellant now contends, so too would be gas production. By making its present contention, appellant appears to have abandoned its earlier assertion that it shut in the wells to conserve gas.

[13] Appellant states at page 23 of its opening brief: "Operating the wells only one out of three months significantly reduces operating expenses to the lessee with no adverse effect on the lessor."

[14] The Area Director wrote in reference to BLM's manner of making paying-well determinations. From the few documents in the record concerning those determinations, it appears that BLM employed a test similar to appellant's "objective" test, without regard to cessations of production.

[15] Other problems with these tests are illustrated by this case. For instance, how is the appropriate time period for determining paying quantities to be arrived at? Is it proper to allow the operator to choose the time period, as BLM appears to have done here? How are the operator's operating costs to be verified? It appears that, in this case, BLM did not require verification.

These are matters that could, perhaps, be addressed in regulations.

[16] As noted in fn. 12, appellant failed to show that this operating method was not harmful to the Tribe's interest. The burden was on appellant to make such a showing.

As the Board stated in *Mobil*, 18 IBIA at 330, 97 I.D. at 223, quoting from *Kenai Oil & Gas, Inc.* v. *Department of the Interior*, 671 F.2d 386, 387 (10th Cir. 1982), " 'As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues'; and [the Secretary] 'must take the Indians' best interests into account when making any decision involving leases on tribal lands.' " Under this trust duty, it is incumbent upon Departmental officials to ensure that tests such as appellant advocates, if applied to leases of Indian lands, are applied with controls sufficient to protect the rights of the Indian landowners.

Within the parameters of this trust duty, there would appear to be room to moderate the harsh effects of the IMLA lease expiration provision. It has been recognized, for instance, that the parties to an oil and gas lease of Indian land may accomplish this by including appropriate language in the lease. *See Mobil*, 18 IBIA at 328 n.9, 97 I.D. at 221-22 n.9.[17] So too, the parties might agree upon a lease modification to accommodate a lessee's changed circumstances. In these cases, control is maintained by the requirement that both BIA and the Indian lessor agree to the terms of the lease or lease modification.

Further, under the rulemaking authority in 25 U.S.C. § 396d (1988), BIA could promulgate regulations either incorporating or providing a role for tests for "paying quantities" and/or other aspects of the body of law applicable to non-Indian oil and gas leasing, with such limitations as would be required under the overriding principles of Federal Indian law. At present however, no such regulations are in place.

The ultimate control is, of course, the IMLA itself. The Board holds that, with respect to oil and gas leases governed by the IMLA, in the absence of regulations providing otherwise, appellant's tests are not appropriately applied where the leases have been periodically shut in to reduce operating costs and where no permission for this method of operation has been given by BIA or the Indian landowner. Accordingly, under *Mobil*, appellant's leases have expired by their own terms.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Albuquerque Area Director's December 14, 1990, decision is affirmed.[18]

ANITA VOGT
Administrative Judge

[17] Another example of a lease provision modifying the standard lease term appears in the lease at issue in *Farmers & Merchants Bank of Tryon, Oklahoma* v. *Muskogee Area Director*, 21 IBIA 106, 108 (1991):
"[I]f, while this lease is being held by production alone, as stipulated above, the well or wells thereon shall cease to produce for any cause, lessee with the consent of the Secretary of the Interior, shall have the period of one hundred and twenty (120) days from the stopping of production within which * * * to attempt to restore production."

[18] Appellant's request for oral argument is denied.

I CONCUR:

KATHRYN A. LYNN
Chief Administrative Judge

ATLANTIC RICHFIELD CO., *ET AL.*

121 IBLA 373 Decided: *December 19, 1991*

Appeal from decisions of the Colorado State Office, Bureau of Land Management, setting royalty rate at lease readjustment for coal recovered by underground mining operations on Federal coal leases C-0117192 and C-1362.

Affirmed.

1. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute and regulations governing readjustment of the royalty rates for coal leases.

2. Appeals: Generally--Rules of Practice: Appeals: Effect of

As a general rule, the effect of a decision is stayed pending an opportunity for administrative review of the decision pursuant to the appeal regulation at 43 CFR 4.21(a). An exception is recognized with respect to decisions regarding the readjusted terms (including royalty rate) of coal leases where the relevant regulation provides that the decision shall be effective as of the lease anniversary date regardless of whether an appeal is filed.

APPEARANCES: Lary D. Milner, Esq., and Charles L. Kaiser, Esq., Denver, Colorado, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This is an appeal from two decisions of the Colorado State Office, Bureau of Land Management (BLM), setting royalty rates of 8 percent on readjustment of Federal coal leases C-1362 and C-0117192. The BLM decisions are dated July 13, 1989 (C-1362) and July 11, 1989 (C-0117192). On August 11, 1989, Atlantic Richfield Co. (ARCO) and

West Elk Coal Co. (West Elk) filed a notice of appeal to the Board.[1] Both of these leases have been before the Board previously, at which time the appellants challenged the readjustment of the lease terms including the royalty rate of 8 percent on underground production set by BLM for each lease. In both cases the Board affirmed BLM's readjustment decision except as to the 8-percent royalty rate. The issue of the rate to be levied was remanded to BLM with instructions to determine what royalty rate was warranted for each lease and to prepare a record of that determination.

Federal coal lease C-0117192 was issued by BLM under the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287 (1988), effective June 1, 1965. BLM issued its notice of intent to readjust the lease on June 14, 1984. ARCO subsequently appealed the readjustment of the lease terms including the 8-percent royalty BLM set on coal mined by underground operations. By order of March 25, 1987, in the appeal docketed as IBLA 86-211, the Board affirmed BLM's readjustment of C-0117192. Subsequent to the Board's order, the Tenth Circuit Court of Appeals issued a relevant decision in a coal lease readjustment case, *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502 (10th Cir. 1987). In *Coastal States* the Tenth Circuit held that it was error for the Department to automatically fix the readjusted royalty at 8 percent for all coal removed from underground mining operations because to do so ignored the proviso in the Departmental regulation at 43 CFR 3473.3-2(a)(3) (1987), that a lesser amount could be set "if conditions warrant." 816 F.2d at 507. ARCO sought reconsideration of the Board's order based on those decisions.

On August 30, 1988, the Board issued an order granting reconsideration and setting aside the BLM decision under review to the extent that it set an 8-percent royalty rate for coal removed by underground operations on Federal coal lease C-0117192. The matter was remanded to BLM to determine a royalty rate and establish on the record the basis for that determination. On remand, BLM requested West Elk to supply information regarding any adverse geologic and/or engineering conditions that would make underground coal economically unrecoverable at an 8-percent royalty rate which conditions are projected to exist for the 10-year term of the readjusted lease.

On April 21, 1989, Arco responded on West Elk's behalf, submitting "certain data" and urging BLM to "undertake additional investigations so that it [could] establish reasonable royalties" for leases C-0117192 and C-1362. The response contained data concerning only adverse economic conditions, specifically increased mining and transportation costs that render the coal "barely competitive under present market conditions."

BLM issued its final readjustment decision for C-0117192 on July 11, 1989, setting the royalty rate at 8 percent. In its decision BLM stated that West Elk had not supplied any new geologic or

[1] West Elk is a wholly owned subsidiary of ARCO and is lessee of record for both leases (Statement of Reasons at 2).

engineering information in its April 21, 1989, submission and, therefore, BLM had based its decision on existing information and four factors it considered relevant. These factors were that (1) the Federal underground coal was of sufficient quality to warrant mining at an 8-percent royalty, (2) areas of poor quality and conditions had already been eliminated from the reserve base, (3) mining height and roof conditions were adequate for a successful underground operation, and (4) economic concerns of the company were a result of current market conditions and transportation costs rather than a result of adverse geologic or engineering conditions.

Federal coal lease C-1362, which was also issued by BLM under the MLA, was effective on September 1, 1967, and, by its terms, was subject to readjustment on September 1, 1987. In an appeal docketed as IBLA 87-687, West Elk appealed the BLM decision of June 25, 1987, readjusting the terms and conditions of that coal lease.

On July 26, 1988, the Board issued its order in that appeal setting aside that part of the BLM readjustment decision establishing a royalty rate of 8 percent for the coal removed by underground operations on Federal coal lease C-1362. The matter was remanded to BLM to determine whether a royalty rate of less than 8 percent could be justified because conditions associated with the underground mining of the leasehold so warrant. As with the rate determination for C-0117192, BLM requested that West Elk provide information that would aid in determining whether conditions warranted a royalty rate between 5 and 8 percent. In that September 20, 1988, request, BLM advised West Elk that its determination would be based on any adverse geologic and/or engineering conditions that existed in the underground operations which could be projected to continue for the entire 10-year readjustment period. West Elk submitted its information to BLM on April 21, 1989, as noted above.

On July 13, 1989, BLM issued its final decision setting the royalty rate for C-1362 at 8 percent. In that decision BLM stated that its determination was based upon existing information because West Elk's April 21 submission did not provide any additional specific geologic or engineering data. BLM also stated in its decision that it based its determination on the same four factors BLM considered in finally setting the 8-percent royalty for C-0117192.

Appellants contend on appeal that BLM must consider all pertinent conditions in deciding what royalty rate to set and not limit its consideration to geologic or engineering conditions. They argue that by limiting its consideration to geologic and engineering conditions, BLM was inconsistent with the regulatory scheme for setting royalties, decisions of both the courts and the Board, and with the rationale pursuant to which Federal coal leases are readjusted. While recognizing that BLM was acting in accordance with Instruction Memorandum (IM) 88-148 in looking only at geologic and engineering

conditions, appellants argue that the IM itself is contrary to the regulations, case law, and the rationale for readjustment. Finally, appellants argue that the market for coal is a condition pertinent to the establishment of a royalty rate which BLM should have considered.

[1] Section 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(a) (1988), requires "payment of a royalty in such amount as the Secretary shall determine of not less than 12 ½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." The Departmental regulation in effect at the time of readjustment for both leases here calls for a royalty rate at readjustment of not less than 8 percent for coal removed from an underground mine "except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant." 43 CFR 3473.3-2(a)(3) (1987).[2] The regulation does not define the phrase "conditions warrant" or identify what conditions the authorized officer will look at in making his determination. IM 88-148, issued by BLM on December 18, 1987, provides that if underground mining operations are being conducted, as they are on the leases at issue here, the authorized officer is to look at adverse geologic and engineering conditions that are projected to exist for the 10-year term of the readjusted lease which would make the underground coal economically unrecoverable at a royalty rate of 8 percent. The IM indicated that short-term conditions which could be addressed through a royalty rate reduction request pursuant to section 39 of the MLA[3] would not form an appropriate basis for readjusting the lease terms to a royalty rate lower than 8 percent.

Appellants argue that the plain language of the regulations is determinative and, since the regulations do not state that BLM may impose royalties from 5 to 8 percent only if "geologic or engineering conditions warrant," it is clear that BLM must look at all conditions. Essentially, appellants are arguing that the phrase "conditions warrant" in 43 CFR 3473.3-2(a) (1987) should include current market conditions, while BLM is maintaining that IM 88-148 properly limits the conditions looked at to those geologic and engineering conditions which will exist during the entire term of the readjusted lease.

Instruction memoranda issued by BLM do not, as a general matter, have the force and effect of law and are not binding on the Board. *Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986). As such, IM 88-148 does not have the force and effect of law which a duly promulgated

[2] The regulations governing royalty for coal removed from an underground mine have subsequently been amended. All references in this decision are to the regulations as they existed prior to this amendment. BLM has promulgated a new regulation providing for a flat royalty of 8 percent of the value of coal removed from an underground mine, without regard to conditions prevailing in the mining operation. 43 CFR 3473.3-2(a)(2) (55 FR 2664 (Jan. 26, 1990)). However, under the new regulations, the automatic 8-percent royalty rate is to be applied to previously issued leases only at the time "of the next scheduled readjustment of the lease." 43 CFR 3473.3-2(b) (55 FR 2664 (Jan. 26, 1990)). Thus, the question of the appropriate royalty rate for C-1362 and C-0117192, which were readjusted under the prior regulation, remains at issue. *See Kanawha & Hocking Coal & Coke Co.*, 118 IBLA 364, 370 n.5 (1991).

[3] Sec. 39 of the MLA authorizes reduction of the royalty rate "in the interest of conservation of natural resources" whenever in the judgment of the Secretary of the Interior it is "necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein." 30 U.S.C. § 209 (1988).

regulation does, and the Board will decline to follow it where it is inconsistent with the terms of the relevant regulations. *Conoco, Inc.*, 110 IBLA 232, 242-43 (1989), *appealed, Conoco, Inc.* v. *United States*, Civ. No. 653-89L (Cl. Ct., filed Nov. 29, 1989); *see Black Butte Coal Co.*, 109 IBLA 254, 260 (1989) (declining to apply published guidelines for processing logical mining unit applications which were inconsistent with regulations); *Charles J. Rydzewski*, 55 IBLA 373, 88 I.D. 625 (1981) (declining to apply IM which was inconsistent with the relevant regulation).

However, where BLM adopts by IM an agency-wide interpretation of a regulation that is reasonable and consistent with the law, the Board will not hesitate to follow it and uphold its enforcement. *See Beard Oil Co.*, 105 IBLA 285, 288 (1988). Thus, the question before the Board is whether the BLM decisions applying IM 88-148 constitute a reasonable application of the discretion vested in the Secretary by the statute and set forth in the implementing regulation, 43 CFR 3473.3-2 (1987). Reasonableness is properly measured in light of what the regulation is intended to accomplish. Since the regulation is intended to guide BLM in setting a royalty rate for the entire 10-year term of a readjusted coal lease, the pertinent conditions are reasonably considered to be those which are likely to exist for the entire term of the readjusted lease. In distinguishing short-term economic conditions from geologic and engineering conditions involved in the underground mining operation, the IM recognized that apart from establishing a lower royalty rate at lease issuance or readjustment, the Department may provide royalty rate relief after lease issuance upon application of the lessee under 30 U.S.C. § 209 (1988). On numerous occasions in the past this Board has recognized that economic conditions tend to be temporary and, therefore, may reasonably be treated differently than those conditions known to be permanent or at least likely to last the 10 years of the readjusted lease term. *See Kanawha & Hocking Coal & Coke Co.*, 93 IBLA 179 (1986); *Mid-Continent Coal & Coke Co.*, 83 IBLA 56 (1984); *National King Coal, Inc.*, 76 IBLA 124 (1983). In *Blackhawk Coal Co.*, 68 IBLA 96 (1982), we discussed the reason for BLM's general application of minimum royalties in coal leases upon readjustment. We noted: "If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment." *Id.* at 99. We further pointed out in *Blackhawk* that a lessee can obtain short-term royalty relief where it can make the showing required under 43 CFR 3473.3-2(d) (1987). *Id.* The Board has held the BLM approach adequately protects both the interests of the Government in obtaining a fair return over the lifetime of the lease and the interest of the lessee in gaining royalty relief where the lessee can establish it is warranted. *Ark Land Co. (On Reconsideration)*, 96 IBLA 140 (1987).

Appellants refer to the Tenth Circuit decision in *Coastal States Energy Co.* v. *Hodel, supra*, to support their contention that case law reflects that BLM must consider all pertinent conditions in establishing royalties at the time of lease readjustment. The Tenth Circuit in *Coastal States* did hold that it was error for BLM to automatically set an 8-percent royalty and that BLM must obey its own regulations and determine if "conditions warrant" a royalty rate from 5 to 8 percent for a particular lease. 816 F.2d at 507. However, the court never defined what it believed the phrase "conditions warrant" encompasses. Since the court quoted the Board's decision in *Blackhawk Coal Co., supra*, it is fair to assume that the Tenth Circuit was aware of this Board's treatment of economic conditions as temporary conditions. In *Blackhawk*, the Board held that it was reasonable for BLM to establish an 8-percent royalty rate for the lease at issue because that rate could be temporarily reduced later if conditions changed, whereas if BLM had set a lower royalty rate and economic conditions changed favorably during the lease term there would be no opportunity to adjust the rate upward. *Blackhawk Coal Co.*, 68 IBLA at 99.

BLM complied with IM 88-148 by allowing appellants the opportunity to provide data concerning adverse geologic and engineering conditions, but none was provided.[4] Nor have appellants established that BLM erred as a matter of law by using the criteria adopted by that IM. Accordingly, appellant has failed to establish that BLM erred when it established an 8-percent royalty for underground coal production on the leases at issue.

Counsel for BLM has recently filed a motion in this case to vacate the stay of the BLM decisions under review pending completion of administrative review in this matter.[5] In support of the motion, BLM has indicated that appellants have continued to pay royalty on the basis of the old,cents-per-ton royalty rate in effect prior to lease readjustment. BLM noted that the lowest royalty rate which could be included in the readjusted lease terms under the regulations in effect at the time of lease readjustment is 5 percent. Further, BLM has asserted that the automatic stay pending appeal provided by the regulation at 43 CFR 4.21(a) is not applicable where the relevant regulations provide that a decision will be in effect pending any administrative appeal. Such is the case, BLM notes, with respect to the regulation at 43 CFR 3451.2(e) which provides that pending an appeal of the readjusted lease terms all of the readjusted terms, including the royalty rate, shall be effective on the anniversary date.

[4] *Compare Kanawha &Hocking Coal & Coke Co.*, 112 IBLA 365 (1990) (remanding BLM decision establishing an 8-percent royalty rate for underground coal because BLM's determination concerning adverse geologic and engineering conditions was not based on data supplied by the lessee and was not supported by the record).

[5] By order dated Nov. 22, 1989, the Board responded to appellants' request for a stay of the BLM decisions without explicitly ruling on the stay request by noting that the Departmental appeal regulation at 43 CFR 4.21(a) provides, as a general rule, that a decision will not be effective during the time the matter is pending on appeal.

Appellants have responded to the motion, opposing any lifting of the stay pending appeal.[6] Appellants contend that a bond has been posted to secure the amount of the royalty obligation ultimately determined to be due. Appellants cite the Board decision in *Marathon Oil Co.*, 90 IBLA 236, 93 I.D. 6 (1986), reversing an order rejecting a bond and demanding payment pending appeal under the pay-pending-appeal regulation at 30 CFR 243.2.

[2] It is expressly provided by the regulations governing administrative appeals that the automatic stay pending administrative review is subject to an exception where "otherwise provided by law or other pertinent regulation." 43 CFR 4.21(a); *Sierra Club*, 108 IBLA 381, 384 (1989). The regulations at 43 Subpart 3451 regarding readjusted coal leases clearly provide an exception to the stay pending appeal for implementation of the readjusted lease terms including payment of royalty. 43 CFR 3451.2.[7] In this regard it is apparent that our prior order regarding the stay in this matter was, at the least, misleading. Accordingly, to the extent that order purported to recognize a stay of implementation of the readjusted royalty terms pending administrative review, the motion to vacate the stay is well founded and we would grant the motion were the matter not rendered moot by our issuance of a final decision on the merits. We note, however, that this does not preclude an appellant from seeking to post a bond during an administrative appeal from an order to pay disputed royalty pending administrative review pursuant to the royalty management program regulations. 30 CFR 243.2; *Marathon Oil Co., 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.

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

DAVID L. HUGHES
Administrative Judge

[6] Attached to appellants' response is a copy of a letter dated June 19, 1991, from the Minerals Management Service ordering payment of royalty at the 8-percent rate from the date of lease readjustment.

[7] Appellants' assertion that giving effect to this regulation promulgated in 1988 would be an improper retroactive application of the regulation issued after the time of the lease readjustment must be rejected. This case involves administrative appeals from BLM decisions issued in 1989. This is not altered by the fact the royalty rate is effective on the lease anniversary date when the readjustment occurred. 43 CFR 3451.2(c).